

December 17, 2010

BYE-MAIL AND REGULAR MAIL

Chuck Hodgkinson, Administrative Assistant
Town of Chilmark
401 Middle Road, P.O. Box 119
Chilmark, MA 02535-0119

Re: Chapter 40A, § 3 Zoning Exemption for Agriculture

Dear Chuck:

Further to my letter of December 14, 2010 to Tim Carroll, I am writing to clarify several points about which you have asked.

1. As I mentioned, there is no case law or regulation which clarifies the statutory exemption for the use of land or the construction of structures, “for the primary purpose of commercial agriculture....” I have spoken with several town counsel of my acquaintance and with Robert Ritchie, now general counsel to the Massachusetts Department of Agricultural resources.¹ Both the other town counsel and Mr. Ritchie concurred with a common sense reading of the statute that in the context of wind power, 51% or more of the electricity expected to be generated by the wind turbine should be devoted to agricultural purposes on that farm. (The word “primary” is not defined in Chapter 40A and therefore a court construing the statute would look to the dictionary or everyday

¹ Mr. Ritchie was formerly town counsel to Amherst and for many years was the Assistant Attorney General in charge of the A.G.’s Municipal Law Division, whose duties included the review of all zoning bylaws adopted by towns in the Commonwealth.

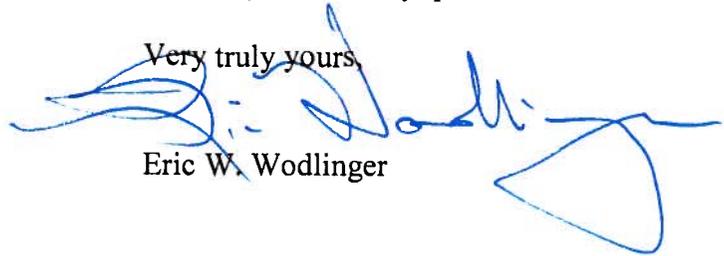
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- definition of the term.) The remainder can be sold into the grid or used for residential purposes.
2. Given the vagaries of power production from wind energy and the recent state legislation authorizing “net metering” in the “Green Communities Act”, I believe it is reasonable to compare the annual expected power production with the annual power needs of the agricultural use, without requiring that the electricity generated from the wind turbine be used solely on the particular farm where it is located.²
 3. In creating a statutory exemption, primarily for commercial agriculture, the zoning exemption does not permit a farmer to include his domestic residential use in calculating his agricultural energy requirements. Just as G.L. Chapter 61A, § 15 does not allow a farmer to claim the preferential agricultural tax classification for his farmhouse, the farmer cannot claim that the energy consumed by his residence is for a primarily commercial agricultural use.

Alternatively, if the wind energy facilities are to be connected solely to the agricultural structures on the farm, and will have no connection to the farmer’s residence, the comparative power consumption of the agricultural operation and the residential home is irrelevant. I trust this clarification will be of assistance, please call me should you have any questions.

Very truly yours,

Eric W. Wodlinger



EWW:gmy
Enclosure

cc: Timothy R. Carroll, Executive Secretary
Leonard Jason, Jr., Building Inspector

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² The wind turbine may produce energy at a time when the agricultural use does not require it, or it may produce more energy than the agricultural use requires, and conversely, the agricultural use may require electricity at a time when the wind is not blowing. It would elevate form over substance and would ignore the public policy embodied in the net metering provisions of the Green Communities Act to effectively prohibit a farmer from selling his excess energy into the grid and then drawing from the grid when he required electricity for agricultural purposes. See G.L. c. 164, § 138, defining “agricultural net metering facility”, attached, and § 139 authorizing the interconnection of such facilities with the grid and the sale of excess electricity to the local electric utility.



PART I ADMINISTRATION OF THE GOVERNMENT
(Chapters 1 through 182)

TITLE XXII CORPORATIONS

CHAPTER 164 MANUFACTURE AND SALE OF GAS AND ELECTRICITY

Section 138 Definitions

Section 138. As used in this section and sections 139 and 140, the following words shall, unless the context otherwise requires, have the following meanings:—

“Agricultural net metering facility”, a renewable energy generating facility operated as part of an agricultural business that generates electricity that does not have a generation capacity of more than 2 megawatts and is located on land owned or controlled by the agricultural business and is used to provide energy to metered accounts of the business.

