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Energy Project Regulatory Considerations

**John Clancy
Godfrey & Kahn, S.C.
jclancy@gklaw.com
Telephone: (414) 287-9256**

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Regulatory Issues and Opportunities

- A number of federal laws and regulations apply to energy development activities on tribal lands
- Federal laws, regulations, and Executive Orders apply to energy development activities
- State laws and regulations largely do not apply to energy development on tribal lands
- Regulatory programs both create opportunities for energy development and requirements that must be met
- Regulatory issues arise both under NEPA and regarding substantive requirements

Key Funding Opportunities Under Regulatory Programs

- Federal Regulatory Funding Programs
- Federal Tax Incentives: Investment Tax Credits and Depreciation Deductions

Federal Regulatory Grant Programs

- DOE Tribal Energy Program
- HUD Indian Housing Block Grant and Indian Community Development Block grant
- DOI grants, including Indian Energy and Economic Development Program
- USDA Rural Energy for America Program, Rural Utilities and Community Facilities
- Federal Home Loan Band Affordable Housing Program
- And many more

Investment Tax Credits

- 30% Investment Tax Credit for Solar and Wind Projects
- Tribes don't pay income tax so they have to partner with the investors who do
- The Tribe must form a partnership with the investors for a limited period of time (at least five years)
- The investor owns 99% of the partnership so that it can claim 99% of the tax credits that the Tribe can't use. The investor also gets 99% of the depreciation tax deductions on the equipment.
- The amount that the investor contributes to the Project is negotiated. The investor is looking for a certain return on investment.
- The solar ITC will begin to phase out beginning in 2019
- The wind ITC will begin to phase out next year

Utilizing Federal Grants and Tax Credits Raises Several Regulatory Issues

- Need to provide project entity access to reservation lands, potentially triggering BIA regulatory review
- Specific regulatory requirements under federal grant programs, including Part 200 Procurement regulations
- Triggering of NEPA review because of federal funding

Renewable Energy Credits

- Based on state renewable energy requirements or voluntary markets
- Typically based on megawatt hour of renewable energy production
- Need for facility to be certified

Climate Change-Related Regulatory Programs

- Carbon standards for new or modified facilities— applies to traditional fossil fuel facilities
- Clean Power Plan
 - Caps on rate of emissions or amount of emissions from existing electrical generating units
 - Opportunity for facilities to meet limits through renewable energy and energy efficiency projects
 - Clean Energy Incentive Program— incentivizes early action renewable energy and energy efficiency in low-income areas
 - Program stayed by Supreme Court and is presently before D.C. Circuit

Other Air Regulatory Requirements Under Clean Air Act

- 42 U.S.C. § 7401 et seq.
- Based on emissions from facility
- Regulation of criteria and hazardous pollutants
- Key issues of whether in attainment area and whether major source
- Counties designated “nonattainment” available at <https://www3.epa.gov/airquality/greenbook/mapnpoll.html>

National Historic Preservation Act (NHPA)

- 16 U.S.C. § 470
- Created the framework within which historic resources are managed in the United States by establishing requirements to ensure responsible stewardship of prehistoric and historic resources for future generations
- Full list of regulations: 36 C.F.R. Parts 800-812
- Typically requires THPO (Tribal Historic Preservation Office) to agree that there are No Historic Properties Affected per 36 C.F.R. § 800.4(d)(1)

Wetland Protection

- Potential need for Section 404 Permit under Clean Water Act
- Need to determine whether project would cause filling of wetlands
- National Wetland Inventory is available at <http://www.fws.gov/wetlands/index.html>

National Pollutant Discharge Elimination System (NPDES) Permitting

- Required by Clean Water Act if point source discharge
- If discharging directly to surface waters, need NPDES Permit
- Must meet water quality standard requirements
- If indirect discharge to waste water treatment facility, must meet treatment facility's requirements

