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FEDERAL APPROACHES TO RENEWABLE ENERGY FACILITY DECOMMISSIONING

By Dietrich Hoefner on 11/5/2021
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As more states continue to adopt and consider rules for renewable energy facility decommissioning, they do so against the backdrop of the existing federal financial assurance rules implemented by the Bureau of Land Management ("BLM") (and, for offshore facilities, the Bureau of Ocean Energy Management). While these federal rules apply only where a project is located on federal land (or offshore), they are instructive as to how financial assurance and bonding requirements can be structured with respect to renewable energy facilities and may serve as a model as states continue to adopt and refine their own rules. This post summarizes the BLM financial assurance requirements for projects sited on federal lands.

Facilities for the generation, transmission, and distribution of electric energy may be sited on federal land under Title V of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1761– 1771) ("FLPMA") and its implementing regulations at 43 CFR part 2800. Under FLPMA, the BLM can issue easements, leases, licenses, and permits to occupy, use or traverse public lands for particular purposes. The BLM generally refers to all such rights-of-way as "grants." BLM also issues leases for solar and wind facilities within "designated leasing areas" under 43 C.F.R. Subpart 3809, which have specific requirements and benefits under the rules.

For renewable energy facilities sited on a granted right-of-way, BLM requires a performance and reclamation bond be posted based on a reclamation cost estimate. For solar facilities, the bond must be no less than $10,000 per acre of land disturbance and for wind facilities the bond must be at least $10,000 per turbine less than 1 MW in nameplate capacity and at least $20,000 per turbine equal to or greater than 1 MW in nameplate capacity. 43 C.F.R. § 2805.20. These bonding amounts may be adjusted upward as warranted by the reclamation cost estimate. As BLM explains in guidance materials, adjustments to bonding amounts are generally made in three categories. First, to address environmental liabilities, including hazardous materials liabilities, such as risks associated with hazardous waste and hazardous substances including herbicide use, petroleum-based fluids, and dust control or soil stabilization materials. If a project uses herbicides extensively, this component of the bond amount may be significant. Second, the bond will address the decommissioning, removal, and proper disposal, as appropriate, of improvements and facilities. All solar and wind energy projects involve the construction of substantial surface facilities, and the bond amount for this component could also be substantial. The third component considered in setting the bond amount addresses reclamation, revegetation, restoration, and soil stabilization. This component is determined based on the amount of vegetation retained on-site and the potential for flood events and downstream sedimentation from the site that may result in off-site impacts, including Clean Water Act violations or other violations of law. The holder of a right-of-way grant can potentially reduce the bond amount for this component by limiting the amount of vegetation removal as part of the project design and limiting the amount of

grading required for project construction.

For renewable energy facilities sited on a lease within a designated leasing area, the structure is similar, but the bond amounts are fixed at $10,000 per acre for solar energy developments and $10,000 (for each wind turbine smaller than 1 MW) and $20,000 (for each turbine 1 MW or greater) for wind energy developments. 43 C.F.R. § 2809.18. These amounts are adjusted every ten years, but the initial amounts are not subject to adjustment based on a reclamation cost estimate.

These reclamation bonding rules provide a general structure for projects sited on federal land that recognizes the intensity and duration of impacts associated with renewable energy facilities. As other governmental entities look toward adopting their own renewable energy facility decommissioning rules, they may look to the BLM rules as a starting point for considering how to handle financial assurance for end-of-life issues.

For more information, visit our Renewable Energy End-of-Life Planning group website or contact Dietrich Hoefner at dhoefner@lewisroca.com.

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