

## Energy and Agriculture: Tax and Legal Perspectives

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### Executive Summary

- Tax incentives to produce ethanol and biodiesel include credits against federal excise taxes of \$0.51/gallon for pure ethanol produced from biomass (corn, cellulosics) and \$1.00/gallon for pure agri-biodiesel (produced from soy or other oil seeds). Also, small producers of ethanol and biodiesel get an income tax credit of \$0.10/gallon capped at \$1.5 million per year per producer (a small producer is one with less than 60 million gallons of production capacity).
- These credits have significant impacts, including tax consequences, on taxpayers, consumers, ag producers, and investors.
- The investment offerings related to ethanol and biodiesel plants are often structured so that the company is exempt from the federal requirement to register Membership Units with the U.S. Securities and Exchange Commission; as a consequence the company saves significant costs associated with registration but the potential investor enjoys little regulatory protection. Potential investors should carefully assess the risks and the potential investment success. The old adage "*Caveat Emptor*" (let the buyer beware) applies!
- World Trade Organization (WTO) rules apply to international trade in biofuels; the U.S. tax subsidies applicable to the production of ethanol and biodiesel, coupled with the tariff of \$0.56/per gallon of imported ethanol, may cause nations hoping to export ethanol to the U.S. to initiate a WTO challenge to the U.S. laws and policies.
- There are numerous legal considerations related to wind farms; easements granted by landowners may limit use of the farmland forever; landowners should consider both short and long run consequences of any proposed agreement involving wind farms; generally, landowners should consult with legal counsel before signing any easements or agreements.
- Illinois is witnessing renewed interest in its abundant coal reserves as a source of energy; one of the more controversial methods of extraction is long wall mining; the controversy arises because of the great potential for subsidence damage to the surface, including damage to drainage systems; long wall mining is legal in Illinois, but requires a permit; landowners or their predecessors in title may have waived rights to subjacent support and this can limit their ability to recover for subsidence damages; it is usually a good idea to obtain legal counsel before selling mineral interests or waiving rights to subjacent support.
- New power lines and pipelines will be constructed in Illinois; utilities attempt to negotiate rights-of-way with landowners voluntarily, but utilities usually have the right to acquire necessary rights of way by eminent domain; the Ill. Dept. of Agriculture attempts to mitigate the adverse impacts of powerlines and pipelines on agriculture, but the negotiations between landowner and utility are still very important; legal counsel may be very helpful.



# Energy and Agriculture: Tax and Legal Perspectives

By Don Uchtman, Bryan Endres & Gary Hoff  
Part of *farmdoc*'s Farm Income 2007 seminars



# Overview of Presentation

- I. Tax Incentives to Make and Use Biofuels
- II. Regulating Biofuel Investment Offerings
- III. Biofuels, International Trade, and the WTO
- IV. Legal Issues Surrounding Wind Farms
- V. Coal Mining, Subsidence, and Other Legal Issues
- VI. The Expanding National Power Grid:  
Utility Easements and Agriculture

# I. Tax Incentives and Biofuels

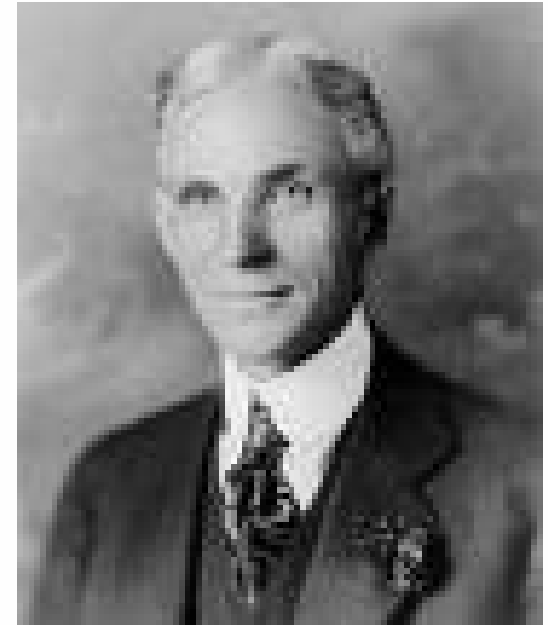
Impacts on **You** as a ...

- Taxpayer
- Consumer
- Ag Producer or Farmland Owner
- Potential Investor, e.g., in a new Ethanol Plant

*Thanks to Gary Hoff for preparing this section*

# Henry Ford & Ethanol

**"There's enough alcohol in one year's yield of an acre of potatoes to drive the machinery necessary to cultivate the fields for one hundred years."**



# Some Basic Biofuels Terminology

- Biodiesel
- Ethanol
- Bioethanol
- Methanol

# Biofuel Tax Subsidies – Overview

- Federal tax incentives for alcohol fuels were first established in 1978 for 10% blended gasoline (gasohol) creating an effective Federal subsidy for ethanol of \$0.40/gallon. Various subsequent acts have raised or lowered, modified, and extended the subsidy.
- Tax incentives for biodiesel were first initiated in 2004 with the American Jobs Creation Act.
- In addition to the tax subsidies, there is the Renewable Fuels Standard for biofuels and several other types of incentives provided in the Energy Policy Act of 2005.

