PERMITTING RISKS AND WIND FARM DEVELOPMENT

AVIATION, BROWNFIELDS, AND MINERAL CONFLICTS

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Aviation Permitting

FAA Obstruction Analysis/Evaluation (Part 77)
- Procedural Notice & Study Requirements
- Not Legally Binding
- Hazard determination may affect property values and the ability to obtain financing or insurance

- State and Local land use approvals
  - May Take FAA Procedural Requirements and Make Substantive Determinations
    - FAA grant assurances may require this

- Mandatory conditions in federal and state environmental approvals
FAR Part 77: Safe, Efficient Use, and Preservation of the Navigable Airspace

- FAA must review two things:
  - Height
    - Is the turbine an “obstruction" or "hazard"?
  - Interference
    - Do the turbines impair air navigation facilities and equipment?
    - Do the turbines interfere with the navigable airspace?
Notice Requirements for Obstructions in Airport Runway Imaginary Surfaces

NOTE: SIMILAR BUT DIFFERENT IMAGINARY SURFACES FOR HELIPORTS

Obstruction Evaluation

- Turbine is considered an “obstruction” if
  - Taller than 499 feet
  - Taller than 200 feet and within 3 miles of the airport
  - Within terminal obstacle clearance area such as approach, departure, and circling areas
  - Pierces an imaginary surface as described at 14 C.F.R. § 77.19, 21, or 23.

Hazard Determinations

- “Does Not Exceed”
- “Exceeds But Okay” Determination
- “Notice of Presumed Hazard”
- “Determination of No Hazard”
- “Determination of Hazard”
Local Government Zoning Authorities and Part 77
Other Approvals/Examples

- Federal approvals (e.g., NEPA, FLPMA)
- State approvals (e.g., mini-NEPA, energy)
Developing Wind Projects on Brownfields

Source: Derek Gee/Buffalo News
Incentives

Source: U.S. Environmental Protection Agency

Source: EPA
RE-Powering America’s Land Initiative
EPA Repowering Our Land Initiative

EPA Tracked Sites with Utility Scale Wind Energy Generation Potential

Wind Resource
- Power Class
  - 1: 0-200
  - 2: 200-300
  - 3: 300-400
  - 4: 400-500
  - 5: 500-600
  - 6: 600-800
  - 7: >800
- Resource Potential
  - Poor
  - Marginal
  - Fair
  - Good
  - Excellent
  - Outstanding
  - Superb

EPA Tracked Sites
- Abandoned Mine Land
- Brownfield
- RCRA
- Federal Superfund
- Non-Federal Superfund

Screening Criteria
- Wind power class of 4 or greater, measured at 50m above ground
- Distance to electric transmission lines of 10 miles or less
- Property size of 2,000 acres or more
- Distance to graded roads of 25 miles or less
Brownfield Tax Credits

Sources of Environmental Liability

- CERCLA
  - Other Federal Statutes
  - RCRA
  - Clean Water Act
  - TSCA

- State Statutes
  - RCRA
  - CERCLA analogues
  - Disclosure statutes
  - Other transfer, reporting, and cleanup requirements

- State Common Law
Cleanup and Liability Protections

- CERCLA and the BFPP Defense
  - Phase I ESA
  - Purchaser has taken reasonable steps
  - No affiliation with the responsible parties
  - Not available to “operators” or lessees unless the lessor maintains the defense or lessee has sufficient “indicia of ownership”

- Department of Defense sites and other federal facilities are conveyed with statutory protections
BFPP Defenses and Tenants

- Owner is BFPP
  - Owner must maintain its status
  - Tenant does not impede remedy
- Owner is not a BFPP
  - EPA enforcement policy governs
  - Tenant treated as a BFPP if
    - Lease after January 11, 2002
    - Otherwise meets requirements
EPA Assurances

- Comfort/status letters
  - “Model Federal Superfund Interest and No Current Federal Superfund Interest Comfort/Status Letter”
  - “Model No Previous Federal Interest Comfort/Status Letter”
  - “Model State Action Comfort/Status Letter”
- BFPP/Prospective Lessee Agreements
State Programs

- Voluntary Cleanup Programs
- Orders
  - Mandatory cleanup
  - Covenants not to sue

Private Assurances:

- Environmental insurance, etc.
What are the resulting concerns of the parties?

Project developers want:
- Access to liability protection/assurances
- Necessary cleanup/accommodation of existing contamination
- Compliance obligations and maintenance of defenses
- Access to financial incentives and cost recovery
What are the resulting concerns of the parties?

Landowners want:
- Maintenance of BFPP defenses (if landowner has any)
- Compliance obligations
- Cleanup to accommodate redevelopment
- Cleanup cost recovery opportunities
What are the resulting concerns of the parties?