Comprehensive Environmental Response, Compensation, and Liability Act

- 42 U.S.C. § 9601
- Legislation, commonly referred to as Superfund, created to protect the public from heavily contaminated abandoned sites
- Question: Is project on brownfields site, will it involve soil movement?
- Provides broad authority to the federal government to ensure that contaminated sites that might pose a risk to the public or environment are cleaned up
- Full list of regulations: 40 C.F.R. Parts 305-307

Endangered Species Act

- 16 U.S.C. § 1531
- Designed to protect and recover species in danger of extinction and the ecosystems that they depend upon
- Regulations provided at 50 C.F.R. Part 402
- List of endangered animal and plant species is available at <https://www.fws.gov/endangered/species/index.html>
- Determination of whether project will have effect on federally protected (listed or proposed) Threatened or Endangered Species

Migratory Bird Treaty Act

- 16 U.S.C. § 703
- Outlaws pursuing, hunting, taking, capturing, killing, offering for sale, purchasing, or offering for shipment any bird, egg, or nest protected under migratory bird treaties, except as allowed under regulation
- Important issue for wind projects
- Full list of regulations: 50 C.F.R. Parts 10, 14, 20, and 21

Airport Runway Clear Zones (Civil) and Accident Potential Zones (Military)

- 42 U.S.C §1331
- Applies to projects which include new construction, major rehabilitation, or any other activity which significantly prolongs the physical or economic life of existing facilities
- If applicable, then project must not be located within 2,500 feet of a civil airport or within 15,000 feet of a military airfield; list available at http://www.faa.gov/airports/planning_capacity/passenger_allcargo_stats/passenger/
- Full list of regulations: 24 C.F.R. Part 51 Subpart D and 32 C.F.R. Part 256

Coastal Zone Management Act

- 16 U.S.C. § 1451
- Legislation to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone
- Establishes the National Estuary Research Reserve System and National Marine Sanctuaries and requires that federal actions be consistent with policies of an approved Coastal Zone Management Program established by any coastal state, territory, or tribe
- Full list of regulations: 15 C.F.R. Parts 921-930

Coastal Barrier Resources Act

- 16 U.S.C. § 3501
- Seeks to eliminate the subsidy of development on coastal barriers, resulting in the loss of natural resources; threats to human life, health, and property; and the expenditure of millions of tax dollars each year
- Protects coastal barriers along the Atlantic and Gulf coasts, undeveloped coastal barriers along the Florida Keys, Great Lakes, Puerto Rico, and U.S. Virgin Islands
- Maps available at <https://www.fws.gov/ecological-services/habitat-conservation/cbra/maps/mapper.html>

Safe Drinking Water Act (Sole Source Aquifer)

- 42 U.S.C. § 300f
- Established to protect the quality of drinking water in the U.S with focus on all waters actually or potentially designed for drinking use, whether from above ground or underground sources
- Key issue: is project located within a U.S. EPA-designated sole source aquifer watershed area (including stream flow source areas)?
- Maps available per EPA region, Region 5 map available at <https://www3.epa.gov/region5/water/gwdw/solesourceaquifer/pdfs/ssa-r5.pdf>
- Applicable regulations: 40 C.F.R. Part 149

Wild and Scenic Rivers Act

- 16 U.S.C. § 1271
- Establishes that certain selected rivers which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected
- Resources to determine if your project is located within proximity of Wild and Scenic River available at <http://www.rivers.gov/rivers/map.php>; <http://www.rivers.gov/rivers/study.php> and <http://www.nps.gov/ncrc/programs/rtca/nri/>
- Full list of regulations: 43 C.F.R. Part 8351

Farmland Protection Policy Act

- 7 U.S.C. § 4201
- Discourages Federal activities that would convert farmland to nonagricultural purposes
- If project irreversibly converts agricultural land to a non-agricultural use, need to determine if land is regulated by FPPA with Natural Resources Conservation Service
- Full list of regulations: 7 C.F.R. Part 658

Thank You

John Clancy
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jclancy@gklaw.com
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