# Major Fed. Ag Biofuel Tax Incentives

[http://cta.ornl.gov/bedb/biofuels/Major\\_Federal\\_Biofuel\\_Tax\\_Incentives.xls](http://cta.ornl.gov/bedb/biofuels/Major_Federal_Biofuel_Tax_Incentives.xls)

Fuel Type	Incentive	Comment & <i>Expiration</i>
Ethanol*	\$0.51/gal used/blended	Excise tax credit; <i>12/31/10</i>
	\$0.10/gal on 1st 30 mil gal; Max \$1.5 mil/yr	Small Plant IncTaxCr, i.e., <60 mil gal plant; <i>12/31/08</i>
Agri-Biodiesel	\$1.00/gal used/blended	Excise tax credit; <i>12/31/08</i>
	\$0.10/gal on 1st 15 mil gal; Max \$1.5 mil/yr	Small Plant IncTaxCr, i.e., <60 mil gal capacity
Renewable Diesel made from biomass	\$1.00/gal used/blended	Thermal depolymerization process used; <i>12/31/08</i>
E85 & B20	30% credit for installing E85/B20 infrastructure	\$30,000 max Income Tax Credit; Jan 06 - <i>Dec 07</i>

• *Domestic Ethanol generally protected by tariff of 2.5% plus \$0.54/gal on imports (this more than recoups the \$0.51/gal tax credit provided when ethanol blended for E85)*<sup>7</sup>



# WHAT DOES THE ENERGY-RELATED TAX LEGISLATION MEAN TO YOU . . .

- As a taxpayer.
- As a consumer.
- As a producer.
- As an investor.

# Impacts on Taxpayers

- Taxpayers are paying for
  - Credits to fuel producers.
  - Credits to blenders.
  - Other energy conservation tax incentives.
- Taxpayers are subsidizing many energy development and energy conservation initiatives

# Impacts on Consumers

Consumers get . . .

- Lower energy costs than would otherwise be the case.
- Tax credits for conserving energy.

**2 14<sup>9</sup>/<sub>10</sub>**

**Ethanol**

**2 36<sup>9</sup>/<sub>10</sub>**

**Regular**  
Gasoline

**2 49<sup>9</sup>/<sub>10</sub>**

**Super**  
Gasoline

**2 59<sup>9</sup>/<sub>10</sub>**

**Premium**  
Gasoline

**2 35<sup>9</sup>/<sub>10</sub>**

**Diesel #2**

**2 65<sup>9</sup>/<sub>10</sub>**

**Bio-Diesel**

**1.99<sup>9</sup>/<sub>10</sub>**

**Natural Gas**

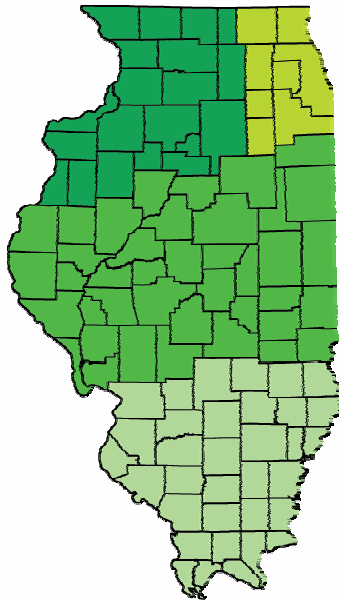
**1 68<sup>9</sup>/<sub>10</sub>**

**Propane**

# Lower Fuel Costs?

- E 85 fuel
- M 85 fuel

# Illinois E 85 Locations



# Consumer Tax Credits for Conserving Energy

- Purchase of qualified motor vehicles.
  - These are hybrid (not E85) vehicles
- Other
  - Energy saving home improvements and expenditures.
  - Energy efficient new home construction.
  - Energy saving appliances.

# Qualified Vehicles (Hybrids)

<u>Make</u>	<u>Year</u>	<u>Model</u>	<u>Credit</u>
Chevrolet	2006	Silverado 2WD Hybrid	\$250
	2006	Silverado 4WD Hybrid	650
	2007	Silverado 2WD Hybrid	250
	2007	Silverado 4WD Hybrid	650
Ford	2006	Escape 2WD Hybrid	2,600
	2006	Escape 4WD Hybrid	1,950
	2007	Escape 2WD Hybrid	2,600
	2007	Escape 4WD Hybrid	1,950

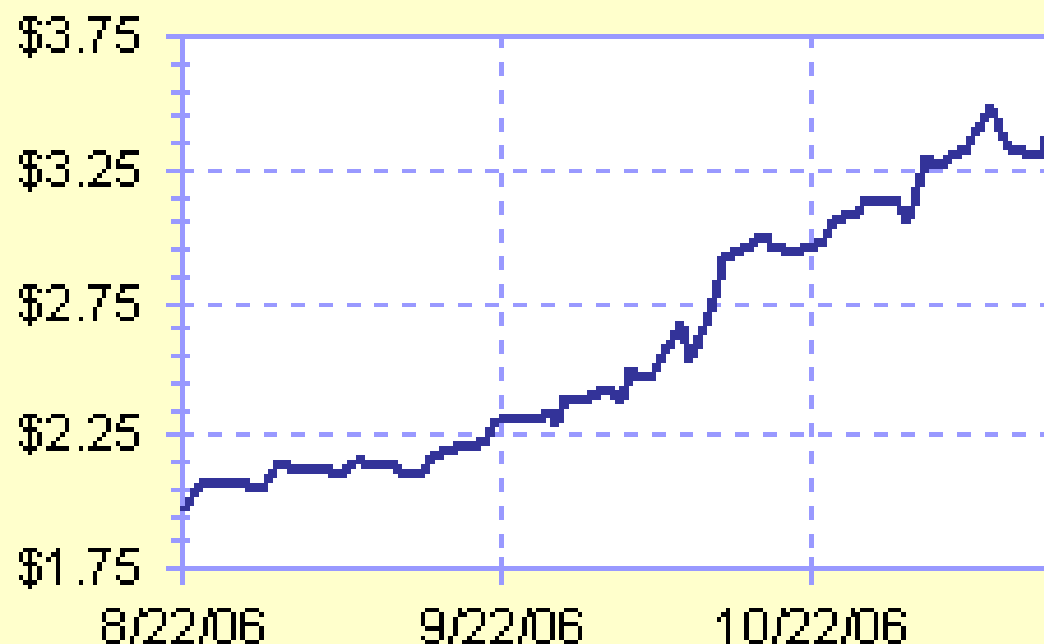
**Caution: This is not a complete list.**



