

Renewable energy in Michigan

Questions answered, questions remain

On Nov. 28, 2023, Gov. Whitmer signed into law two bills that largely preempt township and other local government control over the siting of certain large-scale renewable energy wind, solar and battery storage facilities. The new laws replace local control with a state-controlled statutory framework and grant new siting authority over these facilities to the Michigan Public Service Commission (MPSC). The January 2024 *Township Focus* cover story discussed these new bills and some of the questions they generated. Eleven months later, many questions still remain, but the following will provide an update on what we know now—including the details of the MPSC’s order released on Oct. 10, 2024, which sought to clarify some of the confusion.

Inside PAs 233 and 234

To briefly summarize the new laws, Public Acts 233 and 234 of 2023 severely limit local control over the location and regulation of large-scale renewable energy projects—including wind energy facilities, solar energy facilities and battery energy storage systems. In essence, there is no way to completely prohibit large-scale renewable energy projects in your community. If a developer wants to construct a large-scale renewable energy project, they will be able to do so in any community. The key question now is who will review that project and under what standards.

A large-scale project, as defined by PA 233, is solar energy facilities at 50 megawatts (MW) or more, wind energy facilities at 100 MW or more, and battery storage facilities at 50 MW or more and energy discharge capability of 200 MW hours or more. Any projects smaller than this are still completely regulated by local governments that choose to impose regulations. Also note that “hybrid” projects, discussed later on, are also allowed under the MPSC order.

Options

Municipalities have three main avenues to consider under the new laws. First, **a township could choose to do nothing.** In



unzoned communities, this is essentially the only option (per the MPSC order, discussed below), unless the unzoned community desires to change course and establish local zoning. In a zoned township, you may still opt to do nothing and leave the entire determination up to the MPSC.

Second, **a township can adopt a “compatible renewable energy ordinance” (CREO)**. A CREO is a special kind of ordinance the township can adopt that regulates renewable energy facilities in the township. With a CREO, the township can require that the developer go through the township, and not the MPSC, to review and approve the renewable energy project. Importantly, however, the state law provides that “the requirements of [a CREO] are no more restrictive than the provisions included in section 226(8)” of PA 233. So, although the township can require that the developer go through a local process, the statute greatly limits the sorts of things that the township can consider in reviewing and approving that project. If the application complies with the requirements of section 226(8) but the township denies the application, the developer can submit their application to the MPSC and seek approval anyway.

Third, **a township can adopt a “workable” ordinance**. A workable ordinance provides greater control to the township, but at greater risk. With a workable ordinance, a township adopts an ordinance that it knows is not a CREO: setting standards more stringent than what the statute allows. The developer must voluntarily choose to follow this local ordinance instead of the MPSC. Importantly, a developer can always fall back on the state/MPSC process. The township cannot force them to use a “workable” ordinance.

Some developers have indicated that they still want to work with townships, rather than the state, in order to ensure local buy-in for the project. The township may also be able to offer a faster and easier process than the MPSC. Keep in mind that if the workable ordinance practically prohibits large-scale renewable energy projects, then the developer will just go straight to the MPSC; the ordinance needs to be “workable.”

The MPSC order

The two public acts laid the foundation for the new regulations on renewable energy. However, they also left many questions unanswered. In the year since the acts were signed into law, the MPSC has been hosting work sessions, soliciting expert opinions, and taking public comments on the implementation of the legislation. Throughout the entire process, MTA and its legal counsel participated in each MPSC stakeholder meeting, provided detailed input and feedback on all draft guidance, and shared with the commission background on local land use considerations such as site plan review and decommissioning. This whirlwind of activity culminated with the release of the MPSC’s order on Oct. 10, 2024, which refined and clarified some of the confusion, but still left many questions unanswered. The following will lay out some of the major updates from the MPSC’s order—and also what questions remain.

1. ‘Affected local unit’

PA 233 defines an “affected local unit” (ALU) as “a unit of local government in which all or a part of a proposed energy facility will be located.” This can include a “county, township,



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city, or village.” The definition of an ALU is important, because only ALUs can adopt CREOs, obtain special funding to intervene in a hearing at the MPSC, and obtain notice of proposed renewable energy projects.

Initially, based on the definition from PA 233, it was thought that an ALU was every local unit of government in which the proposed energy facility would be located. This meant that, at a minimum, every project would have two ALUs: the local municipality (township, city or village) where the project was located, and the county in which that locality was located.

However, under the MPSC order, an ALU is limited to be only the unit of local government with zoning jurisdiction. This limits most projects to a single ALU, because no two entities can share zoning jurisdiction over the same single parcel. However, projects may still contain multiple ALUs if they span multiple zoning jurisdictions, such as a project that crosses township boundaries.

