

9006 Grants

Managing Your Legal Issues

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Your Program for the Evening...

- Environmental Issues for Everyone
 - National Environmental Policy Act (NEPA)
 - Endangered Species Act (ESA)
 - The Clean Water Act (CWA) Stormwater Provisions
- Land Use Issues – Above, At, and Below the Surface
- Organizing Your Venture
- Resolving Conflicts
- Some Biofuels-specific Environmental Issues
 - The Clean Water Act (CWA)
 - The Clean Air Act (CAA)

First, the stuff that applies
to everybody...

The National Environmental Policy Act (NEPA)

- NEPA (42 U.S.C. § 4321 *et seq.*) requires federal agencies to consider the environmental impacts of their activities.
- Federal money = some form of “environmental assessment.”
- 9006 applicants must complete Form RD-1940-20.
- From your beloved NOFA:
“The applicant should strive to achieve positive community support, select good sites, and mitigate environmental impacts resulting from his/her proposal.”

The Endangered Species Act (ESA)

- The ESA (16 U.S.C. § 1531 *et seq.*) prohibits the “taking” of an endangered or threatened species.
- To “take” means “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”
- The ESA also requires federal agencies to insure that their actions do not result in the destruction or “adverse modification” of “critical habitat.”
 - “Federal Agencies” like USDA funding projects like § 9006.
- For a list of endangered species in Oklahoma and their likely territories, go to <http://www.fws.gov/species/#endangered>

Land Use Issues – Above the Surface

- Federal Aviation Administration Regulations (the reason there are blinking lights on tall stuff).
 - FAA starts getting involved if your project is 200 feet high (and lower if it is near an airport).
- Bird Impact Mitigation – not a “requirement” but a “really good idea.”
 - Consult the Bureau of Land Management’s “Interim Guidelines to Avoid and Minimize Wildlife Impacts from Wind Turbines.”
http://www.blm.gov/nhp/what/lands/realty/FWS_wind_turbine_guidance_7_03.pdf
- “Viewshed” issues.

Land Use Issues – At the Surface

- Construction Storm Water Runoff
 - Part of the Clean Water Act addresses pollution from storm water runoff, including erosion.
 - If construction activities will disturb more than one acre, they come under Clean Water Act regulation.
 - In Oklahoma, this can usually be handled with a “Notice of Intent” and a “General Permit.”
 - Go to:
<http://www.deq.state.ok.us/WQDnew/stormwater/index.html>
 - In Indian Country, though, EPA is the permit authority.

Land Use Issues – At the Surface

- Local zoning requirements:
 - Is your project within the corporate limits of a city?
 - Is it near a city, highway, or utility way?
 - Is it in part of a developed area?
- Securing the rights to surface access.
 - Have you secured permission to get access for equipment, maintenance, and transmitting product?

Land Use Issues – Below the Surface

- Have the surface and mineral rights been severed?
 - Determine who owns the surface, and who owns the minerals.
 - Generally, the mineral interest is the “dominant” interest over the surface.
 - Be sure to examine the mineral lease agreement.
 - Negotiate an agreement that insures your rights are clearly defined.

Organizing Your Venture

Why should I have a separate legal entity?

- To provide a means of securing investment in the business (and add or change members).
- To allow for the continued “survivability” of the business.
- To gain more tax flexibility.
- To **LIMIT YOUR LIABILITY!!!** (i.e. cover your assets).

Organizing Your Venture

What are some of the most common business entities?

- Sole Proprietorship
- General Partnership
- Corporation
- Limited Liability Corporation (LLC)

Organizing Your Venture

How is the business taxed?

- Sole proprietorship: Flow-through straight to the to the individual.
- General partnership: Flow-through straight to the individual.
- Corporation: Two options:
 - Subchapter C: Taxed at the corporate level, so earnings passed to shareholders are taxed twice.
 - Subchapter S: Election as “S Corporation” allows pass-through taxation, but carries a number of restrictions.
- LLC: Can generally choose to be taxed like a partnership, “C Corporation,” or “S Corporation.”

Organizing Your Venture

Some closing considerations

- Sole proprietorships and general partnerships take virtually no effort to form, but offer no liability protection.
- Corporations limit owners' liability, and are useful for large business with frequently changing ownership, but corporate formalities can be a hassle.
- LLCs are relatively easy to form, and very flexible.

**Now some matters for the biofuels
folks...**

The Clean Water Act (CWA)

- The CWA (33 U.S.C. § 1251 et seq.) was designed to prevent rivers catching on fire (well, sort of).
- It establishes the National Pollutant Discharge Elimination System, which is administered by the Oklahoma Department of Environmental Quality in the state.

The Clean Water Act (CWA)

- The CWA addresses two main types of pollution:
 - “Point source” discharges – stuff that comes out of a pipe.
 - Stormwater runoff – potential pollution from runoff and erosion.

The Clean Water Act (CWA)

- ❑ Point Source Pollutant Regulations
 - Apply if your operation will discharge a pollutant to waters of the state.
 - Handled by NPDES permits or through city water treatment permits.
- ❑ Stormwater Regulations
 - Apply if the project will expose one or more acres.
 - Handled by a “Notice of Intent,” and General Permits specifying stormwater management practices.

The Clean Air Act (CAA)

- The CAA (42 U.S.C. § 7401 et seq.), like the CWA, uses a permitting system to address the equivalent of “point sources” of air pollution.
- Regulation of air pollutant sources in Oklahoma is delegated to the Oklahoma Department of Environmental Quality.

The Clean Air Act (CAA)

- Oklahoma's permit system essentially groups air emission sources into four groups:
 - **Major Facilities** – these require “Title V” permits / PSD permits (the big kids).
 - **Minor Facilities** - they get, surprise, minor facility permits.
 - **“De Minimis” Facilities** - this is a specific listing of operations that do not require an air emission permit or that emit less than a specified threshold amount of pollutants each year).
 - **Permit Exempt Facilities** – the catch-all for facilities that don't fall into one of the other categories.

The Clean Air Act (CAA)

- Here's the big kicker if your facility is going to require an air permit:
 - *You can't even **start** construction until you are **issued** your permit.*
 - If your facility requires a PSD permit, you can't even start site prep without the permit.
 - With other permits, you can't start construction of the actual emitting equipment without the permit.

For environmental compliance help and references, go to:

- Environmental Protection Agency:
www.epa.gov
- Oklahoma Department of Environmental Quality: www.deq.state.ok.us
- National Wind Coordinating Committee
“Permitting of Wind Energy Facilities” guide:
<http://www.nationalwind.org/publications/permit/default.htm>

Resolving Conflicts

- An ounce of prevention is worth tens of thousands of dollars of cure.
- Anticipate problems before they arise.
- Look into other ways to resolve conflicts other than litigation.
 - The OSU Institute for Issue Management and Alternative Dispute resolution
<http://mediation.okstate.edu/>
- And yeah, then there is litigation.

Thanks!

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