

Siting Renewable Energy: Land Use & Environmental Due Diligence

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KAPLAN KIRSCH ROCKWELL

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**LAND USE
FOR A LIFETIME:**
Changing Demographics & Shifting Priorities

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Due Diligence Generally

- Due diligence for siting renewable projects involves many of the usual issues
- Must take into account unique aspects of renewable projects
- This presentation divides the discussion into private, local, state, and federal requirements

Private Access Requirements

- **The site**
- **Easement holders**
- **Utilities**
- **Irrigation ditches**
- **Severed minerals (discussed later)**

Local Requirements

- **Comprehensive Plan**
 - How is the property shown on the Comprehensive Plan?
 - Is there an area plan that affects the property?
 - Comprehensive Plan consistency generally not mandatory, but decision-makers will use this criteria in evaluating zoning and land use decisions

Local Requirements

- **Zoning**

- Does the local jurisdiction have zoning that contemplates the use?
- Is the property zoned for the expected use?
- Does the project require a conditional or special use permit? What types of conditions might be imposed?
- Are any variances necessary?
- Are there other permitting requirements that relate to the project?
- Neighborhood input, participation

Local Requirements

- **Subdivision**

- Does the property need a subdivision plat?
- What will the local jurisdiction require in terms of dedications, open space?
- What infrastructure will need to be constructed and who will be constructing it?
- Are there easements for utilities, etc. that need to be conveyed or dedicated?

Local Requirements

- **Other possible requirements**
 - 1041 Permits (Colorado only)
 - Building Permits
 - Sewage Permits
 - Road Access Permits
 - Oversize Load Permits
 - Fire protection requirements
 - Other Local Requirements

State Requirements

- Mineral interest owners have a right to use the surface of the land as is “reasonable and necessary” to develop underlying minerals. *Gerrity Oil v. Magness*, 946 P.2d 913 (1997); codified in C.R.S.
- Under the Surface Development Notification Act (SDNA), C.R.S. §§ 24-65.5-103 and 103.5, applicants must notify owners of severed mineral rights prior to the first hearing on surface development.
- Notification gives the applicant liability protections from claims by mineral interest owners.

State Requirements



Colorado Public Utilities Commission Regulations

4 C.C.R. § 723-3:3668

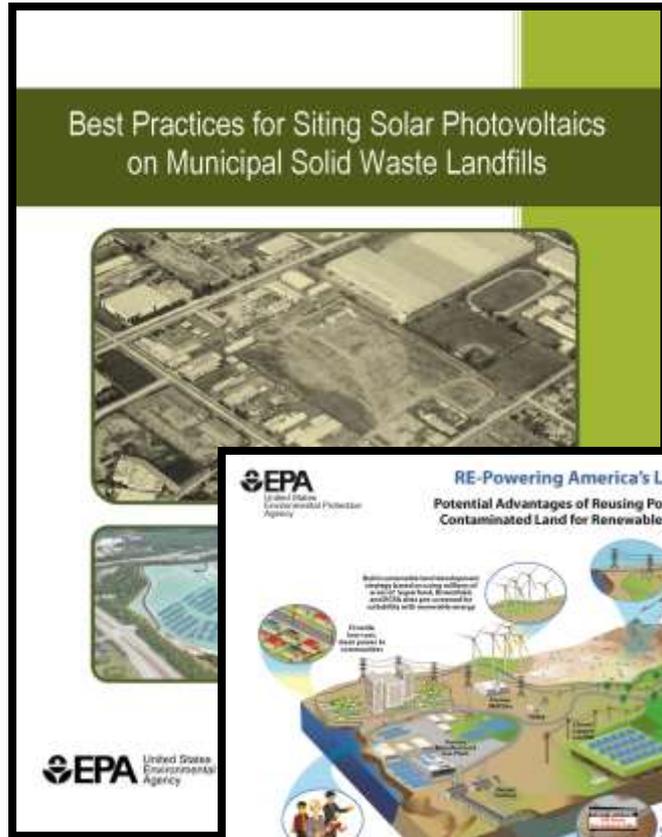
- Electric utilities that are subject to the PUC's regulatory authority must require that wildlife consultation requirements are met for their energy suppliers that generate **over 2 MW or that have turbines over 50 feet.**
- Applies to all electric utilities except cooperative electric associations and municipally owned utilities.

