

NEPA and Energy Law: Environmental Assessment and Siting

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Wind Farms

- LESSONS LEARNED FROM WIND FARM LITIGATION, Lisa Wing Stone, Sara Zdeb, Environmental Litigation and Toxic Torts Committee Newsletter, Vol. 11, No. 1, March 2009, American Bar Association.
- Surveyed 30 lawsuits related to wind farms, claims include:

Wind Farms

- public nuisance
- “including noise, visual obstructions, light flickering (known as “shadow flicker”), and zoning violations.” P.3.
- “environmental complaints, primarily related to increased bird and bat mortality.” P. 3.

NIMBY and Cape Wind: a study in controversy

- 2005 Robert Kennedy Jr., letter to Boston Globe claimed proposed Cape Wind Project in Nantucket Sound would cause environmental damage. p. 89.
- Reasons: potential harm to birds, potential noise, oil used for the turbines could contaminate the water, lights would interfere with the view of the stars and the underwater transmission lines would hurt the fishing industry. P. 90.

Nordhaus-Shellenberger

- Studies of bird deaths in off-shore wind farms in Europe indicate few birds die. P. 90.
- Wind will replace Cape Cod's burning of oil for electricity. The oil is transported by single hulled ships that have spilled into the Sound as recently as 2003. P.91.
- light and sound - negligible. P. 92
- transmission lines generally too shallow to affect fishing (International Seafarers Union endorsed the project). P. 91.

National Environmental Policy Act

- Created in 1968 to recognize the role of government agencies in affecting the environment.
- Requires agencies to develop an Environmental Impact Statement (EIS) before proceeding on large projects to determine potential environmental repercussions.

National Environmental Policy Act (1969)

- Requires Environmental Impact Statement (EIS) on some federal projects.
- incorporates environmental considerations into major federal actions
- Primarily a procedural requirement
- The goal is to ensure informed decision making by federal agencies. P. 167.

NEPA drawbacks

- delays in major energy projects.
- Currently has no provisions to encourage development of clean energy alternatives (Solar, Wind).

Environmental Impact Statements

- Describe environmental impacts of proposed federal projects.
- Set forth alternatives
- Note relationship between short term and long term benefits.
- Note irreversible commitments of resources.

Examples of NEPA Streamlining

- Statutes and Agency regulations simplify the NEPA process.
- Some streamlining exists on energy projects.
- A key area is Categorical Exclusions.

OSTSOSUFA

- Oil Shale, Tar Sands, and Other Strategic Unconventional Fuels Act of 2005.
- Declares U.S. policy that shale, tar sands, and other unconventional fuels are strategically important domestic resources.
- Call it Unconventional Fuels Act (UFA)

UFA, cont.

- Applies to the Green River Basin in Colorado, Utah, and Wyoming.
- Instructs the Secretary to prepare an EIS and establish a commercial leasing program within specific time.
- Final regulations allow a single leaseholder to develop up to 300,000 acres.

Categorical Exclusions

- If an action is categorically excluded, “neither an environmental assessment nor an environmental impact statement is required.”
- An agency may still choose to conduct an environmental assessment to cover unusual cases.

Examples of Categorical Exclusions

- Secretary of Agriculture may apply a rebuttable presumption on activities pursuant to the Mineral Leasing Act for development of oil or gas.

Categories of actions where this rebuttable presumption applies include:

- Maintenance of minor activities.
- Individual surface disturbances less than 5 acres, up to a total of 150 acres.
- Drilling oil or gas wells at sites where drilling has occurred in the last 5 years.
- Placement of pipelines in corridors approved within the last 5 years.
- Drilling wells in sites where drilling was reasonably foreseeable in the last 5 years.

CE Examples

- Nuclear Regulatory Commission (NRC) may exclude licensing and various operations of nuclear plants, including:
 - Recordkeeping, inspection, and reporting requirements.
 - Modifications of licenses regarding fuel transport, waste disposal, and safeguards of nuclear material.

Mini-NEPAs

- Fourteen states have passed “mini-NEPAs” requiring similar review for actions by states.
 - Opponents to the Cape Wind project sued under Massachusetts's mini-NEPA.
 - The Federal EIS is due shortly and will likely have the same challenge.
 - Montana has limited its “Mini-NEPA” to examine only the impacts of projects located on state land to the state land.

Solar and Wind Easements

- Generally under common law prescriptive easements are not given for access to solar and wind resources.
- 34 states have enacted solar easement statutes.
- Only 4 have enacted wind statutes.
- Most solar and wind easements require consent of neighboring landowners.

Feasibility of Green Energy

- 900 GW of potential energy exists off the coasts of the U.S.
- Other countries have demonstrated widespread use of green energy.
- For example, Turkey has over 8.2 million square meters of installed solar collectors on domestic homes.

Inexhaustible Jobs

- Wind projects provide manufacturing, construction, maintenance jobs that are difficult to outsource.
- In 2006 alone, the energy efficiency and clean energy production industries accounted for 8.5 million new jobs and nearly \$970 billion in revenue.
- Cape Wind would provide 1,000 temporary construction jobs, 150 permanent jobs.

Multiple Strategy Approach



Hydroelectric Plant



Solar Farm

- Renewables are fastest growing energy source in the U.S.
- Multifaceted approach is key
- Funding of research
- Put green energies on equal footing with other energy sources.

Thank You!

