

The Permit Playbook

*Reflections on 25-years of Securing
Federal, State and Local Construction Approvals for
Renewable Energy Projects*

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Introduction

Delays in securing construction approvals can be fatal to a renewable energy project. But what can be done to avoid permit delays? How does a developer improve the chances a renewable energy project will move smoothly through the zoning, environmental and land use review process? Answers to these questions, and the roadmap for permit success will be different for every project, and will likely be a function of the relative size, location and potential environmental impacts associated with a project. Yet regardless of project size or type, there are time-tested strategies that can be employed to lower the resistance a project will face as its proceeds through the permit and approval process. I would like to share some of these strategies with you.

Our firm's "permit playbook" reflects 25 years of experience securing federal, state and local construction permits for a variety of controversial facilities. Using this playbook, our clients have been fortunate to secure permits for a wind energy project, refuse burning power plants, cellular radio towers, electric substations, an industrial waste landfill, even a natural gas pipeline extension. These results reflect the following ten (10) basic rules for securing permits and approvals in a timely manner.

Rule No.1

Select the Best Site

The foundation for success in securing land use, environmental and construction approvals begins with finding the least controversial site. The site establishes the baseline conditions a project will confront. Key characteristics include the environmental sensitivity of the site, such as existing air and water quality, the presence of endangered species, and wetlands and the proximity of the site to historic and natural resources. Proximity to schools, hospitals, parks, and scenic vistas and view sheds may also influence the relative ease or difficulty of securing construction approvals. In addition, developers should seek sites where the proposed use is permitted “as-of-right” under the applicable local zoning ordinance. Finding a site that minimizes or avoids zoning, environmental, and neighborhood impact issues is critical to keeping a permit timetable on track.

Another critical important dimension of the site selection process is finding a site without significant “title issues.” When a potential site is being seriously considered we strongly advise clients to perform a “title search.” A title search will confirm that a developer is dealing with the true owner of a property. The search will also examine all deeds and declarations that are recorded in chain of title for the site. The search will determine if any restrictions have been recorded against the site that could impede its use for a renewable energy project.

Avoiding sites with inherent environmental, land use or title risks will improve the chances a renewable project will move smoothly through the permit and approval process.

Rule No.2

Coordinate Federal and State Permit Efforts

If a renewable energy project will require permits or approvals from federal, state and local authorities it is essential that all studies supporting the project comply with the content requirements of the involved government agencies. This means that from the start, any air, traffic, noise or visual impact analysis prepared for a project should simultaneously satisfy the review criteria of the involved federal, state and local agencies.

For example, suppose your wind energy project will require a computer generated visual impact analysis. In such a case be sure the initial study commissioned for the project includes renderings that satisfy all agencies that are likely to request such a study. Federal, state and local agencies may have different lens, distance and aperture settings for an acceptable visual impact analysis. A project will therefore save time and money by including visual and view shed renderings in its visual impact analysis that meet the requirements of multiple agencies. The guiding principle here is that one visual analysis should perform “double duty” and be designed to satisfy multiple agencies. The same approach should be applied to traffic, air, water and other project studies.

As the complexity of the permit process increases, the importance of permit coordination becomes essential to avoiding false starts and project delays.

Particular care should be given to satisfying federal, state and local review requirements when a project triggers the preparation of an environmental impact statement (“EIS”). The National Environmental Policy Review Act (“NEPA”) establishes the elements required for a federal environmental review. Most states have also enacted their own environmental review statutes, with requirements that often differ from or go

beyond NEPA. When a project is subject to both federal and state environmental review, from the outset, the applicant should be generating compliance documents that satisfy the so-called “hard look” requirements of each involved federal and state agency. This will save time and money and avoid the mind-numbing whip-saw effect that an applicant may experience attempting to recast an EIS after it is submitted.

Rule No.3

Mine Your Base of Support

Even controversial projects have friends. Renewable energy projects may find support in the environmental community. A project designed to provide reliable power to a community plagued by electric outages may find support with frustrated rate payers. When a renewable energy project is undertaken by a large utility company, it may even be possible to locate “letters in the files” from ratepayers who want the company to explore “green options” for generating additional electric capacity.