State Requirements

- **Historical**
 - State agency taking action (e.g., approving a project) must consult with OAHP about properties of “historical significance.”
 - If property is listed on the state register, OAHP may require alterations to a project.



State Requirements



- **Environmental**

- Is the site a solid or hazardous waste disposal site?
- Do past land uses indicate potential environmental contamination?

State Requirements

- **Other Requirements**
 - Construction Stormwater Permits
 - Oversize Load Permits
 - Water Well Permits
 - Construction Air Permits
 - Road Access Permits

Federal Requirements

National Environmental Policy Act

42 U.S.C. § 4321; 40 C.F.R. §§ 1500–08

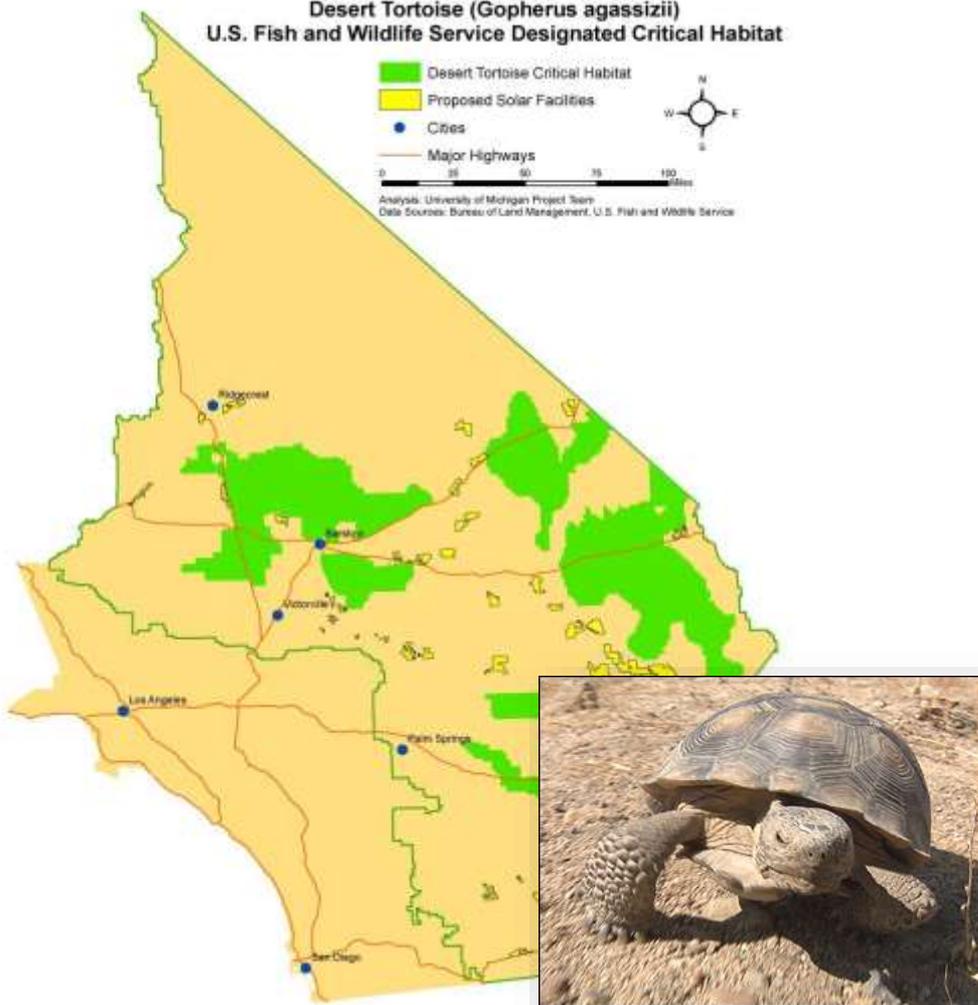
NEPA is triggered if the Project . . .

- will receive federal funding;
- requires a right-of-way or special use permit from a federal land management agency;
- requires a permit under the federal Clean Water Act; or
- has other federal nexus.



