

Relue, Connor & Townsend: The future's so bright (I gotta wear shades)

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IN PRACTICE
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Indiana's longstanding policy of promoting solar energy systems has led to the construction and expansion of solar energy fields across the state.

While solar energy constituted less than 1% of electricity generation in Indiana in 2020, that production is expected to triple in the next five years. When looking at your next solar project, you should be aware of local and national incentives as well as land use restrictions, potential environmental issues and required permits.

Indiana communities can now choose to become solar energy-ready communities under Indiana Code § 8-1-42. To do so, a community must agree to adopt the standards found in the statute including, but not limited to, requirements for setbacks, landscape buffers, height restrictions, ground cover, fencing, a decommissioning and site restoration plan and a surety bond. The hope is that these communities will be rewarded in future budget cycles with financial incentives based on the amount of energy they generate.

The new law adds to a growing list of incentives for solar energy development. The Business Energy Investment Tax Credit, recently extended by the Inflation Reduction Act of 2022, provides a federal tax credit of up to 30% of the cost of a solar energy facility with bonus credits for projects that utilize U.S.-manufactured components or are constructed in qualifying "energy communities." Indiana affords property tax deductions for solar energy systems. Modules, racking and inverters used in the production of electricity for sale are exempt from state sales and use taxes. Indiana's Economic Development Corporation also makes performance-based tax credits available to certain solar projects. Collectively, these incentives can substantially offset the cost of new solar energy facilities.

Constructing a solar field presents many practical, environmental and regulatory issues to consider. An important first step is to identify potential use restrictions. Potential restrictions include: the local zoning code, overlay districts and neighborhood plans, commitments and conditions from previously approved petitions, and recorded restrictive covenants. The zoning code ensures that the applicant's intended use is compatible with other nearby uses, and sets "area" restrictions governing the outward appearance of buildings and improvements. Indianapolis, for example, allows "renewable energy facility, solar and geothermal" as an accessory use only that must be located in side and rear

yards or on rooftops. Some counties are more permissive and some may require that a variance or rezoning petition be filed with the support of legal counsel.

In analyzing potential environmental problems, it is helpful to consider the following questions:

- **Soil/water:** Is there known contamination? What type? Are there or have there been any underground or above-ground storage tanks?
- **Water:** Is any of the property in a floodway or floodplain? Are there any regulated drains? Is there a nearby stream or nearby wetlands that might be impacted?
- **Use:** Are there signs of contamination from prior operations onsite or offsite? What's the impact on future development of any existing environmental restrictive covenants or other institutional controls?
- **Wildlife:** Are there any species listed or proposed as threatened or endangered under the Endangered Species Act that could be found on or near your project area?

While this list of considerations is not exhaustive, it provides a good framework to begin the due diligence process.

A Section 404 dredge and fill permit from the U.S. Army Corps of Engineers is required prior to construction activities that could result in "the discharge of dredged or fill material into the navigable waters" of the United States. 33 U.S.C. §1344 (§ 404). Indiana also has its own Regulated Wetland Law that applies when a wetland is not regulated by the USACE. See I.C. 13-18-22-1. If the wetland is jurisdictional and regulated by USACE, then you must go through the Rule 404/401 permitting processes with both USACE and IDEM. If not, then you should seek a Waters of the State determination from IDEM to confirm whether the wetland qualifies for an exemption. If the wetland is not exempt, a State Regulated Wetland permit must be obtained.

Another common permit is the Construction Stormwater General Permit, which is required for any construction activity, including clearing, grading, excavation and other land-disturbing activities, that results in the disturbance of one acre or more of total land area. If less than one acre of total land area is disturbed but the activity is part of a larger common plan of development or sale, the project must obtain a permit. If this project is within the jurisdiction of a municipal separate storm sewer system with a certified construction program, additional requirements may apply.

An incidental take permit under the Endangered Species Act is also required for projects that might result in the "take" of an endangered or threatened species.

Another important tool to consider in due diligence is the Indiana Brownfields Program, where you can request a "comfort letter" or "site status letter." A comfort letter is not a legal release from liability but provides an opinion that a prospective buyer should not be liable if reasonable steps are taken. A site status letter can demonstrate that current levels of contaminants of concern substantially meet applicable cleanup criteria, but it does not address potential liability. The EPA offers similar letters.

Solar fields, even when privately owned, can be considered a “public utility” and thus within the jurisdiction of the Indiana Utility Regulatory Commission. If requested, however, the IURC may decline to exercise jurisdiction in whole or in part over an “energy utility” to reduce regulatory oversight costs. The IURC has declined jurisdiction over many independent solar fields in Indiana.

A recent Court of Appeals of Indiana decision highlights the importance of complying with all requirements before submitting a solar field application. *Mammoth Solar v. Ehrlich*, 196 N.E.3d 242 (Ind. Ct. App. 2022). In June 2020, Mammoth Solar filed an application to build the first phase of what was to be one of the largest commercial solar energy fields in the world. The first phase was governed by Pulaski County’s Unified Development Ordinance, which set forth requirements for commercial solar energy system applications.

In September 2020, certain neighbors challenged the local zoning board’s approval of Mammoth Solar’s application. The petitioners claimed that the application failed to include all items required by the local ordinance. The Pulaski Superior Court agreed with the neighbors and reversed the zoning board’s approval. The Court of Appeals agreed, finding that the local ordinance used “plain and unambiguous mandatory language” when stating that an application “*shall* include” certain enumerated information. *Id.* at 242. The decision does not prohibit reapplication, but compliance with the ordinance’s requirements would have avoided considerable delay and expense.

With the help of knowledgeable legal counsel, you can take advantage of the available incentives, navigate the environmental and regulatory requirements, and be part of the bright future for solar energy development in Indiana. •

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