Under the MPSC order, in a township that has county zoning or no zoning, the township will not receive the intervenor funds to participate in the MPSC approval process and will not receive the one-time \$2,000 per MW host community fee.

2. Unzoned communities

Following from the discussion of an ALU, the MPSC order also clarified some important points regarding unzoned communities. Because an ALU only includes the unit of

local government with zoning jurisdiction, an unzoned township cannot be considered an ALU. This means that an unzoned township gets very few benefits or opportunity for input under the acts. Unzoned townships are not permitted to adopt a CREO. They also will not receive any notice of meetings or hearings regarding proposed projects in their jurisdiction. Further, unzoned townships will not obtain any funds to intervene in the application process at the MPSC.

3. Hybrid projects

Many projects contain only one renewable energy facility type: either all solar panels, all wind turbines, or all battery energy storage systems. It is relatively simple to calculate whether these projects reach the required size for PA 233: just count the MW. However, the MPSC order has also included so-called “hybrid” projects. These are projects that combine wind, solar and/or battery storage systems—for example, a solar project that also includes battery storage elements that can store the power generated by the solar panels until it is needed in the electrical grid.

For these hybrid projects, the MPSC order states that the combined MW of all renewable energy elements is used to calculate whether the project reaches the required size. In our example solar + battery co-located project, a 30 MW solar facility with 20 MW battery storage would reach the 50 MW minimum to be governed by this MPSC process, even though the two parts individually would not. Another hybrid example would be a collocated 20 MW wind facility with 40 MW battery storage and 40 MW solar to reach the 100 MW minimum for a wind facility.

The order further goes on to explain that if an ALU wants to regulate a hybrid facility through a CREO, then it could have a single CREO ordinance addressing each of the hybrid uses or separate CREOs for each hybrid use.

4. Definition of CREO

As noted, a CREO can be no more restrictive than the provisions included in section 226(8) of PA 233. Section 226(8) establishes the minimum setbacks, fencing, height, sound and lighting for solar, wind and battery storage projects.

The MPSC order states that to be a CREO, “the ordinance must be no more restrictive than PA 233 for the technology type(s) addressed in the ordinance.” If a township adopts a CREO that is in any way more restrictive than section 226(8) and then denies the application on the basis of a more restrictive provision, then the township runs the risk that the developer will just go to the MPSC for approval of the project. If this occurs, the township loses out on the \$75,000 intervenor fund to participate in the MPSC approval process.

It should further be noted that if a township has a moratorium on development of energy facilities, then it cannot be considered to have a CREO.

5. Sound regulations

The MPSC order establishes some more specific details on sound monitoring and compliance. Without diving too deep into the details, the MPSC has essentially adopted the American National Standards Institute sound modeling, which includes how sound interacts with walls and structures on adjacent properties. The order makes the maximum sound levels stricter, essentially requiring quieter systems.

The order also requires that developers conduct pre-construction sound modeling, to predict where and how sound will be generated on the property. It further requires post-construction monitoring, paid for by the developer, to confirm that the project does not exceed the maximum sound levels.

6. Notice of meetings

Under PA 233, the developer is required to hold a meeting in the ALU regarding the project and provide opportunities for public input at the meeting before filing an application with the MPSC. (If the developer determines to go through a workable ordinance or is going through a CREO, then the developer is not required to hold this public meeting and instead goes through the local ordinance process.) Unless otherwise requested by the township supervisor, the public meeting should start between 5 and 7:30 p.m. if held on a traditional workday of Monday through Friday. The public meeting should also be recorded or transcribed. The notices must be published in a newspaper of general circulation in each ALU or a comparable digital alternative at least 14 days prior to the public meeting. The notice must also be submitted to the township clerk at least 30 days in advance of the public meeting.

The developer is also required to provide public notice and the opportunity to comment on an application. However, the notice of the right to comment on a project must be mailed to postal addresses within one mile of a solar or battery storage project, and within two miles of a wind project. These enhanced notice requirements are to ensure that those closest to the project, and therefore most impacted by it, have an opportunity to comment on the development. However, there is no requirement that the developer or the MPSC respond to or address any comments.

7. MPSC application process

If the developer goes through the MPSC (either because the township does not have a CREO, has adopted a workable ordinance that the developer does not like, or because the township adopted what it thought was a CREO but was not), the process is much more comprehensive than is permitted by a CREO at the township. The MPSC has been granted more expansive power of review than a township under a CREO, and the MPSC order clarifies what extra elements they will consider.

For example, the developer must provide a detailed report on the public benefits of the facility. If the proposed project is on undeveloped land, the developer must also identify feasible alternative locations (such as brownfield or developed areas) and explain to the MPSC why those sites were not chosen.

