

LEX HELIUS: THE LAW OF SOLAR ENERGY
—Permitting and Land Use—

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It is not enough to have the sun and the land to construct a solar energy facility. One also needs the permits to use the land for energy generation. Even with the current favorable regulatory environment regarding renewable energy, the successful project developer knows that every element of the facility must have the right approvals to be legally constructed and operated. Failure to obtain the correct permits can be costly in terms of construction delays related to stop work orders; foregone revenues, tax credits, and commencement of accelerated depreciation; and, in today's regulatory climate, quite possibly penalties for failure to meet renewable portfolio standards.

I. Facility Permitting Rules. Energy facility permitting is traditionally a state or local jurisdiction function, unless the facility is constructed on federal land or involves other federal action.

A. State Energy Facility Siting. Many states have established administrative boards, councils, or committees that review and, in most cases, approve or deny the siting of energy facilities. At least one state, Washington, allows only the agency—the Energy Facility Site Evaluation Council (“EFSEC”)—to make a recommendation to the governor about whether to approve an energy facility. The final decision under Washington's regulatory framework rests solely with the governor. In other states with siting councils, such as Oregon, Ohio, and Massachusetts, the agency itself renders a decision to approve or deny an application to site a major energy facility.

States differ greatly on whether the state will assert jurisdiction over energy facilities. Many states, such as Oregon, require energy facilities that will generate a defined amount of power to undergo siting by the state agency while allowing facilities generating amounts under the threshold to be sited by the local jurisdiction in which the facility is proposed. Other states, such as Washington, have full authority to site any size energy facility, but do so only at the election of the applicant. Some states, such as Texas, provide for no such state jurisdiction.

Once a solar developer has determined whether the state it has chosen for its project has a siting council, it must determine whether the siting council has jurisdiction over solar facilities. Siting councils are largely a product of the thermal energy facility construction wave of the 1960s and 1970s. At that time, many state legislatures set out to define the types of facilities that could be sited and typically included only the commercially viable technologies of the day. In many state siting frameworks, renewable energy technologies, such as solar, geothermal, and wind, were not even mentioned. As renewable energy has emerged as a viable industry, states have begun to add alternative energy sources to those that fall within a siting council's jurisdiction. The savvy solar developer will check the state's jurisdictional requirements carefully to determine whether the solar development will be subject to the state siting process and, if so, whether there are exemptions from or waivers for state siting process requirements.

B. Local Energy Facility Siting. In states in which there is no siting council or the council lacks jurisdiction over solar facilities, the siting decisions are made by local jurisdictions, most often township and county governing bodies. Commercial solar facilities, even those proposing to use the most modern technology, often require vast tracts of land. They may also require large amounts of water. For these reasons, as well as the cost of land and aesthetics, solar facilities are typically located outside of urban areas.

Many local governments are quite adept at solar facility permitting. Capital facility permitting is a traditional function of the local jurisdictions within which facilities are generally built, whether they be water treatment, wastewater management, or energy generation plants. As such, nearly all communities have some type of planning or community development department with skilled staff to assist in processing and reviewing permit applications. The solar facility developer should contact the planning, community development, or utility or

public works department for the jurisdiction within which a proposed project lies to assess what local processes and requirements exist for a solar facility.

C. Federal Energy Facility Siting. Solar facilities proposed for construction on federal land fall within the jurisdiction of the agency charged with the land's management, most often the U.S. Department of the Interior's Bureau of Land Management ("BLM") or the U.S. Department of Agriculture's Forest Service. Federal land management policies encourage the development of solar energy on public lands. BLM issues right-of-way authorizations for solar installations, and the Forest Service issues special use permits.

D. Choosing a Siting Process. If the developer has a choice of siting entities, time considerations loom large in making a decision about which process to pursue. Many state siting councils establish a time frame within which a siting decision must be made. The rules and the exceptions thereto should be examined before electing a process. Additionally, siting councils typically have experienced staff who should be consulted for firsthand observations on how smoothly and expeditiously prior siting matters have proceeded. These same state siting entities typically have greater technical resources for review of an application, which often results in a more thorough review. The downside, however, is that this often translates into a longer permit review process than one conducted by a local jurisdiction.

To the extent a developer has a choice of permitting agencies, there are several other factors to be weighed in choosing a siting path. The more extensive resources that are available to a state agency can result in expert review of a proposal. Local agencies often lack the financial resources to hire various experts, particularly in an emergent field such as commercial solar energy generation. The local jurisdiction may handle this lack of staff expertise by requiring that the developer fund or reimburse the local agency's costs expended in reviewing a project. A comparison should be made to determine the difference between state and local application fees and processing and review costs.

Another critical factor involves the political nature of energy facility siting decisions. Although solar facilities generally have less immediate visual impact than nuclear cooling towers, smokestacks, or wind turbines, any energy facility can evoke strong sentiments in a community. Siting of a contentious project, when conducted by a state agency, tends to be more objective and less politicized than a town hall-style local forum. When making the decision about which path to choose, the developer should consider who will be staffing the permit review, who will be making the decision, and what remedies are available under each permitting regime if a negative result is obtained.

II. Environmental and Land Use Considerations. Depending on the forum in which an application for a solar facility is processed, a variety of environmental and land use rules will be applied to evaluate the proposal.