“Agriculture”, the same meaning as provided in section 1A of chapter 128; provided, however, that when necessary, the commissioner of agricultural resources shall determine if a business is an agricultural business.

“Class I net metering credit”, a credit equal to the excess kilowatt-hours by time of use billing period, if applicable, multiplied by the sum of the distribution company’s: (i) default service kilowatt-hour charge in the ISO-NE load zone where the customer is located; (ii) distribution kilowatt-hour charge; (iii) transmission kilowatt-hour charge; and (iv) transition kilowatt-hour charge; provided, however, that this shall not include the demand side management and renewable energy kilowatt-hour charges set forth in sections 19 and 20 of chapter 25; and provided further, that credit for a Class I net metering facility not using solar or wind as its energy source shall be the average monthly clearing price at the ISO-NE.

“Class I net metering facility”, a plant or equipment that is used to produce, manufacture or otherwise generate electricity and that is not a transmission facility and that has a design capacity of 60 kilowatts or less.

“Class II net metering credit”, a credit equal to the excess kilowatt-hours by time of use billing period, if applicable, multiplied by the sum of the distribution company’s: (i) default service kilowatt-hour charge in the ISO-NE load zone where the customer is located; (ii) distribution kilowatt-hour charge; (iii) transmission kilowatt-hour charge; and (iv) transition kilowatt-hour charge; provided, however, that this shall not include the demand side management and renewable energy kilowatt-hour charges set forth in sections 19 and 20 of chapter 25.

“Class II net metering facility”, an agricultural net metering facility, solar net metering facility, or wind net metering facility with a generating capacity of more than 60 kilowatts but less than or equal to 1 megawatt; provided, however, that a Class II net metering facility owned or operated by a customer which is a municipality or other governmental entity may have a generating capacity of more than 60 kilowatts but less than or equal to 1 megawatt per unit.

“Class III net metering credit”, a credit equal to the excess kilowatt-hours by time of use billing period, if applicable, multiplied by the sum of the distribution company’s: (i) default service kilowatt-hour charge in the ISO-NE load zone where the customer is located; (ii) transmission kilowatt-hour charge; and (iii) transition kilowatt-hour charge; provided, however, that if a customer is a municipality or other governmental entity, the credit shall be equal to the excess kilowatt-hours multiplied by the sum of (i), (ii) and (iii) and the distribution kilowatt-hour charge; and provided further, that this shall not include the demand side management and renewable energy kilowatt-hour charges set forth in sections 19 and 20 of chapter 25.

“Class III net metering facility”, an agricultural net metering facility, solar net metering facility, or wind-net-metering facility with a generating capacity of more than 1 megawatt but less than or equal to 2 megawatts; provided, however, that a Class III net metering facility owned or operated by a customer which is a municipality or other governmental entity may have a generating capacity of more than 1 megawatt but less than or equal to 2 megawatts per solar net metering or wind net metering unit.

“Customer”, a customer of a distribution company that is entitled to the net metering credits, including net metering facilities.

“Neighborhood”, a geographic area including and limited to a unique community of interests that is recognized as such by residents of such area and which, in addition to residential and undeveloped properties, may encompass commercial properties.

"Neighborhood net metering credit", a credit equal to the excess kilowatt-hours by time of use billing period, if applicable, multiplied by the sum of the distribution company's: (i) default service kilowatt-hour charge in the ISO-NE load zone where the customer is located; (ii) transmission kilowatt-hour charge; and (iii) transition kilowatt-hour charge; provided, however, that this shall not include the demand side management and renewable energy kilowatt-hour charges set forth in sections 19 and 20 of chapter 25.

"Neighborhood net metering facility", a Class I, II or III net metering facility that: (i) is owned by, or serves the energy needs of, a group of 10 or more residential customers that resides in a single neighborhood and is served by a single distribution company; and (ii) is located within the same neighborhood as the customers that own or are served by the facility.

"Net metering", the process of measuring the difference between electricity delivered by a distribution company and electricity generated by a Class I, Class II, Class III or neighborhood net metering facility and fed back to the distribution company.

"Renewable energy", energy generated from any source that qualifies as a Class I or Class II renewable energy generating source under section 11F of chapter 25A; provided, however, that after conducting administrative proceedings, the department of energy resources, in consultation with the department of agriculture, may add technologies or technology categories.