# Impacts on Producers

- Higher grain prices?
- New crops?
- Lower fuel costs?

# Higher Grain Prices



**\$3.450 + 14.5c** as of 11/14/2006

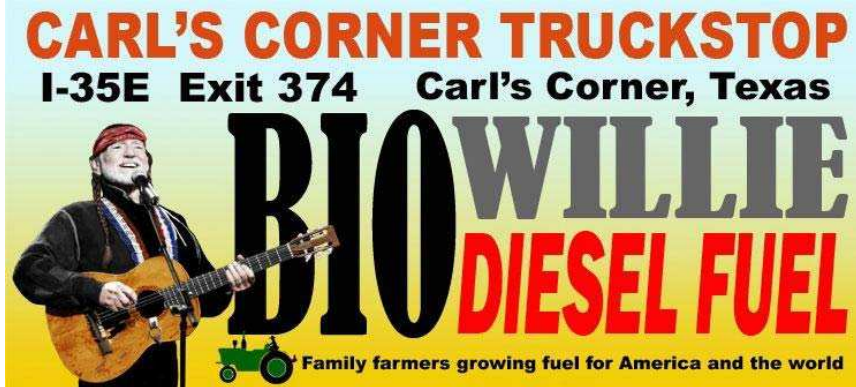
# Potential for New Energy Crops

- Switch grass
- Napier grass
- Miscanthus
- Meadowfoam
- Cottonwood
- Sunflowers

# New Crops



# Lower Fuel Costs?



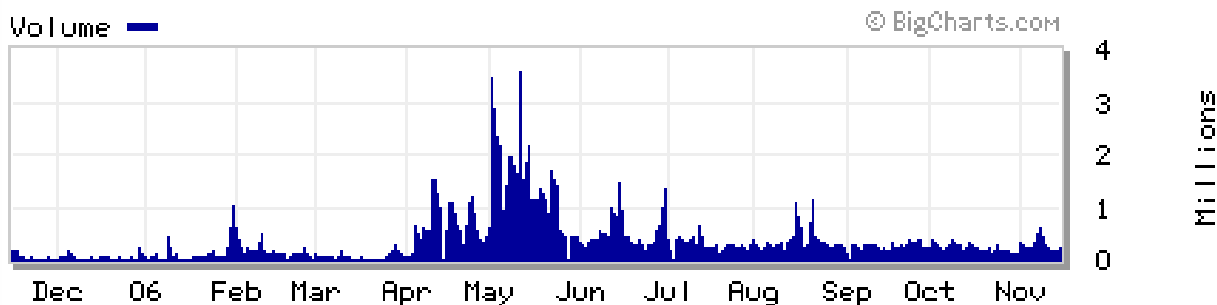
# Impact on Investors

- Profit potential.
- Possible tax savings.

# Archer Daniels Midland



# MGP Ingredients





# Investor Tax Considerations

- Basis
- At-risk
- Passive activity

# LLC Investor



## Schedule K-1 (Form 1065)

Department of the Treasury  
Internal Revenue Service

For calendar year 2005, or tax  
year beginning \_\_\_\_\_, 2005  
ending \_\_\_\_\_, 20\_\_\_\_

2005

### Partner's Share of Income, Deductions, Credits, etc.

▶ See back of form and separate instructions.

#### Part I Information About the Partnership

A Partnership's employer identification number

11-2222222

B Partnership's name, address, city, state, and ZIP code

Yellow Gold Ethanol LLC  
127 Ear Corn Road  
Somewherein, IL 55555

C IRS Center where partnership filed return

Cincinnati, OH

D ☐ Check if this is a publicly traded partnership (PTP)

E ☐ Tax shelter registration number, if any

F ☐ Check if Form 8271 is attached

#### Part II Information About the Partner

G Partner's identifying number

123-45-6789

H Partner's name, address, city, state, and ZIP code

John Farmswell  
25 Center Road  
Anyplace, IL 66666

I ☐ General partner or LLC member-manager ☒ Limited partner or other LLC member

J ☐ Domestic partner ☐ Foreign partner

K What type of entity is this partner?

