

Excerpt from Renewable Energy Reader Teacher's Manual
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Appendix 9
Skills Exercise
Chap. 5—Biomass

Renewable Energy Law

Professor DuVivier 2011

Biomass Exercise

Assignment:

Each person is assigned to one of four teams below. You may trade slots with a classmate, but both must confirm any changes with me.

During the class period on Thursday, September 29, 2011:

Two members of each team will present a ten minute oral argument on behalf of the team's client. These two members may divide the time and arguments as they choose. The two who are arguing may not be those who presented for the Wind Exercise, which are indicated with an asterisk below.

Members of the class who are not arguing will act as judges and pose questions to those who are arguing. The remaining class time will include feedback on both the substance and form of the arguments from classmates, Professor DuVivier, and our guest, Matt Larson of Ireland, Stapleton, Pryor, & Pascoe, P.C.

Substantive objective:

The purpose of this assignment is to better understand some issues that may arise from the development of brownfields sites for renewable energy.

Skills objective:

The skills component of this exercise is to learn oral argument and persuasion skills.

Fact pattern:

The DU Sustainability Council wants to support renewable energy, so as part of its "Renewables Today for Tomorrow" campaign, DU decided to develop a small-scale solar and wind farm close to campus. The most convenient site was a brownfields development of a near-by shopping mall. As part of its due diligence before purchasing the property, DU's engineers took samples around the property and recorded no evidence of toxins.

The shopping mall had been the host of ChemTek Cleaners. The ground at the site had become contaminated when ChemTek disposed of cleaning solvents, which they pumped into sumps under their building—a common practice in the past. Before selling the property to DU, ChemTek covered the dry cleaning sumps with a concrete slab. As noted above, the testing by the DU engineers around the periphery of the slab did not reveal any evidence of the toxic sumps.

SolRUs is a solar energy development company. SolRUs designs, develops, and operates mid-to-large PV solar arrays. DU hired SolRUs to develop its solar and wind farm on the former ChemTek site. Although SolRUs had no previous experience with brownfields development projects, the company was advised that this project was on a brownfields site.

Willis is one of the largest insurance companies in the world and specializes in insuring brownfields development. DU contracted with Willis to cover any potential liability that DU might have from the former ChemTek brownfields development project. DU signed one of Willis's off-the-shelf policies with lots of exclusions.

Although the solar panels could be placed on the surface of the slab covering the site, the foundations for the wind turbines and the related underground wiring required penetration into portions of the slab. Shortly afterward, contaminants were detected through testing of soils and nearby groundwater.

There is some debate about whether the contaminants were migrating before the penetration of the slab and would have been detected at this time or whether penetration of the slab caused an otherwise contained hazard to be released because water filtered through the penetrations mobilizing and accelerating the release.

Following the release of the contaminants, EPA incurred \$200,000 in remediation costs, which it sought to collect from DU and SolRUs. DU and SolRUs have cooperated completely with the EPA. Willis refused to reimburse DU for the costs saying that DU should not be a PRP under CERCLA. DU and Willis brought this action against ChemTek and SolRUs to recover the \$200,000.

The oral arguments will be in the following order on the following topics:

#1 DU arguing why ChemTek and SolRUs should be responsible for the costs, and if DU is held responsible, why Willis should indemnify DU under its insurance policy.

2 Willis arguing why ChemTek and SolRUs should be responsible for the costs, and if DU is held responsible, why Willis is not responsible for indemnification because this situation is outside of the policy terms.

3 ChemTek arguing that ChemTek should not be liable as a past owner under CERCLA, and why DU or SolRUs should be the PRPs.

#4 SolRUs arguing why it should not be a PRP.

You may use whatever resources you have to prepare your arguments. As a start the following two cases should be useful: *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 746 F. Supp.2d 692 (D. S.C. 2010) and *3000 E. Imperial, LLC v. Robertshaw Control*, 2010 WL 4013840 (C.D. CA 2010).