"Solar net metering facility", a facility for the production of electrical energy that uses sunlight to generate electricity and is interconnected to a distribution company.

"Wind net metering facility", a facility for the production of electrical energy that uses wind to generate electricity and is interconnected to a distribution company.



PART I ADMINISTRATION OF THE GOVERNMENT
(Chapters 1 through 182)

TITLE XXII CORPORATIONS

CHAPTER 164 MANUFACTURE AND SALE OF GAS AND ELECTRICITY

Section 139 Class I, II or III net metering facilities; election of net metering; tariffs; limitation on aggregate capacity; rules and regulations

Section 139. (a) A distribution company customer that uses electricity generated by a Class I or Class II net metering facility may elect net metering as follows:

(1) If the electricity generated by the Class I or Class II net metering facility during a billing period exceeds the customer's kilowatt-hour usage during the billing period, the customer shall be billed for 0 kilowatt-hour usage and the excess Class I or Class II net metering credits shall be credited to the customer's account. Credits may be carried forward from month to month. A Class I or Class II wind or solar net metering facility may designate customers of the same distribution company to which the Class I or Class II wind or solar net metering facility is interconnected and that are located in the same ISO-NE load zone to receive such credits in amounts attributed by the Class I or Class II wind or solar net metering facility. Written notice of the identities of the customers so designated and the amounts of the credits to be attributed to such customers shall be in a form as the distribution company shall reasonably require.

(2) If the customer's kilowatt-hour usage exceeds the electricity generated by the Class I or Class II net metering facility during the billing period, the customer shall be responsible for the balance at the distribution company's applicable rate.

(b) A distribution company customer that uses electricity generated by a Class III net metering facility may elect net metering as follows:

(1) If the electricity generated by the Class III net metering facility during a billing period exceeds the customer's kilowatt-hour usage during the billing period, the customer shall be billed for 0 kilowatt-hour usage and the excess Class III net metering credits shall be credited to the customer's account. Credits may be carried forward from month to month. A Class III net metering facility may designate customers of the same distribution company to which the Class III net metering facility is interconnected and that are located in the same ISO-NE load zone to receive such credits in amounts attributed to such customers by the Class III net metering facility. Written notice of the identities of the customers so designated and the amounts of the credits to be attributed to such customers shall be in a form as the distribution company shall reasonably require. A distribution company may elect not to allocate such credits and instead may purchase net metering credits from the facility at the rates provided for in this subsection.

(2) If the customer's kilowatt-hour usage exceeds the electricity generated by the Class III net metering facility during the billing period, the customer shall be responsible for the balance at the distribution company's applicable rate.

(c) The distribution portion of any Class I, Class II or Class III net metering credits and distribution company delivery charges displaced by a Class I, Class II or Class III net metering facility shall be aggregated by the distribution company and billed to all customers on an annual basis through a uniform per kilowatt-hour surcharge or surcharges.

(d) The distribution company shall impose tariffs, as may be approved from time to time by the department, regarding necessary interconnection studies and the type, costs and timeframe for installing metering and distribution system upgrades to accommodate these installations. Such tariffs shall require that all facilities maintain adequate insurance. Distribution companies shall be prohibited from imposing special fees on Class I net metering facilities, such as backup charges and demand charges, or additional controls or liability insurance, as long as the facility meets the other requirements of the interconnection tariff and all relevant safety and power quality standards.

Before providing net metering service under this section, a Class II or III net metering facility shall provide all necessary information to, and cooperate with, the distribution utility to which it is interconnected to enable the distribution utility to obtain the appropriate asset identification for reporting generation to ISO-NE.

(e) A Class I, II or III net metering facility or net metering customer shall not be: an electric utility, generation company, aggregator,

supplier, energy marketer or energy broker, within the meaning of those terms as defined in sections 1 and 1F.

(f) The aggregate capacity of net metering shall not exceed 1 per cent of the distribution company's peak load. For the purpose of calculating the aggregate capacity, the capacity of a solar net metering facility shall be 80 per cent of the facility's direct current rating at standard test conditions and the capacity of a wind net metering facility shall be the nameplate rating.

(g) The department shall adopt rules and regulations necessary to carry out this section.