L Partner's share of profit, loss, and capital:

	Beginning	Ending
Profit	%	5,000 %
Loss	%	5,000 %
Capital	%	5,000 %

M Partner's share of liabilities at year end:

Nonrecourse	\$	100,000
Qualified nonrecourse financing	\$	
Recourse	\$	30,000

N Partner's capital account analysis:

Beginning capital account	\$	0
Capital contributed during the year	\$	10,000
Current year increase (decrease)	\$	(9,500)
Withdrawals & distributions	\$	( )
Ending capital account	\$	500

☒ Tax basis ☐ GAAP ☐ Section 704(b) book  
Other (explain)

☐ Final K-1

☐ Amended K-1

651105

OMB No. 1545-0099

Part III Partner's Share of Current Year Income, Deductions, Credits, and Other Items	
1 Ordinary business income (loss)	15 Credits & credit recapture
2 Net rental real estate income (loss)	
3 Other net rental income (loss)	16 Foreign transactions
4 Guaranteed payments	
5 Interest income	
6a Ordinary dividends	
6b Qualified dividends	
7 Royalties	
8 Net short-term capital gain (loss)	
9a Net long-term capital gain (loss)	17 Alternative minimum tax (AMT) items
9b Collectibles (28%) gain (loss)	
9c Unrecaptured section 1250 gain	
10 Net section 1231 gain (loss)	18 Tax-exempt income and nondeductible expenses
11 Other income (loss)	
	19 Distributions
12 Section 179 deduction	
13 Other deductions	20 Other information
14 Self-employment earnings (loss)	

\*See attached statement for additional information.

For IRS Use Only

# Schedule K-1 (Form 1065)

Department of the Treasury  
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# 2005

For calendar year 2005, or tax  
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☐ Final K-1

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	(9,550)		
2	Net rental real estate income (loss)		
3	Other net rental income (loss)	16	Foreign transactions
4	Guaranteed payments		
5	Interest income	50	
6a	Ordinary dividends		
6b	Qualified dividends		
7	Royalties		
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25 Center Road  
Anyplace, IL 66666

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# Summary for Investors

- Investigate.
- Understand the tax consequences
- Look at both the pros and cons.
- Understand the investment risk and whether the investment opportunity is subject to securities regulation
- Do what is best for you.

## **II. Securities Regulation of Biofuels Investment Offerings . . .**

**GIBSON CITY**

# **Ethanol plant operation seeks area investors**

**First meeting giving details slated for Monday**

***- Excerpt from The News-Gazette (Nov. 16, 2006, p. A5)***

*(Thanks to Don Uchtman for preparing this topic)*

# **PROSPECTUS *[HYPOTHETICAL]***

## **XYZ BIODIESEL, LLC**

**30,000,000 Membership Units**

**Offering Price: \$1.00 per Unit**

**Minimum Purchase Requirement: \$30,000 Units (\$30,000)**

**Additional Purchases in Increments of 1,000 Units (\$1,000)**

**We are offering limited liability company membership units in XYZ Biodiesel, LLC, a newly formed, development stage Illinois limited liability company. We intend ....**

**(. . . in a real prospectus, perhaps 60 + pages follow)**

# Regulation or Non-Regulation?

Offerings are often structured to be exempt from  
S.E.C. Securities Registration Requirements

Hence, the warning often appearing at the bottom  
of page 1 on a Prospectus, e.g. ...

**THESE UNITS HAVE NOT BEEN APPROVED OR  
DISAPPROVED BY THE SECRETARY OF STATE OF ILLINOIS,  
THE STATE OF ILLINOIS, OR THE S.E.C., NOR [HAVE THEY]  
PASSED UPON THE ACCURACY OR ADEQUACY OF THIS  
PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY  
IS A CRIMINAL OFFENSE. THE UNITS OFFERED THOROUGH  
THIS PROSPECUS ARE SPECULATIVE SECURITIES AND  
INVOLVE A HIGH DEGREE OF RISK (see “RISK FACTORS”  
beginning on page ...).**



# Select Security Regulation Laws

- Security Act of 1933 (15 USC Sec. 77a)
  - Publicly offered securities must be registered
  - Prospectus required; fraud regulated
- Sec. Exchange Act of 1934 (15 USC 78a)
- State “Blue Sky” laws (e.g., 815 ILCS 5)

# What is a “Security”?

Securities include such things as:

- Notes, Stocks, Bonds
- Debentures, Other Evidences of Indebtedness
- Certificates of Interest in Profit Sharing Agreements
- Pre-organization Certificates or Subscriptions
- Puts, Calls, Options on any Security
- INVESTMENT CONTRACTS (a catch-all)

*See Sec. 2(1) of 1933 Act, Sec. 3(a)(10) of 1934 Act*

# Securities Registration

- If a security is publicly offered by a company in the U.S., the 1933 Act requires that the security be registered with the SEC
- Registration is intended to ensure that key info concerning the company is filed with the SEC and distributed to potential investors in the prospectus
- When securities are registered, SEC only determines the adequacy and accuracy of info in the registration statement and Prospectus

# Exemptions from SEC Registration

- Reg. A Exempt Offering
- Reg. D Exempt Offering (Rules 504 & 505)
- Sec. 4(2) Private Placement Exempt Offering
  - E.g., offerings to institutional investors, only
- Sec. 3(a) and Rule 147 **Intrastate** Offerings
  - Company and Investors all from Same State
- Others