Federal Requirements

Desert Tortoise (*Gopherus agassizii*)
U.S. Fish and Wildlife Service Designated Critical Habitat



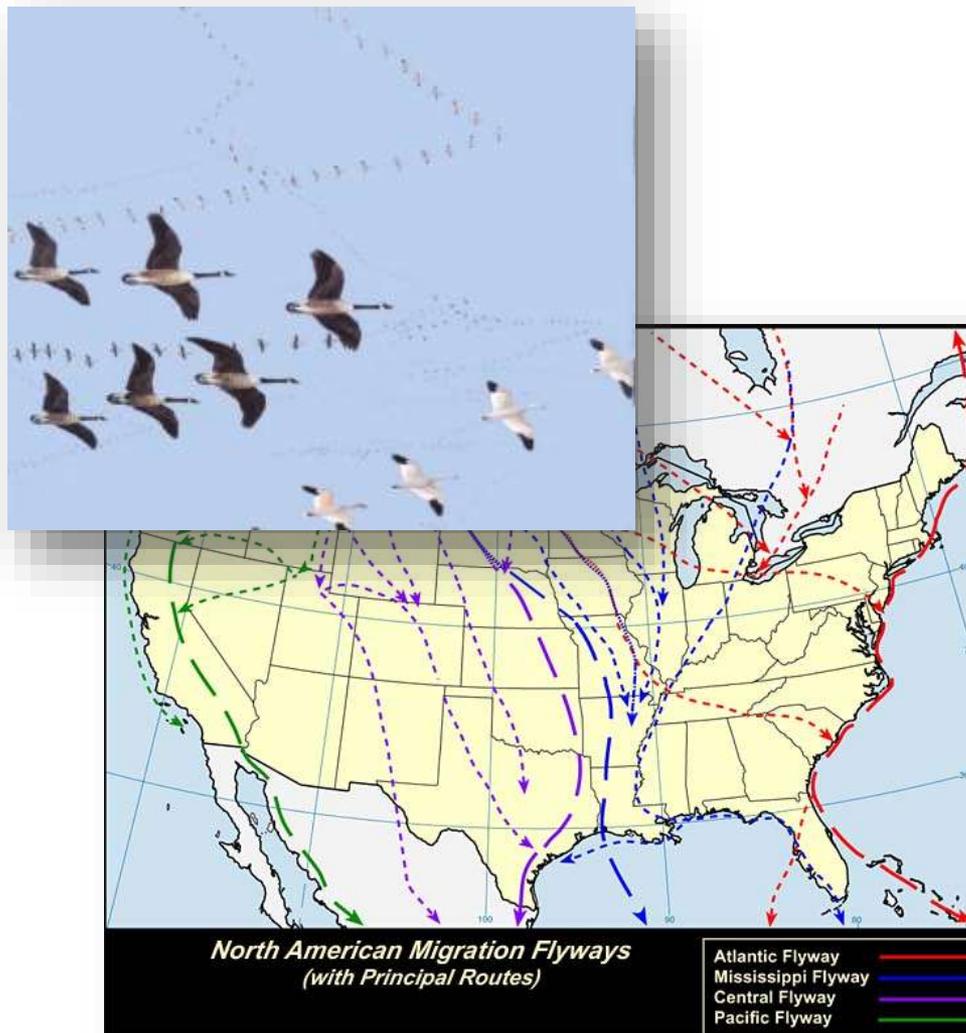
Endangered Species Act

16 U.S.C. §§ 1531–44;

50 C.F.R. Parts 13, 17

- **Section 9** prohibits any person from “taking” endangered or threatened species.
- **Section 7** requires federal agencies to consult with the U.S. Fish & Wildlife Service (FWS) before granting federal approvals to ensure that the approvals are not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitat for those species.