The point is developers must not overlook hidden constituencies that can be mobilized to support a project. It is surprising how often the construction and development arm of a company missing an opportunity to work closely with the customer relations office of the same company. When undertaking a major renewable energy project, both sides of the house must communicate and exchange information to maximize the chances of permit success. The construction side of the house must recognize that marketing and customer relations may hold the key to generating a level of public support that can tip the scales in favor of project approval.

For example, complaints from energy consumers were critical in securing the zoning approval for the extension of a natural gas pipeline we recently worked on.

The engineers responsible for securing the zoning approval for the pipeline had not consulted the company's customer service department as part of the application groundwork. We saw this as an oversight, and reached out to the customer care department. Through that initiative we located a series of letters from a nearby nursing home and retirement community requesting natural gas service.

On the night of the pipeline's first hearing, after the opposition had finished its presentation, a caravan of senior citizens arrived to testify in favor of the pipeline extension. Our client had invited this group to attend the hearing based on correspondence located in its customer care files. The outreach effort worked. At the end of the evening, we requested a vote and the pipeline extension was approved.

Support may also be generated through the often overlooked public referendum process. Understandably, politicians and local residents are often reluctant to publicly support a project when it is strongly opposed by some of their friends and neighbors. However, in some jurisdictions developers may be able to "call the question." That is, if enough signatures can be timely filed with a local government, it is sometimes possible to schedule a local election or project referendum to see if a majority of the electorate supports or opposes a project.

Recently, we used a referendum to secure construction approval for a large multi-carrier cellular radio tower that many people were reluctant to support publicly. We petitioned for a referendum and then retained an experienced political consultant to shape a compelling campaign. When the election was held, the tower was approved by a wide margin.

Project sponsors are often running a campaign for public approval. All possible sources of support need to be tapped, and all options for succeeding in the arena of public opinion need to be explored.

Rule No. 4

Flexibility Counts

Be flexible. Flexibility in the layout and design of a project can often help minimize permit delays. An example: moving a cooling tower a few feet may eliminate the need for a costly set-back variance. Moving a power plant 100 yards may take it out of a wetlands buffer. A small reduction in the height of a wind turbine may avoid the need for exhaustive visual renderings and view shed analyses. Recycling cooling water or eliminating a discharge to or a physical impact on a navigable waterway may avoid the need for a permit from the U.S. Environmental Protection Agency, a review by the U.S. Army Corps of Engineers or a filing with state and local wetland preservation agencies.

Minor changes in project design can dramatically reduce the regulatory timeline or even the number or complexity of the federal, state, and local approvals that must be secured for a project. Changes may also soften public opposition.

Recently, our firm helped secure approvals for a large electric substation that faced substantial public opposition. However, after carefully listening to the project opponents and conferring with the project sponsor and its engineers, our firm was able to help shape a design compromise that satisfied the needs of all parties.

By helping the parties listen to each other, we were able to formulate a series of design changes that would mitigate the visual impact of the substation and address public concerns over potential noise and vibrations. Using landscaping, slotted fences, down-tilted motion-controlled lighting, and other measures, the developer gave the substation a

stealth appearance, which made it far less of a concern to the community. We have used a similar approach to help quell community opposition to cell towers, public safety radio facilities, and waste-to-energy facilities.

Flexibility in all stages of the permit review process will often improve the chances for project approval, shorten the review process, and enhance the developer's credibility if the project goes to court.

Rule No. 5

Show Resolve by Building a Strong Record

When a project is likely to generate controversy, it is imperative that all e-mails, correspondence, documents, studies and minutes from meetings with regulators be carefully preserved.

In addition, when hostility to a project is palpable, it is good practice to hire a stenographer to create a verbatim transcript of all comments and exchanges that take place during the public review of a project. A stenographic transcript is particularly important when a project is located in a community which uses hand-written notes or similarly unreliable media (such as cassette tapes) as the official record of a permit proceeding. Such "records" are often difficult to duplicate, easily lost, and sometimes unreliable. A stenographic record is clearly preferable.