# Reg. D Rule 506 “Safe Harbor”

## Key Requirements:

- No limit on aggregate offering price
- No limit on number of “accredited investors”
  - These include executive officer, directors
  - Also, e.g., any *natural person* with
    - net worth >\$1million OR
    - individual income  $\geq$  \$200k in last two years
- Up to 35 “sophisticated investors”
  - They have knowledge & experience in business to evaluate merits and risks of the offering
- NO solicitation or advertisement to the general public

# III. Application of World Trade Organization (WTO) Rules to International Trade in *Biofuels*

Primary Source:

**International Food & Agricultural Trade Policy Council, WTO Disciplines and Biofuels: *Opportunities and Constraints in the Creation of a Global Marketplace*** (Oct 2006), available at

[http://www.agritrade.org/Publications/DiscussionPapers/WTO\\_Disciplines\\_Biofuels.pdf](http://www.agritrade.org/Publications/DiscussionPapers/WTO_Disciplines_Biofuels.pdf)

*(Thanks to Bryan Endres for preparing this topic)*

# What Drives Biofuel Production?

- 1) Increased demand for raw materials (e.g., corn), leading to increased prices
  - 2) Increased rural development
  - 3) Environmental protection
  - 4) Energy independence
- But, the most efficient or cost-effective sourcing of raw materials for biofuel production may not necessarily be through domestic production.

# Where WTO Rules May Come Into Play

1. If the U.S. continues to *subsidize* or otherwise encourage production through *policies and laws*, whether at the point of raw material production or biofuel production
2. If foreign countries seek to sell biofuels in the U.S., and the U.S. applies a *tariff* to protect domestic production.



## 3 Issues Arise In This Context

- 1) How should the WTO *classify* biofuels—as an environmental, agricultural, or industrial good—and what are the implications of each classification?
- 2) Can existing or future WTO rules address the *subsidization* of production or consumption of biofuels? What about cross-subsidization?
- 3) How do WTO rules apply to *rules and regulations* mandating or preferring use of biofuels?

# Issue 1: Classification and WTO Law

- For purposes of achieving certainty, transparency, and non-discrimination in international trade WTO law, members are encouraged to express their commitments with respect to tariffs in terms of a *bound rate*, to be applied on an unconditional *most favored nation* status (MFN). These provisions are found in the *General Agreement on Tariffs and Trade* (GATT).

→MFN means that WTO members have a legal obligation not to impose tariffs in excess of that rate on imports of the product in question from other WTO members.

→To arrive at the bound rate, members adhere to the “Harmonized Commodity Description and Coding System” (HS), which contains classifications of goods.

# Ethanol Classification

- The US classifies fuel ethanol separately from the broader HS classification for all ethanol, applying a 54 cent per gallon tariff on imports of fuel ethanol.
  - Other countries do not classify ethanol the same way, and the HS does not contain distinctive headings for biofuels.
- Ethanol qualifies as an agricultural good under the WTO *Agreement on Agriculture (AoA)*; biodiesel is considered an industrial good.
  - This distinction has tariff implications.
- Ethanol and biodiesel could conceivably fall under the WTO *Environmental Goods and Services (EGS)* negotiations under the Doha Ministerial Declaration, which calls for reduction or elimination of tariff and non-tariff barriers on EGSs.
  - **The US has taken the position that only certain non-agricultural products should be included in EGS negotiations, which excludes ethanol given its HS classification.**
- The US does not give preferential treatment to biofuels imported from developing countries under WTO's *Generalized System of Preferences (GSP)*.
  - The European Union does give preferential treatment to biofuel imports from developing countries.

# Classification Solutions to Potential Biofuel Trade Disputes

- 1) Amend the HS classification system to include a specific HS heading for biofuels.  
→ This is a slow process.
- 2) Amend the annex to the AoA to include an HS classification, by consensus of WTO membership.
- 3) Negotiate a separate agreement in the WTO

## Issue 2: Subsidization of Biofuel Production and/or Consumption

- US subsidies of ethanol production began during the 2nd oil shock of the late 1970s.
  - the Energy Security Act of 1978 provided a \$.40/gallon federal excise tax exemption (now at \$.51/gallon through 2010).
  - The Energy Tax Act of 1980 established a loan program for small producers of ethanol.
  - DOE funds research on renewable fuels

# Issue 2: Subsidies (continued)

Classification of biofuels is not only important for purposes of tariffs, but also determines which WTO rules apply to subsidies:

- ***The AoA*** contains notification requirements, quantitative ceilings, and reductions over time for agricultural subsidies, *depending on whether the subsidy falls under the amber versus green box*. But, biofuels have been excepted from these requirements up until now.
- ***The Subsidies and Countervailing Measures (SCM) Agreement*** prohibits export subsidies and subsidies contingent on the use of domestic over imported products. The latter is an issue in the biofuels arena.
- **Other subsidies** that do not fall under the SCM may still be actionable if:
  1. a government makes a financial contribution;
  2. the recipient receives a benefit;
  3. the subsidy is targeted to a specific class; and,
  4. an adverse effect occurs.

# Examples of Subsidies

## 1) Subsidies on production of biofuels

-US: Volumetric Tax Credit for biodiesel=\$1.00/gallon produced from virgin oils or fats and \$.50/gallon from recovered oils/fats (waste-grease)

## 2) Subsidies on consumption of biofuels

-EU member states: exemptions from gasoline tax to purchasers of biofuels.

