

Environmental considerations in project development



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Environmental considerations can determine the success or failure of a commercial or industrial project. They should be carefully evaluated at the earliest planning stages with a view toward the long-term success of the project.

For new facilities, one of the earliest and most significant decisions can be the selection of the site for the project. Get this decision “right” and the chances of a successful project are greatly enhanced. Get it “wrong” and the result can be delays or even failure of the project.

So what is involved in selecting the “right” site for a new facility? Clearly, the site must meet the criteria for commercially successful operations.

These criteria can include proximity to customers, usable acreage, configuration of the site, available infrastructure (such as river, highway, rail or pipeline access, and utilities), and compliance with local zoning, land use and buffer zone ordinances.

The site selection decision, however, should also be made with a view to minimizing potential adverse environmental impacts of facility operations.

These considerations can include potential impacts on surrounding land uses (such as residential areas, schools or Native American lands) and environmental justice concerns.

Minimization of such impacts may help avoid public opposition and litigation related to environmental permits, increase the likelihood that permits will be upheld if challenged, and avoid nuisance or similar claims after operations begin.

Moreover, a balancing of the social and economic benefits and potential adverse environmental impacts of the facility may not only be advisable, it may be required in connection with the permitting of the facility under the public trust doctrine in the Louisiana Constitution.

Environmental due diligence is also an important aspect of any project. A pre-purchase environmental site assessment can help identify potential

contamination issues that should be addressed in negotiation of the price or other terms of the transaction, as well as risks of future contamination-related claims by neighboring landowners or other third parties.

An appropriate environmental assessment can also qualify the purchaser for the “innocent landowner” or “bona fide prospective purchaser” statutory limitations to environmental liability for existing contamination.

A wetlands delineation of the property, which is outside the scope of a typical environmental site assessment, is often advisable, as permits are required for development in wetlands. Also, if the transaction involves an operating facility, the purchaser should consider obtaining an environmental compliance audit to evaluate whether the facility has all the environmental permits that are required for its operations and whether there are outstanding enforcement actions or related liabilities.

It should also be remembered that the developer and the regulatory agencies may not be the only persons that will review the environmental permits and related issues.

Frequently, especially with respect to significant industrial projects, financing or outside investors will be required to make the project a reality. These lenders and investors will often

have their own attorneys and experts review the environmental permits and related approvals with a fresh set of eyes to be sure all requirements are met and no material gaps exist or “shortcuts” have been taken. It is best to keep this in mind and build a solid permit record that will withstand such scrutiny.

Finally, lawyers and technical consultants are becoming more and more specialized and a team approach is often the best approach. Industrial projects commonly involve a team of environmental, real estate, public incentives, construction, tax and other attorneys and technical experts working closely together to make the project a success.

To sum up, in any significant commercial or industrial project, it is best to plan early and adjust as needed as the project moves forward, assemble the right team to get the job done, and always think long-term.

Boyd Bryan is a partner in the Baton Rouge office of Jones Walker LLP. His practice focuses on environmental law, including environmental issues in transactions such as due diligence and allocation and management of environmental liabilities; regulatory matters; defense of agency enforcement actions and environmental litigation. He is a past chairman of the Louisiana State Bar Association Section of Environmental Law and a frequent author and lecturer on environmental law issues.

