

Chapter 3

Developing Alternative Energy Projects – Practical, Legal and Commercial Considerations: A Landfill Gas-to-Energy Project Case Study

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The development of alternative energy projects presents a host of different legal and commercial issues than are typically associated with other types of energy projects. The developer and legal counsel must remain sensitive to these considerations in order to piece together an economically viable project. Foremost among these considerations is an understanding of the legal framework that often provides the initial commercial opportunity to develop an alternative energy project. Therefore, a thorough understanding of what does and does not qualify as “alternative energy” under state or federal law (or a regional program, in some cases) is critical to the evaluation and execution of a successful alternative energy project. Unlike other energy projects, alternative energy projects tend to be unusually sensitive to changes in economics, law and public policy. Accordingly, a successful developer must continually evaluate how a given project relates to these three issues. Failure to maintain sensitivity to these realities may jeopardize even the most well-intentioned project.

Although similarities do exist, there is currently no universal legal definition of what qualifies as an “alternative energy” project in the United States. Furthermore, the use of differing terminology, including renewable energy, alternative energy resources and clean energy, to name a few, often only adds to the confusion. In most cases, the definition of “alternative energy” is found in an applicable Renewable Portfolio Standards (RPS) statute. Although not covered in detail in this chapter, it is important to recognize that dozens of states have enacted RPS legislation in recent years in an effort to create more economic opportunities for alternative energy.

The RPS adopted by a state often reflects various public policy decisions, with ample consideration for native sources of energy. For example, the laws of many Appalachian basin states include advanced fossil fuel projects, such as coal mine or coal bed methane and waste coal combustion in the list of alternative energy projects, along with wind and solar energy. By contrast, other states focus exclusively on promoting non-fossil fuel alternative energy projects through their RPS legislation.

As a matter of perspective, it is important to recognize the role alternative energy plays in the overall energy portfolio in the United States. According to a recently released report from The Pew Charitable Trust, total installed alternative energy capacity in the United States through the end of 2009 was 53.4 gigawatts.³ This equates to four percent of the total power capacity. For comparison purposes, in 2008, existing generator nameplate capacity for coal was 337,300 megawatts (MW) and 454,611 MW for natural gas, whereas the nameplate capacity for wind was 24,980 MW and biomass, which includes combustion of landfill gas, was 4,854 MW.⁴ The Pew Charitable Trust projects a five-year growth rate for the alternative energy sector of 24.3 percent.⁵ Total investment in the alternative energy sector through 2009 was \$18.6 billion, down significantly from prior years in large part due to macroeconomic conditions.⁶

§ 3.02. Alternative Energy Policy Drivers in the U.S.

The United States has largely taken an incremental approach to developing policies that encourage the construction of alternative energy projects. These policy developments reflect the ever-changing views on the types of energy sources the United States should invest in for the future.

³ “Who’s Winning the Clean Energy Race? Growth, Competition and Opportunity in the World’s Largest Economies”, *G-20 Clean Energy Fact Book*, The Pew Charitable Trusts, 2010, p. 39 (hereinafter “The Pew Report”).

⁴ Electric Power Annual (2008 data), Existing Capacity by Energy Source, Table 1.2, U.S. Energy Information Administration, January 21, 2010.

⁵ The Pew Report, p. 39.

⁶ *Id.*