

Minnesota Brownfields Renewable Energy on Brownfields Legal Considerations

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Renewable Energy

- Solar
- Wind
- Hydroelectric
- Biomass
 - Landfill Gas-to-Energy
 - Anaerobic Digestion
 - Municipal Solid Waste
 - Wastewater Sludge
 - Others

Brownfields

- Some Degree of Existing Soil and/or Groundwater Contamination of Regulatory Concern
- Landfills
 - Operating, But Closed Cell
 - Closed
- Sites To Be Investigated/Remediated
- Sites That Have Been Investigated and Remediated

Key Parties

- Project Developer/Owner
- Land Owner
- Potentially Responsible Party (PRP); May or May Not Exist and Be Involved
- Contractor/Builder
- Raw Material Suppliers
- Off-Take Contractors/Utilities

Key Parties (continued)

- Bank or Other Financing Entities
- Local, Regional, State and Federal Governments:
 - City
 - County
 - Metropolitan Council
 - MPCA
 - DEED
 - EPA

Key Project Elements

- Site Control
 - Own
 - Lease
- Financing and Tax Equity Structure and Agreements
- Supply and Off-Take Agreements
- Permitting, Regulatory and Transmission Matters
- Design and Construction Agreements
- Liability Mitigation

Many Variables = Differing Approaches

Issues and Resolutions Will Depend Upon:

- Type of Renewable Project
- Type and Condition of the Brownfield
- Project Development Arrangements
- Interests and Roles of the Various Parties

Federal Sources of Liability

- Comprehensive Environmental Response Cleanup Liability Act (CERCLA)
 - Potentially Responsible Parties:
 - Current Owners/Operators
 - Past Owners/Operators
 - Arrangers
 - Transporters
 - Defenses/Assurances
 - Innocent Landowner
 - All Appropriate Inquiry Before Purchasing; No Knowledge Or Constructive Knowledge
 - Bona Fide Prospective Purchaser
 - Secured Creditor Exemption

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Federal Sources of Liability

(continued)

- Resource Conservation and Recovery Act (RCRA)
 - Corrective Action
 - Defenses/Assurances
 - Comfort/Status Letters
 - Administrative Agreements

State Sources of Liability

- Minnesota Environmental Response and Liability Act (MERLA)
 - Responsible Parties-
 - Ownership Does Not Equal Liability
 - Only Those Who Were Directly Involved Or Engaged in Conduct Associating Them With Contamination
- Petroleum Tank Release Cleanup Act
 - Responsible Parties-
 - Owners of Tanks or Land, Except Those Who Did Not Know of or Significantly Contribute to Release

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Liability Mitigation

- Separate Project Entity Structure
- MPCA Brownfields Programs:
 - Voluntary Investigation and Cleanup (VIC)
 - Petroleum Brownfields
- No Association Determination
- No Further Action Letter
- Certificate of Completion
- Lender Letter

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Liability Mitigation (continued)

- Other Potential Liability Mitigation Assurance Letters
- Environmental Impairment Insurance

Relevant Contractual Provisions

- Site Conditions
 - Clear Annunciation of Existing Conditions
- Conditions Precedent
 - Procurement of Assurances
 - Procurement of/Compliance with Permits
 - Indemnification and Hold Harmless Provisions
 - Insurance

Example: Solar on Landfill

- Depends on Status of Landfill; but Focus Will Be Protection of Cap and RCRA Permit Compliance
- Seek No Association, If Possible
- Agreements Between Landfill Owner and Project Developer; and Project Developer and Project Construction Contractor
- Indemnities, Responsibilities and Remedies if Cap is Pierced
- Interactions Among the Parties and Local Government and MPCA Regarding Permitting
- Insurance

Example: Solar on Existing Brownfield

- MPCA VIC Program Entrance
- Seek No Association, If Possible
- Phase I and II Environmental Site Assessments
- Pursue Potential Brownfields Grant/Loan Funds (Usually With Local Government Sponsor) for Investigation/Remediation
- Job Creation is Important Factor
- Further Site Investigation

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Solar on Existing Brownfield (continued)

- Response Action Plan
- Site Remediation
- No Further Action Letter/Certificate of Completion
- Compliance with Institutional Controls for Remaining Contamination

Example: Solar as Part of Larger Redevelopment

- Project is Part of an Overall Brownfield Redevelopment Project
- Seek No Association, If Possible
- More Jobs Will Have Greater Potential for Grant Funds
- If Ground-Based and Includes Soil Disturbance, Must Work Within the RAP and Any Institutional Controls
- Similar Contractual Arrangements
- If Roof-Based, Less Potential Risk Related to Brownfields

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Conclusion

- Minnesota Has a Very Successful Approach to Brownfields Redevelopment
- Renewable Energy Projects Can Benefit, But Job Benefits to Leverage Investigation and Cleanup Funding Will Be Important
- Strong Potential for Integration of Renewable Energy into Larger Redevelopment Projects