In addition to a stenographic transcript, an applicant must also build a record that presents its case in the best possible light. One way to do this is through a process known as "pre-filed direct testimony." Pre-filed direct testimony constitutes the written statements of the various experts that will testify on behalf of a renewable energy project. These statements are filed as part of the official project record. By using pre-filed

testimony the developer can carefully craft and polish exactly what the expert is saying for the record. Pre-filed direct testimony avoids the risk that an expert will have a bad night or otherwise get rattled or flustered when presenting “live testimony” to a board. When pre-filed direct testimony is used by an engineer or other expert, an essentially flawless record can be compiled. With pre-filed direct testimony the project sponsor controls the development of its record, and the tone and level of detail that best supports the project. Once the pre-filed testimony is submitted the testimony actually presented by the witness becomes less of a “do or die” proposition.

If litigation is required to secure project approvals, the record assembled by the project developer will be essential to prevailing in court. The chances of securing project permits and approvals will be improved by building a complete record using pre-filed direct testimony, by carefully indexing all project records, and by using stenographers to send the strategic message that the sponsor is seriously committed to securing its approvals.

Rule No. 6

Consider a Public Partner

Having a public agency as a stakeholder in a renewable energy project is a good way to help build project support. Locating a wind turbine on public land for example, may give the local community a stake in the project outcome. Project revenue in the form of lease payments or even as part of a revenue sharing arrangement, can help pay for schools, hospitals, ambulances, fire trucks, improved public safety radio networks, and otherwise contribute to the public treasury.

In many parts of the country, municipal or state owned sites (often with the exception of parks) may be exempt from zoning. Sites owned by police departments, fire districts, parking authority property and publicly owned colleges are good partners to have when these entities are entitled to construct projects free from some or all zoning considerations.

Having a state or local government as a partner may also allow the project sponsor to avoid certain sales and use taxes on material and equipment used in a project. Projects located on state land may even be exempt from some property taxes.

The benefits of having a governmental partner should always be considered, particular if it can improve project economics or help build public support for a project.

Rule No. 7

Know the Regulations

The success of any project permitting effort requires an in-depth knowledge of the applicable federal, state and local regulations that apply to all aspects of the project. At the outset, project sponsors should be cognizant of local zoning regulations and seek a project site located in a zone where it is permitted “as-of-right.” Developers of “renewable energy projects” should carefully review the local zoning ordinance to see if a renewable energy project can be located as-of-right in a zone where “public utilities,” “generating stations,” “tower, silos and related equipment” or similar uses are permitted without the need for a zoning variance.

Similarly, knowledge of local regulations can avoid needless project delays. The developer of a small rural wind farm recently sought help from Snyder & Snyder, LLP, after receiving a stop work order from a local building inspector. The order halted

construction of a wind turbine and directed the developer to apply for various local approvals, including a site plan, a special permit, and a building permit. We reviewed the applicable regulations and concluded that the wind turbine did not meet the definition of a building under the local “building code” since the turbine did not have a roof and was therefore not by definition a “building.” On this basis we argued that the wind turbine was not subject to the local building and zoning code. Our argument prevailed and construction of the wind farm proceeded without interruption. Finding this exception in the local building code saved our client significant amounts of time and money.

Knowledge of federal and state environmental regulations can also help reduce the number or complexity of the permits a project will need to file. For example, regulations are always in transition, and it may be essential to file certain project applications before new restrictions take place. At the outset, project sponsors should carefully review the regulatory programs that apply to a project to see if there are any emission thresholds, deadlines or other criteria (such as proximity to or impacts on wetlands or navigable waters) that can be avoided to simplify the permit process.

A working knowledge of federal, state and local land use, environmental and siting rules will potentially provide invaluable insights for reducing project delays and improving the chances for timely permit approvals.

Rule No. 8

Understand the Process

Securing permits and approvals for a renewable energy project is going to be a delicate dance in most cases. But understanding the nuances in the permit review process can make the outcome potentially more favorable.

First, in the earliest stages of project planning, the sponsor and its team should meet with involved federal, state and local agencies. These introductory meetings are essential to gauge the reaction of government officials, to understand the subtleties of various approval programs, and to begin developing a rapport with regulators.

