

# Minnesota Brownfields Renewable Energy on Brownfields Legal Considerations

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# Renewable Energy

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- Solar
- Wind
- Hydroelectric
- Biomass
  - Landfill Gas-to-Energy
  - Anaerobic Digestion
  - Municipal Solid Waste
  - Wastewater Sludge
  - Others

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# Brownfields

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- Some Degree of Existing Soil and/or Groundwater Contamination of Regulatory Concern
- Landfills
  - Operating, But Closed Cell
  - Closed
- Sites To Be Investigated/Remediated
- Sites That Have Been Investigated and Remediated

# Key Parties

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- Project Developer/Owner
- Land Owner
- Potentially Responsible Party (PRP); May or May Not Exist and Be Involved
- Contractor/Builder
- Raw Material Suppliers
- Off-Take Contractors/Utilities

# Key Parties (continued)

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- Bank or Other Financing Entities
- Local, Regional, State and Federal Governments:
  - City
  - County
  - Metropolitan Council
  - MPCA
  - DEED
  - EPA

# Key Project Elements

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- Site Control
  - Own
  - Lease
- Financing and Tax Equity Structure and Agreements
- Supply and Off-Take Agreements
- Permitting, Regulatory and Transmission Matters
- Design and Construction Agreements
- Liability Mitigation

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# Many Variables = Differing Approaches

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Issues and Resolutions Will Depend Upon:

- Type of Renewable Project
- Type and Condition of the Brownfield
- Project Development Arrangements
- Interests and Roles of the Various Parties

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# Federal Sources of Liability

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- Comprehensive Environmental Response Cleanup Liability Act (CERCLA)
  - Potentially Responsible Parties:
    - Current Owners/Operators
    - Past Owners/Operators
    - Arrangers
    - Transporters
  - Defenses/Assurances
    - Innocent Landowner
      - All Appropriate Inquiry Before Purchasing; No Knowledge Or Constructive Knowledge
    - Bona Fide Prospective Purchaser
    - Secured Creditor Exemption

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# Federal Sources of Liability (continued)

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- Resource Conservation and Recovery Act (RCRA)
  - Corrective Action
  - Defenses/Assurances
    - Comfort/Status Letters
    - Administrative Agreements

# State Sources of Liability

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- Minnesota Environmental Response and Liability Act (MERLA)
  - Responsible Parties-
    - Ownership Does Not Equal Liability
      - Only Those Who Were Directly Involved Or Engaged in Conduct Associating Them With Contamination
- Petroleum Tank Release Cleanup Act
  - Responsible Parties-
    - Owners of Tanks or Land, Except Those Who Did Not Know of or Significantly Contribute to Release

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# Liability Mitigation

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- Separate Project Entity Structure
- MPCA Brownfields Programs:
  - Voluntary Investigation and Cleanup (VIC)
  - Petroleum Brownfields
- No Association Determination
- No Further Action Letter
- Certificate of Completion
- Lender Letter

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# Liability Mitigation (continued)

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- Other Potential Liability Mitigation Assurance Letters
- Environmental Impairment Insurance

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# Relevant Contractual Provisions

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- Site Conditions
  - Clear Annunciation of Existing Conditions
- Conditions Precedent
  - Procurement of Assurances
  - Procurement of/Compliance with Permits
  - Indemnification and Hold Harmless Provisions
  - Insurance

# Example: Solar on Landfill

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- Depends on Status of Landfill; but Focus Will Be Protection of Cap and RCRA Permit Compliance
- Seek No Association, If Possible
- Agreements Between Landfill Owner and Project Developer; and Project Developer and Project Construction Contractor
- Indemnities, Responsibilities and Remedies if Cap is Pierced
- Interactions Among the Parties and Local Government and MPCA Regarding Permitting
- Insurance

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# Example: Solar on Existing Brownfield

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- MPCA VIC Program Entrance
- Seek No Association, If Possible
- Phase I and II Environmental Site Assessments
- Pursue Potential Brownfields Grant/Loan Funds (Usually With Local Government Sponsor) for Investigation/Remediation
- Job Creation is Important Factor
- Further Site Investigation

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# Solar on Existing Brownfield (continued)

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- Response Action Plan
- Site Remediation
- No Further Action Letter/Certificate of Completion
- Compliance with Institutional Controls for Remaining Contamination

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# Example: Solar as Part of Larger Redevelopment

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- Project is Part of an Overall Brownfield Redevelopment Project
- Seek No Association, If Possible
- More Jobs Will Have Greater Potential for Grant Funds
- If Ground-Based and Includes Soil Disturbance, Must Work Within the RAP and Any Institutional Controls
- Similar Contractual Arrangements
- If Roof-Based, Less Potential Risk Related to Brownfields

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# Conclusion

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- Minnesota Has a Very Successful Approach to Brownfields Redevelopment
- Renewable Energy Projects Can Benefit, But Job Benefits to Leverage Investigation and Cleanup Funding Will Be Important
- Strong Potential for Integration of Renewable Energy into Larger Redevelopment Projects

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