# More Examples of Subsidies

- 3) Subsidies on raw materials used for biodiesel production
  - must distinguish b/t (a) general support for production versus (b) targeted support to production intended for biofuel use
  - Trend: subsidy for production of biofuel inputs on “set aside” land? Corn (a marketable agricultural product) versus switchgrass?
  
- 4) Subsidies to by-products created in the manufacture of biofuels
  - does the subsidization of biofuels act as a “downstream” subsidy of glycerol?
  - do “cross-subsidized” by-products lead to increased exports that displace other like-product providers?



## Issue 3: Domestic Regulations and WTO Law

The cornerstone principle of the WTO approach to internal policies is ***non-discrimination***:

**Art. 1** (MFN): Internal regulations cannot provide less favorable treatment to imports from some WTO members relative to like products of other members to the extent that there is discrimination on the basis of which WTO member the import is coming from

**Art. 3** (National Treatment): Divided into fiscal and non-fiscal measures

# Examples of Regulations

- 1) Internal taxation measures
- 2) Non-fiscal internal measures
- 3) Environmental sustainability standards

# Internal Taxation

Measures must:

- treat “like” imported and domestic products identically
- treat “directly competitive or substitutable” products in a similar way so as not to favor domestic production.

→ US excise tax exemption for ethanol versus no exemption for products of foreign producers that are “like” ethanol?

# Non-fiscal Internal Measures

- some examples related to biofuels include:
  1. Use mandates of particular quantity or percentage
  2. Limits on proportion blended with conventional fuel
  3. Specifications regarding performance/properties or from what material the fuel must be made from
  4. Labeling for consumer protection or informational purposes
  5. Health and safety regulations
  6. Environmental performance requirements
- If the two products are “like,” governments may still regulate so long as it does not result in less favorable treatment for the imported product

# Environmental Sustainability Standards

Some examples related to biofuels:

1. Conditions that address the environmental impact of biofuels in the country of import
2. Conditions that seek to maximize the contribution of biofuels to reducing carbon emissions and thus look to the net effects of a particular fuel on carbon emissions throughout its entire life-cycle, including carbon emissions in the production and processing of the fuel
3. Conditions that go beyond carbon emissions to promoting sustainable agriculture in the country producing the feedstock or biofuel

# Exceptions to the Rules

- Article XX “saves” measures that would otherwise be GATT-illegal if they serve certain public-policy objectives, which include protection of human health and conservation of exhaustible natural resources.
- Article XI (national security exception)

# The TBT Agreement's Application to Standards/Regulations

- Technical regulations must not be more trade restrictive than necessary to fulfill a legitimate objective (e.g., protection of human health/safety, or the environment).
- The Technical Barriers to Trade (TBT) Agreement admonishes members to use “international standards” as a basis for technical regulations, where possible.
  - A rebuttable presumption that the measure is “least trade restrictive” exists if the measure meets international standards.
- No standards exist yet for biofuels, **but** percentage blend requirements (limits on % ethanol) may not be scientifically justified for health/safety/environmental concerns under GATT.

## The Application of the SPS Agreement to Standards/ Regulations

- The Sanitary and Phytosanitary Measures (SPS) Agreement applies to risks arising from trade in food and agricultural products
- Some of its provisions could apply to transportation and trade of feedstocks for biofuels, including biomass or biowaste.
- Resolution of GMO dispute may have implications for biofuels.



# Government Procurement

- The Government Procurement Agreement (GPA) may apply to policies and regulations that mandate government purchase/use of biofuels.
- Where GPA applies:
  - Requires no-less favorable treatment
  - Cannot use non-economic criteria for suppliers
  - Procurement specifications must be based on international standards, if available

# WTO Summary

- Are the U.S. subsidies targeted to domestic ethanol and biodiesel production likely to be successfully challenged in the WTO?

