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Siting and Permitting for Energy Projects: Managing the Risks

TUESDAY, MARCH 26, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Siting and Permitting Energy Projects: Managing the Risks

March 26, 2019
Brooke McNabb and Andrea Stover

Risk Analysis for Siting and Permitting Energy Projects

A. Regulatory Risk

- Opposition to the permitting and licensing of the project
 - Example: Organized NIMBY groups
- Changing Regulations
 - Example: Nationwide vs. Individual Permits USACE
- Avoiding, minimizing regulated status
 - Example: Wind farm interconnecting transmission lines
 - Example: Private Utility Networks (PUNs)
 - Example: Private vs. common carrier pipelines

Risk Analysis for Siting and Permitting Energy Projects

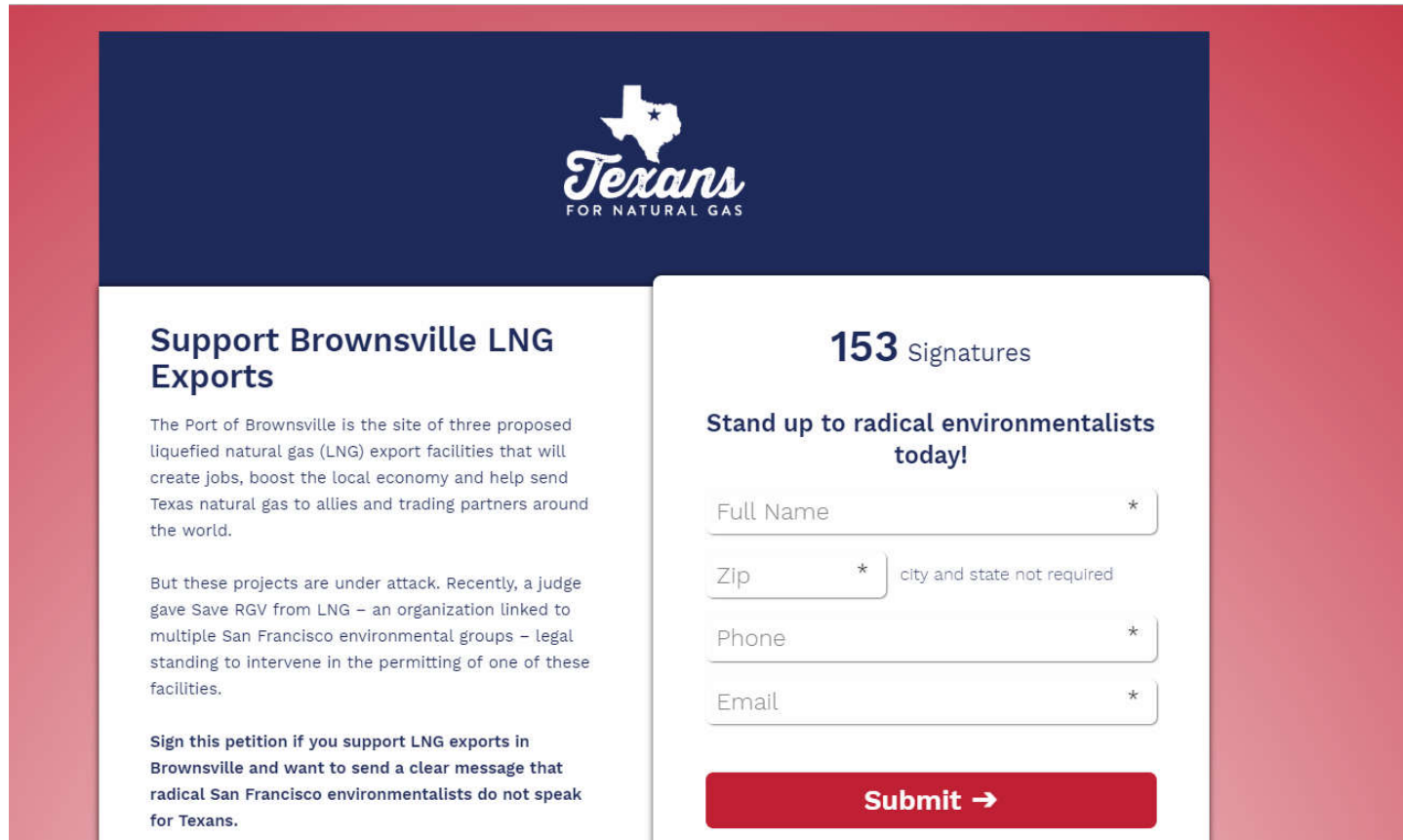
B. Media, Public Relations Risk

- Opposition to energy and other projects are fought across all media platforms
 - Example: Brownsville LNG Projects
 - Example: Wind Catcher Energy Connection
 - Example: Invenergy solar farm, Pueblo County, CO
 - Example: Meadowlands Power Plant
- Project developers need to respond
 - Example: Power line projects
 - Example: Meadowlands Power Plant
 - Example: Texas low level radioactive waste project

Andrews Low Level Radioactive Waste



Brownsville LNG Support Petition



The screenshot shows a petition page for 'Support Brownsville LNG Exports'. At the top, there is a dark blue header with a white outline of Texas and the text 'Texans FOR NATURAL GAS'. Below the header, the page is split into two columns. The left column contains the title 'Support Brownsville LNG Exports' and two paragraphs of text. The right column features a signature form with the heading '153 Signatures' and the sub-heading 'Stand up to radical environmentalists today!'. The form includes input fields for 'Full Name', 'Zip', 'Phone', and 'Email', each with an asterisk indicating it is required. A red 'Submit' button with a right-pointing arrow is at the bottom of the form.

Support Brownsville LNG Exports

The Port of Brownsville is the site of three proposed liquefied natural gas (LNG) export facilities that will create jobs, boost the local economy and help send Texas natural gas to allies and trading partners around the world.

