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Top Ten Practice Points

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TOP TEN QUESTIONS TO ANSWER IN CONSIDERING RENEWABLE ENERGY AT A CONTAMINATED SITE

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Growing interest in the redevelopment of contaminated properties as sites for renewable energy facilities may offer companies with an inventory of such properties or with cleanup liability at non-owned abandoned sites a new opportunity to return such sites to productive reuse, generate revenue and reduce the company's carbon footprint. State and federal incentives may make such projects even more attractive. Using solar energy as an example, here are ten key considerations for counsel to evaluate in assisting with planning for renewable energy at a contaminated/brownfield site:

1. Why consider reusing a brownfield property for renewable energy?

While many contaminated sites may be attractive to third party real estate developers (or the site owner) for a variety of commercially viable projects, some sites either have no significant value for commercial redevelopment, cannot be readily redeveloped because of remedy constraints or the company that owns the site wants to retain control of the site as a liability management strategy. In these circumstances, reuse of the site for renewable energy generation may be a strategy that will generate some revenue or energy cost savings if the energy generated can be used by the owner. Pursuit of renewable energy also may fit nicely with a corporate sustainability program aimed at reducing the company's carbon footprint.

2. Will government agencies permit renewable energy projects at contaminated sites?

The federal government strongly encourages the reuse of contaminated properties for renewable energy. The U.S. Environmental Protection Agency ("EPA") has a program entitled "RE-Powering America's Land: Siting Renewable Energy on Potentially Contaminated Land and Mine Sites", the primary objective of which is to provide incentives and technical assistance to siting renewable energy on contaminated property. Even Superfund sites have been redeveloped for alternative energy projects. In addition, a number of states are actively encouraging the redevelopment of contaminated sites and landfills for renewable energy (e.g., New Jersey, Massachusetts) and many states provide preferential treatment for all brownfields redevelopment projects for which these sites are also eligible. In states where warehousing of contaminated sites (e.g., cap and fence with no planned use) is discouraged by regulation and other commercial uses are not viable, a renewable energy project may present an attractive option.

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3. Are there government incentives available for my project?

The most significant incentive is usually available through the sale of solar renewable energy certificates ("SRECs") that a number of states have created under their energy regulatory programs. These states have established renewable energy portfolio standards ("RPS") under which their public utilities must maintain a certain portion of their energy portfolio in renewable energy. SRECs are automatically created as energy is generated by solar energy projects and may be sold to the utilities to enable them to meet their RPS goals, thereby generating an SREC revenue stream for the project developer. Other significant incentives include the federal investment tax credit which provides qualifying entities with a credit equal to 30 percent of the eligible costs of a solar system and grants in lieu of these credits which provide cash payments in the same percentage from the US Treasury Department (the grant is currently scheduled to be phased out for systems which had not "commenced construction" as defined by the Treasury prior to prior to the end of 2011). In addition, many states currently offer grants, rebates, and/or attractive loan programs for qualifying solar projects, while some states and municipalities also offer performance-based incentives such as feed-in-tariff programs. Technical and limited financial assistance is also available through EPA's RE-Powering America's Land initiative.

4. Is the site a good candidate for a renewable energy project?

Many industrial contaminated properties have been targeted for commercial redevelopment because of their urban locations near critical infrastructure. The same advantages apply to the reuse of contaminated sites for renewable energy projects. These sites are often located close to existing public utility infrastructure and may be located on the same site as the owner's operating facility or adjacent to another company with significant energy demands. Ideally, the energy generated by the solar facility can be used at an onsite operating facility (or potentially to supply power to run an on-site groundwater remediation system) with attendant energy cost savings under the "net-metering" rules that apply in many states. A third party end user located on an adjacent property is also another good possibility, assuming an acceptable power purchase agreement can be negotiated and the state energy regulatory program allows for net-metered projects on separate but adjacent properties. Selling the energy into the grid through an interconnection with the local public utility may be a third option. Finally, the availability of a sufficient area of open land and current or potential future presence of significant obstructions to sunlight at or around the site will need to be considered.