Federal Requirements



Migratory Bird Treaty Act

16 U.S.C. §§ 703–712;

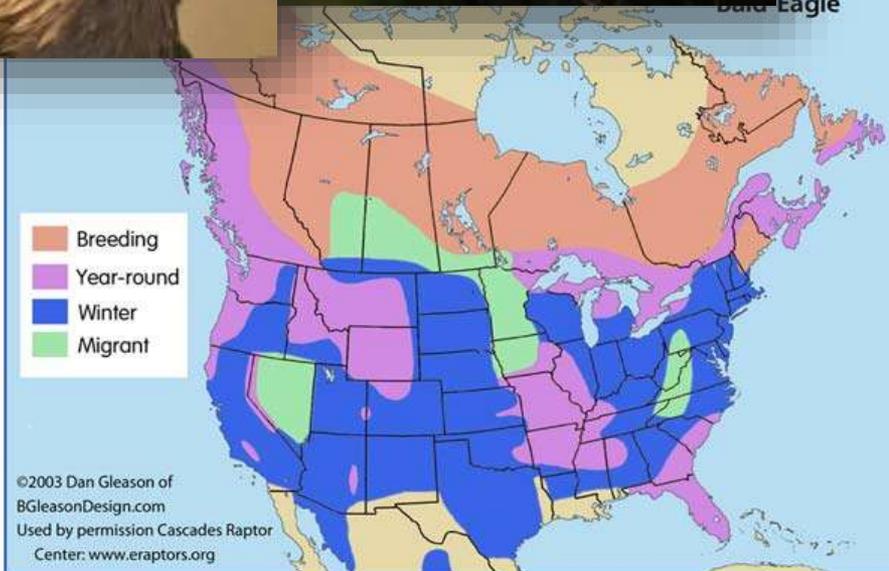
50 C.F.R. Parts 13, 21

- MBTA protects over 800 species of birds, making it illegal to take them.
- MBTA is a **strict liability statute**, but FWS exercises discretion in enforcement if good faith efforts were taken to avoid take. Good faith efforts involve following FWS guidance documents.

Federal Requirements



Bald Eagle



Bald and Golden Eagle Protection Act

16 U.S.C. §§ 668–668d;
50 C.F.R. Parts 13, 22

- BGEPA protects the bald or golden eagle, making it illegal to take them and their nests, eggs, etc.
- BGEPA is **not a strict liability statute**. It applies only to those who act “knowingly, or with wanton disregard for the consequences” of their acts.

Federal Requirements



National Historic Preservation Act

16 U.S.C. § 470;

36 C.F.R. Parts 60, 800

- A federal agency taking action regarding properties on or eligible for listing on the National Register of Historic Places must consult with the state's Historic Preservation Officer to determine any potential effect.

Federal Requirements



Clean Water Act

33 U.S.C. § 1344; 33 C.F.R. §§ 320–332;
40 C.F.R. Part 230

- **Section 404** permit is required for any dredging or filling of “waters of the United States.” Triggers include:
 - clearing and grading;
 - construction of access roads;
 - culvert replacements; or
 - road/bridge improvements.
- **Section 402** permit (NPDES) may be required for discharge of pollutants, including stormwater runoff, into “waters of the United States” (usually administered by states).

Federal Requirements



Federal Aviation Act

49 U.S.C. §§ 44718;

14 C.F.R. Part 77

- A developer must obtain a **Determination of No Hazard to Air Navigation** from the FAA if a project involves construction or alteration of structures higher than 200 feet above ground level, construction near an airport, or siting within a radar line-of-sight.
- This can be particularly important for wind projects, but it can apply to solar projects as well.

Federal Requirements



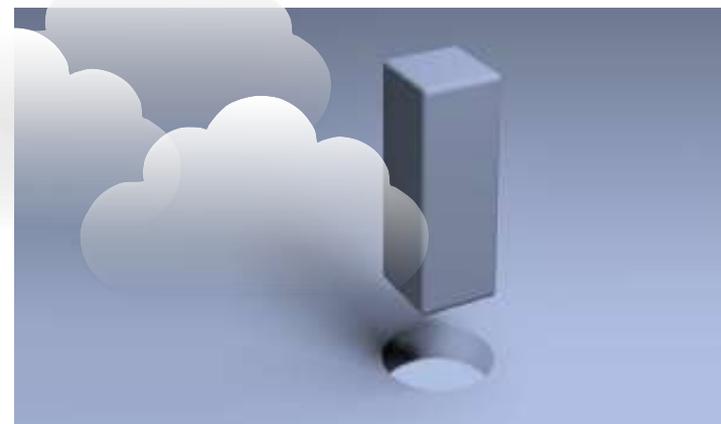
Mission Compatibility Evaluation Process

32 C.F.R. Part 211

- Provides for formal and informal reviews of projects to determine if they pose an **unacceptable risk to national security**.
- Required for projects with applications filed with the FAA under 49 U.S.C. § 44718.

Conclusions

- **The standard legal checklist applies**
- **Distinguish between:**
 - Requirements that impact project planning and cost
 - Permits required for construction
- **Understand compliance lead times**



Questions

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