But these projects are under attack. Recently, a judge gave Save RGV from LNG – an organization linked to multiple San Francisco environmental groups – legal standing to intervene in the permitting of one of these facilities.

Sign this petition if you support LNG exports in Brownsville and want to send a clear message that radical San Francisco environmentalists do not speak for Texans.

153 Signatures

Stand up to radical environmentalists today!

Full Name *

Zip * city and state not required

Phone *

Email *

Submit →

Recent Energy Project Media Outreach con't

Wind Catcher Energy Connection

In fact, in a recommendation of denial from Public Utility Commission of Texas legal staff, the word "risk" appears 23 times.

Wind Catcher is TOO RISKY for our pocketbooks. See what others are saying.

Wind Catcher creates jobs and infrastructure in Oklahoma but provides none of these benefits to Arkansas, Louisiana or Texas. 4,000 jobs to build the project and 80 permanent jobs will go to Oklahoma – along with millions of dollars in tax benefits. Even so, consumers in Arkansas, Louisiana and Texas are responsible for billions in costs to build Wind Catcher.



Radio Program Example

Houston Import Project

A citizens committee, led by real estate broker Nancy Perry, is calling for landowners to oppose a Texas Department of Transportation's proposed transmission lines and high speed rail line connecting Dallas to Houston slated to cross into the county.

Another one of the projects being opposed is a proposed toll road through the county.

A group named Grimes County Sub-regional Planning "391" Commission, whom Perry is citizen's committee member, held her own meeting, asking landowners to take action to stop construction of outside projects that will be constructed throughout the county.

One of the projects being proposed and opposed by the committee is a 345 kV double circuit transmission line and a high speed rail project.

Perry's group is attempting to get legal assistance to fight these projects, knowing that the other side already has powerful attorneys on their side.

Perry is trying to raise awareness of the projects, and has already offered \$1000 of her own money, however, these projects have deadlines, and also says that the projects are already hurting property values.