Contractors want to:
- Avoid owner/operator liability
- Avoid construction delays and unexpected costs associated with contamination
- Avoid arranger/transporter/generator liability
Environmental Terms: Real Property Lease

- Conditions of leasing/due diligence
  - Comfort letter or other liability assurances
  - Due diligence/disclosure rights and obligations
  - Grant funding or other tax incentives
- Cleanup/remedy protection requirements
- Indemnification
- Ownership of any brownfield tax credits/incentives
- Environmental insurance
Environmental Terms: Interconnection Agreement

- Allocation of liability for new and pre-existing contamination
- Environmental insurance

Environmental Terms: Power Purchase Agreement

- Construction milestone extensions
- Environmental insurance
Environmental Terms: Engineering, Procurement, and Construction ("EPC") Agreement

- Design standards
- Cleanup/materials management and engineering protections
- Costs are incurred “consistent with the National Contingency Plan” to preserve CERCLA cost recovery options
- Records
- Generator
Engineering, Procurement, and Construction ("EPC") Agreement, cont.

- Contractor’s pollution legal liability insurance
- Owner/project developer oversight and inspection
- Reporting/cleanup requirements for new conditions
- Warranties
- Indemnification
- Compliance with applicable environmental laws
Environmental Terms: Operation and Maintenance (O&M) Agreement

- Contractor’s obligations to monitor and maintain engineering protections and coordinate with any O&M related to the remedy
- Bonding/financial assurances
- Contractor’s pollution legal liability insurance
- Reporting and maintenance coordinated with the underlying site remedy
- Indemnification
- Compliance with environmental laws
Mineral Rights and Wind Development

Source: Natural Gas Now, http://naturalgasnow.org/
What is a “split estate?”

- Surface estate and all or part of the mineral estate are not owned by the same party

- Occurs through the act of “severance”
  - a private fee owner
    - conveys the surface to another party, reserving to the grantor the underlying minerals, or
    - conveys the minerals to the other party, reserving the surface estate to the grantor.
  - the U.S. government patents land to private parties, while reserving the minerals.

- The rights of private parties are a matter of state law

Source: The Hindu
What rights do the parties have in Colorado?

- **Common law “due regard” concept**
  - Each party “must have due regard for the rights of the other in making use of the estate in question.” This concept requires “mineral rights holders to accommodate surface owners to the fullest extent possible consistent with their right to develop the mineral estate.”

- **Statutory “due regard” concept**
  - An oil and gas operator shall conduct oil and gas operations in a manner that accommodates the surface owner by minimizing intrusion upon and damage to the surface of the land.
  - Surface owner may bring legal action against the operator if the operations “materially interfere” with the surface owner’s use.
  - In response, the oil and gas operator must demonstrate that it met the standard of “minimizing intrusion” and may assert as a defense that it complied with a regulatory requirement or the terms of a surface use agreement.
Colorado Oil and Gas Conservation Commission

- State agency overseeing oil and gas development
- Rules governing
  - drilling process, location, waste, spills, emissions, and production
- Onsite Inspection Authority
  - avoid potential unreasonable crop loss or land damage
  - address potential health, safety, and welfare or significant adverse environmental impacts not adequately addressed by COGCC rules or orders
  - ensure compliance with the COGCC’s rules relating to advance notice and good faith consultation with respect to timing of operations and location of facilities
Surface Use Agreements

- Agreement governing the use of the surface of land by a mineral interest holder
- Establishes the scope of a mineral interest holder’s right to use the surface of property to develop subsurface minerals
- Parties may be the owners or lessees of each estate, or both

Source: Oil and Gas Law Digest, http://oilandgaslawdigest.com/
Are Surface Use Agreements Required or Necessary?

- **Colorado Surface Development Notification Act** and **Colorado Oil and Gas Conservation Commission (COGCC) rules** create a process of notification and consultation between the respective property interest parties.

- **Surface Development Notification Act** requires that surface developers provide written notice to mineral interest holder of impending surface development at least 30 days before initial public hearing by local government on a development application.

- The **local land use authority** may impose land use permit conditions requiring reasonable efforts to enter into a surface use agreement.

- The **COGCC rules** require notice to surface owners and “good faith consultation” with the surface owner at the time an operator applies for a permit to drill.
Benefits of Surface Use Agreements

- For the operator, some background rules and requirements can be waived or defined.

- For a surface owner, background rules and requirements may not be sufficient to protect surface uses and are better negotiated in a surface use agreement.

- For both parties, surface use agreements provide greater certainty regarding the requirements that will apply.

- The relative bargaining power of the parties will affect the terms and conditions:
  - For example, if the surface owner also owns the mineral estate—the surface owner has greater leverage to dictate the terms.
Topics Typically Addressed

- Locations
- Operational restrictions
- Releases/waivers of claims
- Indemnification and insurance
- Compliance with laws
- Hazardous materials and spills
- Notice of operations
- Recording
Examples of terms

- OIL AND GAS DEVELOPMENT REQUIREMENTS
  - Access to subsurface mineral locations to maximum extent allowed by oil and gas regulations
  - Spacing regulations
  - Surface locations for wells, pits, tanks, pipelines, roads
  - Safety regulations
  - Local land use regulations
  - Limited operational restrictions
Oil and Gas Operating Requirements
Examples of terms

- WIND DEVELOPMENT
  - No permanent facilities in the turbine “tip zone”
  - Transmission lines
  - Roads
  - Protection for turbines from vibrations, dust, and wind interference
  - Construction coordination
Wind development terms
Questions?

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