The MPSC also requires that a developer meet with local first responders and fire departments to discuss their capabilities to handle emergencies at the renewable energy site. The developer is also required to pay for or hold training for emergency personnel to address any gaps in managing emergencies at these energy sites.

Further, the MPSC requires the developer to pay for a third-party independent monitor who will be on the construction site at least once per week for the duration of construction. This monitor will evaluate whether the developer is following their proposed plans and also report any concerns to the MPSC.

8. Eminent domain

Finally, many townships have asked MTA whether the new law gives the state, the MPSC or developers the power of eminent domain. In other words, can property owners be forced to lease or sell off their land to be used in renewable energy projects? The MPSC has clarified that participating or not participating in a renewable energy project is a decision for individual landowners. The certificate from the MPSC to the developer to locate their site does not include the power of eminent domain; it does not require landowners to participate against their will.

Pending litigation challenges MPSC order

It is also important to note that the MPSC order is currently subject to legal challenge. Dozens of Michigan townships and several counties have jointly filed an appeal to the Michigan Court of Appeals contesting certain aspects of the MPSC order. This appeal does not challenge the laws as a whole—it only challenges the MPSC order and specific provisions therein.

First, the appeal challenges the authority of the MPSC to adopt the order at all. The MPSC is considered an agency of the State of Michigan. Agencies in Michigan must generally follow the Administrative Procedures Act (APA), MCL 24.201, *et seq.* The APA allows an agency to interpret or explain statutes through orders. However, part of the APA requires that establishing substantive rules and standards must be done through a process known as “rulemaking.” The appeal alleges that the MPSC’s order establishes substantive standards and was therefore required to go through “rulemaking.” The MPSC did not go through the formal rulemaking process when issuing its order.



cover story

Second, the appeal challenges the definition of a CREO put forth by the MPSC. PA 233 defines a CREO as “an ordinance that provides for the development of energy facilities within the local unit of government, the requirements of which are no more restrictive than the provisions included in section 226(8).” The MPSC order further provides that “a CREO may only contain the setback, fencing, height, sound, and other applicable requirements expressly outlined in Section 226(8) of Act 233 and may not contain additional requirements more restrictive than those specifically identified in that section.” The appeal argues that the MPSC’s order unlawfully restricts a CREO, and instead argues that local units are authorized by the statute to impose additional regulations on energy facilities.

Third, the appeal challenges the definition of an affected local unit. As discussed, the MPSC order defines an ALU as “only those local units of government that exercise zoning jurisdiction.” The act defines an ALU as “a local unit of government in which all or part of a proposed energy facility will be located.” The appeal argues that the MPSC order unlawfully restricted the definition of an ALU by zoning jurisdiction and that it should instead include all local units in which the project is located (county, township, city and/or village).

Fourth, and finally, the appeal challenges the definition of a “hybrid facility.” The appeal argues that the MW values of the individual components should not be added together to determine whether the project reaches the minimum MW requirement to be covered by the act. Instead, the appeal argues that each individual piece (solar, wind or battery energy storage) must meet its own minimum MW requirement before it will be covered by the act.

Effect of the litigation

As of the writing of this article, the appeal is still pending and no court orders have been issued. The appellants have requested that the Court of Appeals vacate (in other words, invalidate) the MPSC order in its entirety, or at least the specific parts described above. They also ask that the Court of Appeals block the MPSC from enforcing any part of its order while this appeal is ongoing.

The filing of the lawsuit does not automatically invalidate or halt the enforcement of the MPSC order. Those decisions must be made by the Court of Appeals in a formal court order. It is unknown at this time whether the Court of Appeals would grant a stay while the case is pending, or whether the court will ultimately invalidate the entire order.

What is known for certain is that this lawsuit is not challenging the acts as a whole. Even if the MPSC order is invalidated, PA 233 and 234 are still valid pieces of legislation that took effect Nov. 29, 2024. The MPSC order clarified, and perhaps changed, some aspects of the acts, but their overall structure and preemption scheme will remain whether the appeal succeeds or fails.

Consult with your legal counsel

As of *Township Focus* press time, the MPSC order stands as valid and will govern the application process for renewable energy projects, effective Nov. 29, 2024. Townships should reach out to their legal counsel to discuss their options, in particular whether the township wants to do nothing and wait, adopt a CREO, adopt a workable ordinance, or something else. Please note that different attorneys have different interpretations of the acts and the MPSC order. It is important that the township does not take any action without consulting its legal counsel, as missteps can result in very negative consequences for the township as it relates to renewable projects.

To stay up to date on the latest news and updates regarding renewable energy legislation, the MPSC order and the pending appeal, watch MTA publications, including *Township Focus* and the weekly *Township Insights* e-newsletter.



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Sample PA 233 documents, including a CREO, application and escrow documents, and example workable ordinances, are available on <https://michigantownships.org/sample-creo> (member login is required).



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