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Environmental Laws Increasingly Lead to Litigation Concerning Renewable Energy Projects

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Presented by:

Tim Bishop
Partner
+1 312 701 7829
tbishop@mayerbrown.com

Susan Brice
Partner
+1 312 701 8424
sbrice@mayerbrown.com

Michael Hutchinson
Partner
+44 20 3130 3164
mhutchinson@mayerbrown.com

Layers of Environmental Regulation Apply to Alternative Energy Projects

Federal examples:	National Environmental Policy Act (NEPA) Endangered Species Act (ESA) Marine Mammal Protection Act Migratory Bird Treaty Act Clean Water Act (CWA) Antiquities Act National Historic Preservation Act Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Resource Conservation and Recovery Act (RCRA)
State examples:	State versions of many of the above Coastal Zone Management Acts Tort suits (e.g., nuisance)
Local examples:	Zoning ordinances & comprehensive plans Preservation ordinances

Renewable Energy – Green v. Green

- US environmental law is one of the biggest obstacles to green energy projects in the US
- Renewable projects are regulated by a complex web of environmental laws
- Projects are often located in greenfield areas that receive special scrutiny under these laws
- Project opponents use these laws to halt, delay or force changes in the project, alleging violations of the environmental laws

Devastating Effect

- Failure to adequately understand and evaluate environmental risks can have devastating effects
  - Suits by opponents against the government seeking an injunction
  - Suits by the government/citizens to compel developer or others (including owner/operators) to pay for remediation or to conduct remediation
  - Suits by citizens against developer or others alleging violations of the common law (e.g., nuisance)
  - Suits by the government/citizens against developer or others to enforce environmental laws (can lead to fines, penalties and prison)

NEPA – Granddaddy of Siting

- Enacted in 1970 – Focus on federal government action
- Most important provision requires the federal government to prepare a "detailed statement" when it proposes to take a "major federal action significantly affecting the quality of the human environment"
- Examples of situations that trigger NEPA review
  - Projects involving federal land
  - Projects involving federal funding
  - Projects requiring federal permits or approvals

Three Levels of NEPA Review

- Three Levels of NEPA Review
  - Categorical Exclusion by law
  - Environmental Assessment – Is there a “significant impact”? If not, FONSI is issued
  - Environmental Impact Statement - If significant impact exists, agency must prepare the detailed statement. Government must then issue a Record of Decision with respect to the EIS

NEPA – Public Process

- NEPA is a public process
  - State and federal agencies, Native American tribes, local residents, environmental groups and others all have the right to comment on a proposed EIS
  - Significant delays in a project may result (e.g., Cape Wind Project – First draft EIS completed 9/04. Final EIS completed 1/09). No ROD yet
- Certain NEPA decisions are subject to judicial review under the APA
- Litigation is commonplace. Plaintiffs allege government failed to comply with NEPA and seek an injunction
- Many states have their own versions of NEPA

Handling NEPA Risk- A Few Tips (three Ds)

- Do your homework
  - Has NEPA or will NEPA be triggered? Can you set up the project to avoid NEPA? NEPA can be triggered by small issues (Section 404 permit)
  - If triggered, do what you can to help facilitate the process (if possible)
- Develop good PR plan - Develop good relationships with the agenc(ies) involved and the locals early on. Involve them in the planning
- Deploy smart risk management - Allocate NEPA risks carefully (including unfavorable decisions, delays, costs and modifications) in deal documents

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) – The King of Remediation

- The primary statute used by the government and private parties to force cleanup of contaminated sites
- Current owners and operators (among others) of contaminated property can be ordered to remediate a contaminated site and/or held liable for the costs associated with remediating a contaminated site
- Liability may attach even if you did not cause the contamination.
- Cleanups are very time-consuming and exorbitantly expensive

Handling CERCLA/Contamination Risks – A Few Tips

- Do your homework - "Appropriate" Due Diligence
  - May qualify an owner for certain CERCLA defenses (e.g., innocent landowner, bona fide prospective purchaser)
  - What is appropriate
    - American Society for Testing and Materials (ASTM) Standard E-1527-05 and EPA's All Appropriate Inquiry Rule
    - Phase I ESA - Identifies recognized environment conditions that indicate the presence or likely presence of any hazardous substances or petroleum products on or near a property
    - Phase II Assessments - performed when Phase I recommends further testing - typically an invasive investigation
  - Assists with risk evaluation

Handling CERCLA/Contamination Risk – A Few Tips (cont.)