## IV. Key Issues in Wind Farms

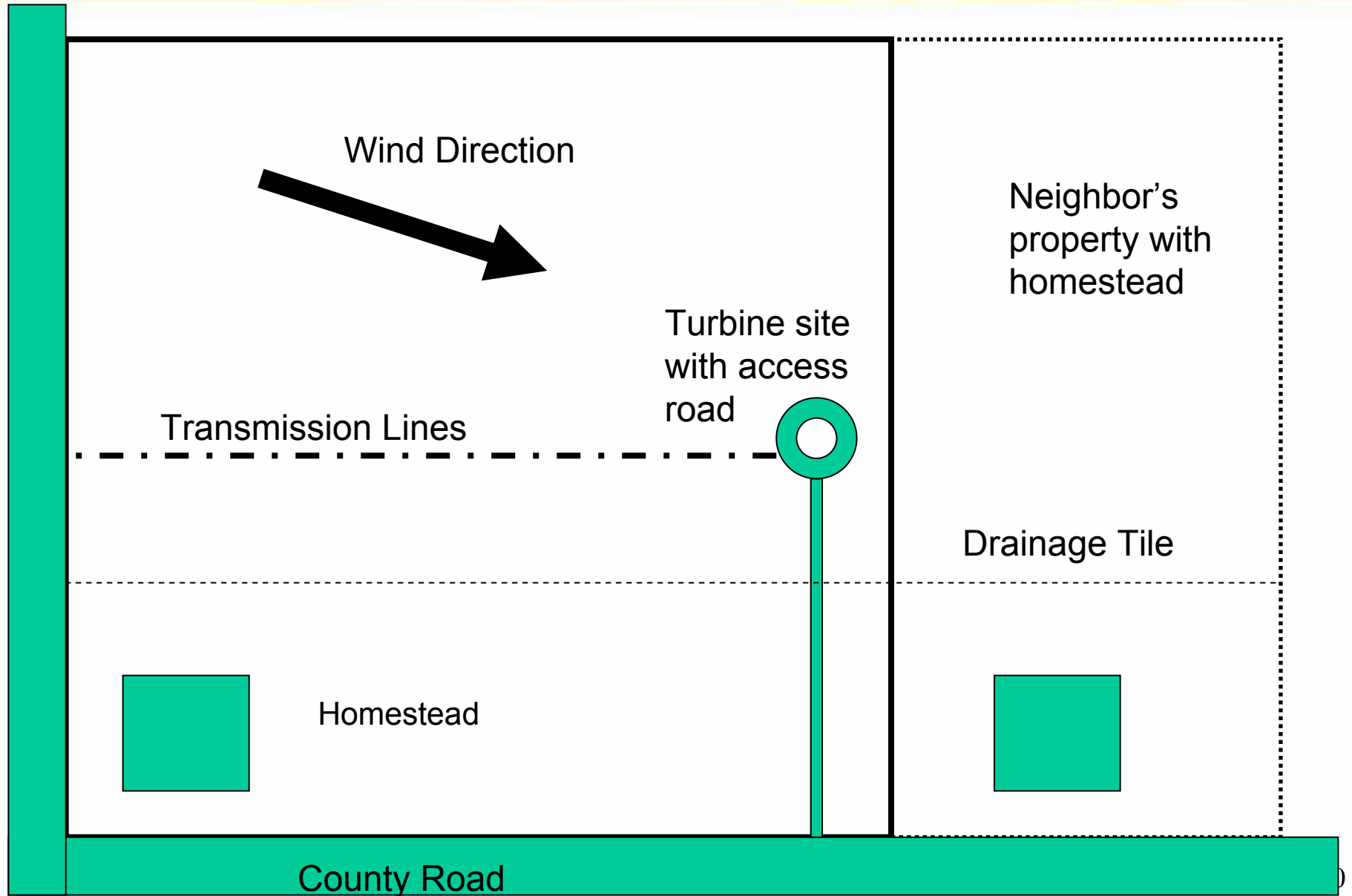
- Land Use
- Insurance and Liability
- Lifestyle
- Revenue Options
- Taxes



*-Thanks to Bryan Endres for preparing this section*<sup>58</sup>

# Initial Considerations

- Some of the terms in a wind generation contract may limit your use of the property FOREVER, including your heirs and any other future owners.
- Consider short AND long-run implications of any agreement.
- Consult an attorney experienced in wind generation transactions.
- The following is an overview of SOME considerations you may wish to discuss with your attorney.



# Specificity

- Designate specific location on the land
- Consider dividing out a parcel of the land for the area on which the turbine will be sited
- May need to coordinate with FSA once site determined

# Easements

- Definition: an interest in land owned by another that entitles the easement holder to a specific use of the land
- Application in the wind-energy context
  - Access Easement
    - Build and maintain roads
    - Specify access rights (vehicles, pedestrians, others)
    - Specify when this easement might terminate (a determinable easement)
    - Specify which party is responsible to restore the area if the easement terminates and the extent of restoration

# Maintenance Easements

- Who maintains the infrastructure necessary for operation of the turbines
  - Roads
  - Buildings (other structures)
  - Turbines and blades (including foundation)



# Damage to Crop Production

- Loss of acres in production
- Damage to crops during construction/maintenance activities
- Drainage
  - Immediate impact on drainage tiles/flow
  - Future impact on topography
  - Impact on adjacent landowners
    - If there is a problem later, who pays to correct
- Soil Compaction
- Who determines extent of damage
  - Landowner-Energy Co.-Impartial 3<sup>rd</sup> party (e.g., insurance adjuster; extension agent)
- When is payment due for damages



# Insurance



- During construction and operation
  - Wildlife
  - Ice buildup on blades
  - Personal injury; property damage; crop damage
  - Short and long-term need
- Indemnification for any liability
- Cost to defend the lawsuit
- Will your personal coverage needs change

# The End of the Road

- Lifespan of the turbines
- Lifespan of the company
- Conditions to trigger obligation to remove
- Who will pay for removal
  - What if company's "line of credit" no longer exists
  - Escrow money
  - Performance bond
  - Legislative fund similar to grain fund?
- Restoring land to productive use after removal / other damages to drainage incurred during removal

# Lifestyle Considerations

- 400 ft. towers
- Turbines the size of school busses
- Blades similar to wingspan of 747
- Noise/View considerations
- Impact on farming operations
  - Can you still graze? Plant crops? Aerial spraying?
- Impact on neighbors
  - Nuisance lawsuit
  - Will your “wind print” take the neighbor’s land?
  - Aerial spraying by neighbors?
- Impact on your property value



# Revenue Options

- Fixed annual lease
- Lump-sum, up-front payment
- Revenue sharing
- Combination of the above
- “Net Metering”
  - Invest in your own wind generation equipment
  - FY 2007 State of Illinois Grant Program
    - Wind Energy Production Development Program

# Real Estate Taxes

- Who pays...developer or landowner... for improvements to land
- Protect against any liens on the property
- County-by-county differences in assessment;
  - Assessment Options
    - Personal vs real property
    - Agricultural, commercial, industrial?
    - Zoning issues
  - Statewide assessment standard possible, in the future