5. Is the project consistent with the remediation strategy for the site?

Often a company that is remediating a site will want to retain control of the site post-remediation as a means of controlling human exposure and limiting the company's future liability. A solar energy reuse may be particularly attractive for these circumstances given the limited potential for human exposure. Typically soil contamination will be left in place under an engineered cap on the top of which solar panels may be placed using a variety of engineered systems designed for land (versus rooftop) mounting. It will be important to avoid any significant penetration of the cap, which could impede its effectiveness, and other potential damage to the cap during construction caused by truck traffic. Taking account of any impacts to the stormwater management features of the cap also will need to be considered.

6. Are there any other siting issues that need to be considered?

Positioning of the panels will be important to maximize exposure to the sun. The presence of any obstructions to sunlight at and around the site may also be an issue, particularly where the site is located in an otherwise heavily developed urban setting.

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7. Is the municipality or county likely to be helpful or a hindrance?

Renewable energy projects are sometimes viewed as unsightly or otherwise objectionable to neighbors. In these instances, advanced planning involving the municipality may be critical. In addition, local ordinances may limit the property owner's ability to develop the site for this purpose, although many forward thinking municipalities are adjusting their regulations to facilitate renewable energy development consistent with municipal sustainability goals and some states are enacting legislation preemptively authorizing these uses in industrial or commercial zones. Frequently, municipalities may make good partners as end users for the energy generated by the facility, e.g., where a publicly owned wastewater or water treatment plant, a school or other public facility is located nearby with substantial energy needs.

8. Are there any special liability protections provided where remediation projects are integrated with renewable energy?

Neither EPA nor the states have yet developed any special liability protections associated with renewable energy end uses at contaminated properties; however EPA and many states have a variety of liability protections that apply to third party developers of contaminated sites (e.g., bona fide purchaser protections, covenants not to sue, comfort letters, etc.) that may also have application in facilitating a transaction where the party responsible for the contamination desires to lease or sell its property to a third party for redevelopment with a renewable energy project. While third party development of the renewable energy project may raise its own concerns (see no. 9 below), a partnering arrangement where both parties share in the upsides of the project may work for a property owner that wants to pursue a project, but does not want to develop the project itself. In those instances, these liability protections may be important to make the project viable for the third party, its investors and lenders.

9. Is it wise to partner with a third party renewable energy developer at a contaminated site?

Some companies may view renewable energy to be an attractive end use of their contaminated site, but may not have the necessary expertise or may simply want to avoid the headaches associated with developing the project. In such instances, a joint venture with or a lease to a responsible solar energy developer may be attractive. In considering such an arrangement, in addition to carefully evaluating the financial terms, it will be important to include appropriate provisions to guard against interference with the remedy by the third party and to allocate responsibility for any post-remediation monitoring and maintenance. Site security issues need to be considered as well as the possibility that the third party may cause its own contamination that could affect the property. The third party will likely want to ensue the availability of statutory and regulatory liability protections regarding any residual contamination at the property and contractual protections through indemnifications and potentially pollution liability insurance. Finally, the possibility of government liability liens related to recovery of oversight and response costs may need to be considered in connection with a third party transaction.

10. Would a renewable energy project at a non-owned contaminated site make sense?

So far we have addressed company owned sites, but many companies are responsible parties at off-site multi-party contaminated sites, for example abandoned disposal sites being cleaned up under the federal Superfund program or state counterparts. Project development may be more difficult at such sites – the site owner is often not involved in the cleanup; government agencies, whose oversight of these projects is substantial, are frequently more focused on investigation and remedy completion than developing an end-project; and remediation and post remedy monitoring may present more complex technical problems. Nevertheless, utilizing government policies such as RE-Powering America's Land may enable the responsible parties to leverage a renewable energy project to achieve remedy concessions and cost savings that might not otherwise be available and provide a potential revenue stream to fund remedy operation and maintenance costs.