- Develop a good PR plan - Make use of good will associated with Brownfields redevelopment
- Deploy smart risk management
  - Assess and allocate CERCLA/contamination risk (cost and delay) carefully in deal documents
  - If developer retains some of the risk, quantify it and develop plan for dealing with known and unknown contamination

The Common Law - Nuisance Litigation

- Nuisance - neighbors often rely on the common law of nuisance to interfere with renewable projects
  - Nuisance is generally an unreasonable interference with one's use and enjoyment of their property
  - They claim pollution, noise and/or visual blight caused by the project would interfere with their use and enjoyment
  - Example: West Virginia court allowed a suit based on noise, unsightliness and diminished property values to proceed

Handling Nuisance Risks – A Few Tips

- Do your homework. Make sure your plans conform to setback requirements as a matter of policy and law. Know the pros and cons of the equipment you are using
- Develop a good PR plan. Get neighbors involved early on. Show the public you have taken nuisance considerations into account and mitigated for them
- Deploy smart risk management. Attempt to allocate risk appropriately, depending upon your role in the deal

Endangered Species Act: Protected Plants And Animals Are Everywhere

1250+ animals, birds, and plants protected by the ESA. Many occur in areas of wind or solar development: *e.g.*, desert tortoise in western deserts, Indiana bat in Midwest and northeast

As between national mandates to protect species and to develop renewable energy, species protection wins: "Congress intended endangered species to be afforded the highest of priorities" and to prevent "species extinction, whatever the cost." *TVA v. Hill* (U.S. Supreme Court)

ESA Requirements Can Be Onerous

Incidental takes. It is a civil and criminal violation to harass, harm or kill any listed creature. This prohibition covers any action that "disrupts normal behavioral patterns" with regard to "breeding, feeding, or sheltering," including "habitat modification." Enforceable by government or in private suits by neighbors/environmental groups

Critical habitat. U.S. FWS designates "critical habitat" for many species, which may encompass private and public land

Habitat Conservation Plan. Proponent of project that alters critical habitat or involves incidental take must obtain an "incidental take" permit from FWS, preparing a "Habitat Conservation Plan" that describes steps to prevent/mitigate harm and explains why alternatives are inferior; federal agencies may require modification of or bar project altogether. FWS monitors compliance

ESA Case Study: *Animal Welfare Institute v. Beech Ridge Energy LLC* (U.S. Dist. Court, Maryland)

Invenergy sought to develop the Beech Ridge project, a wind farm to be constructed along Appalachian ridge lines in West Virginia. It planned 124 turbines, operated year round.

In December, a federal judge enjoined the project, permitting completion only of 40 turbines under construction but limiting even their operation to 4½ months each year. What happened?

A national environmental group and local community organization sued to halt the project on the ground that the turbines would take endangered Indiana bats but Beech Ridge had failed to get an incidental take permit under the ESA. The court agreed an ITP was required.

Court credited plaintiffs' experts' opinions that bats were virtually certain to be killed and injured by the turbines. He sharply criticized Beech Ridge's environmental consultant for concluding during the planning stages that no bats were present based on an inadequate survey and "low-tech" testing methods that did not include acoustical detectors, thermal imagery, or radar.

Beech Ridge subsequently settled the lawsuit by agreeing to limit the project to 100 turbines, and to operate them only during bat hibernation (Nov. 16-Mar. 31) until such time that it obtains an incidental take permit from FWS.

Lessons from Beech Ridge

- Do not ignore possible presence of endangered species at renewable energy sites
- Involve ESA consultants early in project planning to determine existence and scope of any ESA issue
- If your company lacks in-house experience to supervise the consultants, retain legal counsel experienced with ESA early to work with the consultants
- At the first sign that the project implicates ESA protections, start working with US FWS. Most issues with renewable energy projects can be resolved in a satisfactory way if addressed directly and clearly—but it takes time
- Work with environmental/neighborhood groups to try to head off private litigation, if necessary

Clean Water Act

CWA Section 404 requires a federal permit "for the discharge of dredged or fill material into the navigable waters."

Covers any addition of virtually any material into any water of the United States that is connected, even remotely, to a navigable water. It is a civil and criminal offense to fill jurisdictional waters or wetlands without a permit. Enforcement is by private right of action as well as by government.

Wet soil that drains to a ditch that drains to a river miles away has been treated by regulators (the U.S. Army Corps of Engineers) as jurisdictional. Even ephemeral desert washes may be covered. Only waters or wetlands that can be shown to be truly isolated are exempt.

Any large-acreage energy project is likely to have some impact on jurisdictional waters/ wetlands. If an expert survey suggests they are present, important to engage with regulators to determine if waters are jurisdictional and if permit is required, in which case project modifications and/or on- or off-site mitigation may be required.

State and Local Laws

Examples:

Wind development within 3 miles of shore requires state approval. For example, the Massachusetts Ocean Plan designates only 2% of coastline for commercial wind development and imposes restrictions on projects in key area of Buzzards Bay to protect roseate tern.

Wyoming has designated 25% of the state as "core habitat" for the greater sage grouse (which is not yet federally protected). Habitat management requirements are imposed on projects within that core area.