## V. Coal Mining: New Extraction Methods have Increased Impact on Agricultural Land

- Discussion Topics
  - What is Long-Wall Mining
    - Also called “planned impact mining”
  - Common law right of support/subsidence
    - Is there case law about this in Illinois?
    - Is there a statute?
  - Similar issues involved with oil wells and other mining operations

*-Thanks to Bryan Endres for preparing this section*

# What is “Long Wall Mining”

- Instead of coal pillars, the long wall mining system uses a line of moving hydraulic jacks to support the roof temporarily in the mining area. No coal pillars are present to obstruct work, so a large coal-cutting machine cuts coal continuously along a wall face typically about 180 m (590 ft) wide. This massive coal-cutting machine works like a wood power saw, shredding coal from the wall in strips about 50 to 75 cm (about 20 to 30 in) wide. As the coal-cutting machine strips layers of coal from the wall face like a meat cutter, the line of roof-supporting hydraulic jacks moves automatically behind the machine. As the hydraulic jacks move forward, the roof is allowed to collapse behind the equipment.
- Long wall mining produces **four to five times more coal** (90% vs. 50%) from a given deposit than the room-and-pillar method because coal pillars are not built. But because long wall mining causes the land to sink, land use regulations prohibit this practice in many areas. Despite this prohibition, long wall mining still accounts for about 30 percent of the coal mined in the United States.
- James Speight, B.S., Ph.D.



# Long Wall Mining Operation



Note the hydraulic lifts that support the ceiling.

# Subsidence occurs after hydraulic supports removed

- Inspection of subsidence from long wall mining operation; area fenced off to prevent cattle from falling into subsidence crevice.



# Legality of Long Wall Mining

- Method is *legal* in Illinois and has been used in southern Illinois for some time
- Permit required from IDNR and mining company must present a subsidence plan
- Key concern is drainage
- Land must be returned to a condition capable of supporting previous uses
- Compensation for crop loss until repairs complete
- Structures repaired, replaced or compensated for value

# Property Rights: Deeds, Mineral Rights and the Common Law Right to Subjacent Support

- Mine operator usually doesn't control surface above the coal
- Mine operator may have the right to extract coal, but not intentionally subside the surface
- Mine operator may need to reach a separate subsidence agreement with surface owners
- Many deeds/lease agreements are *very* old and unclear on issues of subsidence.
  - IDNR will not adjudicate title issues
  - MUST seek legal counsel if unclear of rights
  - Find legal counsel experienced in mineral law
- Good idea to seek legal counsel if approached to sell mineral rights or right to subside

## **VI. The Electric Power Grid: Utility Easements and Agriculture**

- With concerns about the adequacy of the electric power grid, and
- With new electricity generating capacity coming on line,
- How will the new utility easements be acquired and what will be the impact on farming operations?

*-Thanks to Don Uchtman for preparing this topic*

# Can easements for power lines be acquired by Eminent Domain?

- Yes, generally
- Usually, a utility must obtain a **Certificate of Public Convenience and Necessity** from the Illinois Commerce Commission before it may construct a new utility line
  - Special Proceeding before the ICC (220 ILCS 5/8-406)
  - Must prove utility line is in the public interest
- Before a utility can condemn land for a right-of-way, it must obtain an Order from the ICC (220 ILCS 5/8-503)
  - Utility must prove ... good faith effort to acquire necessary easement by voluntary acquisition ...
  - And that all property interests sought are actually needed

# Are the Easements Negotiable?

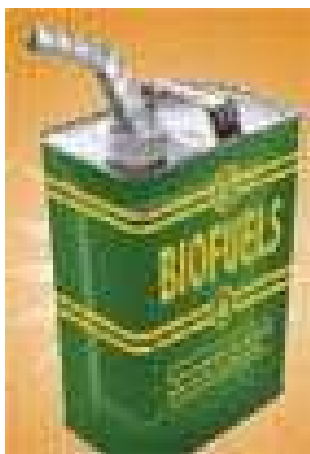
- Yes (location, access, types of structures, compensation)
  - Utility companies often willing to accommodate the reasonable concerns of landowners
  - Utility companies usually prefer to purchase the right of way voluntarily and not condemn it
- Assistance by an attorney may be very helpful to the landowner (once landowner grants a permanent easement, its too late to get a better deal!)



# **Does the IL Dept. of Agriculture help minimize adverse effects on farmland?**

- **IDOA ELECTRIC TRANSMISSION LINE CONSTRUCTION STANDARDS AND POLICIES for Ag Impact Mitigation**
- **[www.agr.state.il.us/Environment/LandWater/electrictransmissionlineconstructionstds.pdf](http://www.agr.state.il.us/Environment/LandWater/electrictransmissionlineconstructionstds.pdf)**
- **Examples**
  - Only single pole support structures to be used
  - Utility will chisel to a depth of 18 inches all cropland, which has been traversed by construction equipment to alleviate compaction impacts ....
- This sets the floor, but landowners may be able to negotiate more stringent protections





# ***The End – Thank You*** **Energy and Agriculture:** **Tax and Legal Perspectives**

By Don Uchtmann, Bryan Endres & Gary Hoff  
Part of *farmdoc*'s Farm Income 2007 seminars

