



BRIGHTENING UP ENVIRONMENTALLY IMPAIRED PROPERTIES WITH SOLAR

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In recent years, federal and state governments have promoted and incentivized the private development of renewable energy generation, with a particular emphasis on solar, as a means to advance energy-related public policy goals. Given the available financial incentives and the potential for long-term benefits for the project host that are typically associated with these projects (e.g., lower energy costs, the potential for lease income, positive public relations opportunities, etc.), more and more businesses are scrutinizing their portfolio of underperforming land assets for a parcel where a renewable energy generating facility may be feasibly developed. The evolution of creative third party ownership models, such as the [power purchase agreement](#) (“PPA”) model, have only further enhanced the attractiveness and feasibility of these projects. In general, under the PPA model, an energy user (e.g., the owner or occupant at the host property) purchases the power generated by a solar energy system that is physically located on the user’s property, but the system is financed, owned, constructed, operated and maintained by a third party.

For businesses that have an environmentally impaired property(s) with limited development alternatives and/or productive reuse options, such properties may be ideal candidates for solar energy development under the third party ownership model; however, it is often the case that developers and their lenders are hesitant to get involved in these types of properties because of the potential for environmental cleanup liability risk. The U.S. Environmental Protection Agency’s (“EPA”) has tried to address these concerns and promote Brownfield reuse with its [RE-Powering America’s Land Initiative](#). EPA recently issued a fact sheet titled “[Siting Renewable Energy on Contaminated Properties: Addressing Liability Concerns](#)” (the “Fact Sheet”) that was intended to, among other things, clarify potential liability issues in this scenario and to help facilitate the implementation of these projects. It is important for corporate counsel to understand these issues and how they may be handled in a PPA deal.

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In prior guidance, EPA has addressed the liability protections afforded to property owners that qualify for the “[Bona Fide Prospective Purchaser](#)” (“BFPP”) defense to CERCLA liability, and how that defense may be extended to lessees. The Fact Sheet goes one step further and addresses the scenario where the BFPP status and its related liability protections may not come into play. The Fact Sheet outlines the steps that developers can follow to minimize, and potentially eliminate, the risk of CERCLA liability associated with the renewable energy development effort. It also expressly indicates EPA’s willingness to work with parties on these projects to determine whether a site-specific document from EPA addressing the defense and/or liability risk would be appropriate to help move a transaction forward. Such a document could provide the parties a sense of EPA’s current intentions concerning the exercise of its cleanup and enforcement authorities with respect to a particular property, and may serve to allay certain fears and address certain unknown risks for a given development project.

These property-specific documents include [Ready for Reuse](#) (“RfR”) determinations, which is a determination by EPA that all or a portion of a property is sufficiently cleaned-up to support the contemplated use, and comfort letters, which may further address the “reasonable steps” that a solar energy developer may need to take to avoid liability, e.g., the steps to take when installing solar panels on a soil or engineered cap to help avoid any exacerbation of the existing contamination. In certain instances, EPA may also be willing to enter into an administrative agreement, such as a prospective lessee agreement, that may provide a higher degree of comfort to a solar energy developer if necessary.

In summary, corporate counsel should be aware of the liability protections that are available at the federal and state levels to lessees and/or operators of renewable energy facilities on environmentally impaired property(s), and the related mechanisms that federal and state governments may offer to clarify these protections as applied in a particular transactional context. Understanding these protections can be an important tool in attracting these projects to your property that in the right situation, can have a tremendous upside and help to create tangible value for the company in an otherwise underperforming asset.