Increasingly, communities are adopting local zoning ordinances that limit density or restrict siting of wind turbines, or even ban commercial wind development altogether. For example, Wabaunsee County, Kansas, has banned commercial wind development to protect the rural character of and environmental tourism in the Flint Hills region. Landowners with wind development contracts have sued arguing that the ban interferes with interstate commerce in wind energy in violation of the U.S. Constitution and amounts to an uncompensated taking of their property.

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The UK Experience

Michael Hutchinson
Partner

020 3130 3164
mhutchinson@mayerbrown.com

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The UK Experience – Layers of Environment Regulation Applying to UK Alternative Energy Projects

- European examples:

  SEA Directive
  Birds Directive
  Habitats Directive
  Aahrus Convention
  EIA Directive

- Regional/Local examples

  Regional Spatial Strategies
  Local Development Framework
  Supplementary Planning Documents

- National examples:

  Planning Act
  Town and Country Planning Act
  National Parks and Access to the Countryside Act
  Wildlife and Countryside Act
  Electricity Act
  Human Rights Act
  Food and Environment Act

The UK Experience: Background

- April 2009: EU 20-20-20 package
- Renewable Energy Directive: UK target of 15% renewables by 2020
- That means 30% of electricity generation to be from renewable sources by 2020 (versus 2.25% in 2008)
- E&Y (July 2009) estimate $130 billion investment needed by 2025.

The UK Experience: Renewables and the Planning System

- Locally submitted applications for on-shore wind take an average 14 months to get to a decision: approval rates are 25% versus average of 70%
- Where an appeal is launched, decision time on average is 26 months
- 7GW of on-shore wind currently stuck in planning process (against a target of 14GW to be operational by 2020)

The UK Experience: the law in a "nutshell"

- Planning Act 2008
  - "*nationally significant infrastructure projects*"
    - 50MW on-shore
    - 100MW off-shore
  - Development consent granted by Infrastructure Planning Commission
  - IPC must decide the application "*in accordance with any relevant national policy statement unless…*"

    e.g. "*adverse impact would outweigh its benefits*"
  - Key is the NPS
    - Criteria-based policies
    - Locationally specific
  - 1 year statutory limit for decisions (subject to exceptions)

The UK Experience: Legal challenges to planning policy

- How to challenge an NPS
  - NPS is subject to strategic environmental assessment (EU SEA Directive)
  - Draft Energy National Policy Statement published November 2009
  - January FoE (supported by WWF and RSPB) threatened judicial review for breach of SEA Directive

The UK Experience: the law in a "nutshell"

- Town and Country Planning Act 1990
  - all other on-shore development requires planning permission
  - granted by local authorities (subject to appeal to the Secretary of State)
  - decision to be made having "*regard to the development plan… and to any other material considerations*"
  - Local Development Framework

The UK Experience: the law in a "nutshell"

- What are "material considerations"?
  - Examples:
    - EU/UK/Local designations or protected species
    - Regional or local planning policies
    - Alternative sites
    - Noise
    - Landscape and visual impact
    - Tourism impact
    - Impact on built heritage
    - Safety issues
    - Human rights issues
  - Examples: Beauley-Denny
  - *R (on the application of Hulme) v Secretary of State for Communities and Local Government*

NB: *Greenpeace v Secretary of State for the Department of Trade and Industry* (2007)

The UK Experience: Environmental Impact Assessment

- EIA is likely to be required for any wind farm involving more than 2 turbines
- Issues in EIA challenges
  - Challenge has to be prompt
  - Locus standi
  - Remedies are equitable i.e. in the discretion of the courts
  - Cost
- Common problems with EIAs
  - Inadequate consultation
  - Inadequate scoping
  - Failure to disclose background data
  - Failure to keep up-to-date
  - Poor modelling of noise impacts/assessment of energy production

The UK Experience: Environment Impact Assessment

- Judicial review: opening the floodgates?
  - *Condron v United Kingdom (2009)*
- Aahrus Convention 1998 guarantees access to environmental information
- In *Condron*, communicant alleged failure to carry out EIA
- Local authority challenged decision to grant public funding for judicial review
- Was this harassment contract to Arts 3(8) and 9(4) of the Convention?

The UK Experience – The UK Planning System

- What to do to avoid problems:
  - Comply with consultation requirements and document it
  - Identify objectors and negotiate early
  - Disclose everything/use privilege to limit disclosure
  - Check your application materials are consistent
  - Assess alternative sites
  - Indentify “green” benefits fully
  - Identify “community benefits“ (where adverse impacts are identified)

The UK Experience - Conclusion

- Potential causes of action in relation to renewables vary according to jurisdiction
- Litigation risk management techniques:
  - Do your homework
  - Develop a PR plan
  - Deploy smart risk management

Thank you for participating

Today's presenters:

Tim Bishop

tbishop@mayerbrown.com

Susan Brice

sbrice@mayerbrown.com

Michael Hutchinson

mhutchinson@mayerbrown.com

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