A. Federal Environmental and Land Use Review. Approval of a facility on federal land through the issuance of a right-of-way or special use permit (as well as other federal agency approval actions) necessarily involves application of environmental review under the National Environmental Policy Act ("NEPA"). The scope of a NEPA review is broadly designed to assess the environmental impacts of a proposed development and the potential significance of those impacts. This includes assessment of project development impacts to both the built (*e.g.*, roads) and the natural (soil, wildlife, and ground and surface water) elements of the environment. Predictably, the more significant the potential for adverse environmental impacts, the more closely the project will be scrutinized. It follows that the higher the level of review, the longer the process will take. Projects that are categorically exempted from NEPA by federal regulations can result in near-immediate review. However, nonexempt actions must go through an Environmental Assessment, usually a four- to six-month process, to

determine whether the solar project will cause no significant impact (finding of no significance) or will likely cause significant environmental impact, which triggers the preparation of a full-blown Environmental Impact Statement (“EIS”). Preparation of an EIS is a lengthy process that involves considerable and multiple public and agency review opportunities, and is rarely completed in under a year. Although NEPA itself is only a procedural and evaluative tool without substantive standards or requirements that must be imposed on a project, the resulting analysis of impacts, alternatives, and potential mitigation serves as the basis for imposition of conditions on projects.

B. State and Local Environmental and Land Use Review. Because our nation is a federation of states, each state puts its own imprimatur on environmental and land use review. State and local agencies typically conduct environmental reviews during the permit issuance process, whether the project calls for a siting permit issued by a state or a local permit (typically a conditional use permit).

Some jurisdictions, such as California (under the California Environmental Quality Act), conduct a comprehensive environmental review of project impacts contemporaneously with the review of the permit itself for land use and regulatory consistency. The process in such states is patterned after the federal NEPA framework and is commenced through a separate application for environmental review of the proposed project. The environmental review is conducted as an overlay to the permit review. Because environmental review regulations contain public notice and participation requirements, compliance with those requirements can add considerable time to the review process. The same procedural review is applied by local jurisdictions when reviewing a permit. The developer should consult agency staff and, if necessary, legal counsel early in the process to ascertain the responsibilities of the developer as the review progresses. There are also timelines that accompany review processes. Clarification should be obtained to determine whether timelines set (1) a maximum processing period, such as the 12-month review process promised by the Washington EFSEC or (2) a minimum period before the agency may act but not a maximum time limit for rendering a decision.

Some solar resource-rich states, such as Nevada and New Mexico, do not conduct contemporaneous environmental review processes at all. Although such states do not undertake environmental review of a permit as a separate process, some states and local jurisdictions will consider environmental issues as part of the permit application itself. Oregon, for example, has adopted criteria, applicable statewide, that address environmental issues. Solar facility developers in Oregon will encounter a host of statewide land use goals with substantive prohibitions built into them. These land use goals apply to both the state’s Energy Facility Siting Council and every state’s political subdivision. Such goals are stringently applied. Although there are processes to seek exceptions therefrom, those requests are reviewed narrowly and are infrequently granted. Oregon has a rich history of publishing appellate decisions of land use appeals, and legal counsel should be able to assist in determining whether the criteria for a land use goal exception have been interpreted previously, which can provide guidance for difficult siting decisions.

In addition to environmental review, applications to develop solar facilities will undergo permit review to determine whether a solar facility is in compliance with the jurisdiction’s approved land use laws. The first phase of such review is nearly always to assess whether the use is allowed outright or conditionally at the proposed location. Most often, this is accomplished by reviewing the zoning code to ascertain whether the solar facility is an outright, predetermined compatible use with other uses in the zone, or is a conditional use. If the use is conditionally allowed, the environmental assessment undertaken either as part of the permit review or separately through a NEPA-like process generally provides a host of conditions that can be imposed on the facility that render it more compatible with its zone.

Additional land use laws that may apply to a solar project include surface and ground water quality and quantity protection, as well as shoreline regulations. The genesis for many of the state-administered laws is the federal Clean Water Act, although states such as Washington and California have also enacted shoreline protection laws that superimpose more review and additional permits before a solar facility may be permitted.

For most local permitting decisions, the body empowered to approve a project is a board of county commissioners or a legal equivalent or, less commonly, planning agency administrators.

C. Streamlining the Process. Some jurisdictions are beginning to recognize the value of consolidating the permitting processes for several renewable technologies. For example, a county in Washington has conducted an areawide EIS for wind energy facilities to create an overlay zone in certain areas for wind development. While the environmental impacts for wind development were being assessed, the ramifications of solar energy facility development were considered. As a result, both technologies have been established as permitted uses in certain zones. A solar facility proponent should meet early with the local planning authority to review the compendium of land use laws and determine which permits will be required, as the opportunity to reduce permitting costs is significant.

Energy generators and developers are also taking steps to reduce the time and cost of solar facility permitting by co-locating several renewable energy generation facilities on a single site. An example of this is found at the Wild Horse Wind Power Project in Washington. The wind energy facility owner is a utility subject to the state's Renewable Portfolio Standards. The facility occupies over 6,000 acres on which are placed only 121 turbines. Because wind turbines occupy a vertical plane and solar panels a horizontal plane, there was room for the two technologies to compatibly occupy the same acreage. Both share transmission facilities, reducing capital facility costs. The environmental impacts for both the solar and wind facilities were constrained to the same site, resulting in a more expeditious and less obvious environmental review process.