Second, understand how the public hearing process works. There is nothing more damaging to a project than a run-away public hearing. Project sponsors should therefore insist that hearings be conducted with decorum and in a manner that avoids a mob mentality. To this end, persons wishing to speak at a public hearing (whether for or against a project) should be initially limited to 3 minutes and until all interested persons have had a chance to speak. If there is still more that needs to be said, interested persons may return for another 3 minute presentation. The idea is to let everyone have a chance to speak at least once, and to avoid the type of repetitive interminable grand-standing that can feed irrational opposition to a project.

It is also important that hearings take place in a comfortable surrounding. Nothing makes project opposition more entrenched than stuffing too large a crowd into too small a room. As simple as it sounds, much will be gained by doing whatever it takes to secure a comfortable, convenient hearing venue that is large enough to accommodate all interested parties and equipped with the audio and visual resources to let information flow easily between the developer, the public and regulators.

Finally, it is critical to keep public agencies apprised of all changes in the layout and design of a project. Projects will evolve over time. Whether as a result of public hearings, meetings with regulators or discussions with project opponents, various project

elements are likely to change. The project sponsor must be sure that all involved agencies are “in the loop” as a project evolves.

Developing key contacts within regulatory agencies, understanding options for preventing runaway public hearings, and keeping all interested parties informed of project changes are fundamental strategies that are essential to helping a project move efficiently through the permit process.

Rule No. 9

Consider Alternate Business Models

When widespread public opposition is likely, one option for deflecting opposition may be to incorporate the project as a state chartered public utility. Utility corporations are eligible to operate with statewide franchises than can sometimes streamline or even pre-empt some local land use regulations.

Most states provide for the creation of state chartered utility corporations. These type corporations were conceived in the mid-1800’s to facilitate construction of the first electric, steam, and railroad projects. In some instance these corporations have the power to condemn private property, though this power is rarely used.

Proceeding as a utility corporation may involve some additional state regulation. As a regulated utility, the corporation may be required to subject its fees to state-level review, and utility-type tariff regulation. However, when a patchwork of local regulations may impede an innovative renewable energy project, operating as a state-chartered public utility may pre-empt such local laws, and thus represent a siting option worth considering.

Rule No. 10

Share the Wealth

Project sponsor may want to consider offering the public a stake in a renewable energy project. That is a legitimate way to generate support. Whether it is a wind farm, a small hydro electric plant, or waste to energy facility, a project can often be designed to enlist and encourage public support by sharing the wealth. Here are examples of ways our clients have structured projects so public support was encouraged.

In the case of a co-generation project, which planned to use waste heat to generate steam and electricity, the developer agreed to contribute a portion of the energy produced by the facility to offset energy costs in the community. In effect, energy from the plant was contributed to the grid by the developer, and the local utility used this power to subsidize energy costs for persons living in the immediate vicinity of facility. With this arrangement in place, public opposition was greatly reduced.

In another example, a cell tower developer agreed to build the facility on land leased from a local government – lease payments to the town produce a significant contribution to the public treasury. Moreover, the developer also agreed that police and fire dispatch antennas could be located on the proposed cell tower thus improving emergency communications. By making a contribution to the public treasury and by improving public safety communications, the facility gained a broad local constituency and moved quickly through the permit and approval process.

Developers of renewable energy projects should be prepared to offer creative ways in which a project can directly benefit the public. Whether it is through revenue sharing, by accommodating police or fire dispatch antennas or some other creative

approach, there are usually ways the developer of a renewable energy project can share the wealth and generate project support throughout a host community.

Conclusion

Securing permits and approvals for a renewable energy project is rarely a simply process. However, by following the ten (10) basic siting tested rules set forth above, the developer of a renewable energy project will improve the chances for success in the permit and approval process.

About the law offices of Snyder & Snyder LLP

Snyder & Snyder, LLP is a twenty-year-old law firm concentrating in the development of telecommunications, environmental, and energy-related projects. The firm has secured federal, state, and local construction approvals for a small rural wind farm, various waste-to-energy plants, electric substations, steam and electric co-generation facilities, cellular radio towers, and public safety radio networks. Firm clients include leaders in the fields of energy, national defense, telecommunications, and big-box retailing. For more information on ways Snyder & Snyder LLP may be able to assist your project, please visit the firm website at www.snyderlaw.net, or call our founding partner David L. Snyder at 914.333.0700.