CenterPoint Energy has told country residents that the project, named the Brazos Valley Connection Project, is needed since the demand from the Houston area will outgrow its capacity to provide power.

Grimes County was chosen for the project after the project was endorsed by ERCOT as part of a larger project to construct the 345 kV transmission line through Harris, Waller and Grimes County.

An exact route has yet to be determined.

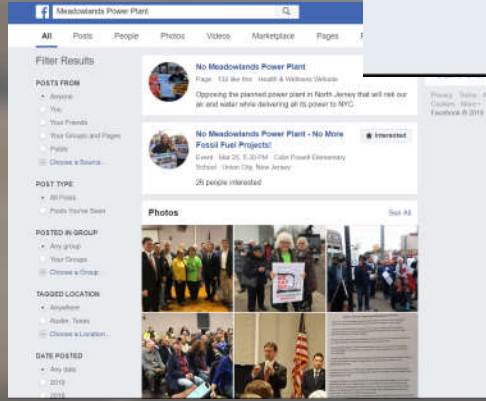
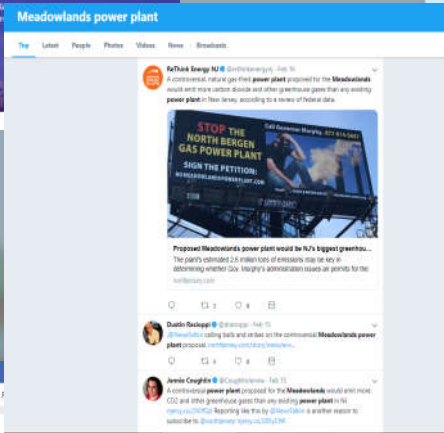
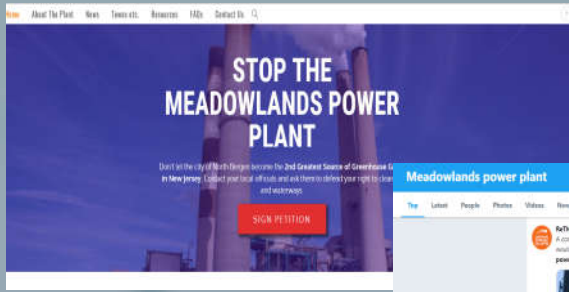
A public meeting is slated for this Tuesday, December 2, from 4:30 to 7:30 p.m at the Iola Community Center.

For more information on the BVCP project, visit brazosvalleyconnection.com, or call 1-800-416-9625

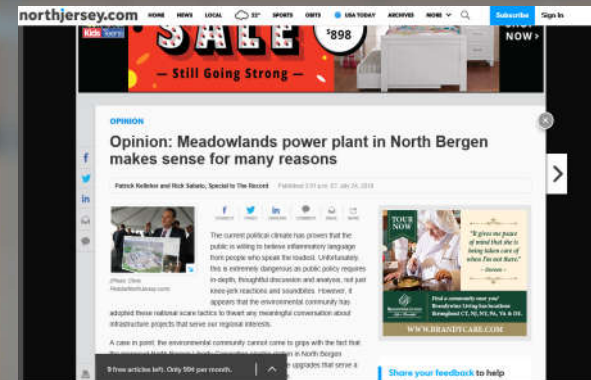
For more information on the high-speed rail project, visit DallasHoustonHSR.com, or call 844-541-1875.

Websites, Social Media, and Traditional Media Presence

Opposition



Support



Risk Analysis for Siting and Permitting Energy Projects

C. Litigation Risk

- Can disrupt or even kill project
 - Example: Keystone Pipeline
- Can prevent or slow down full development of project
 - Example: Wind farms
- Can put client at risk for substantial damages
 - Example: *Parr v. Aruba*
- Opponents are hiring better lawyers
- Potential *statutory* claims: Endangered Species Act, Coastal Zone Management Act, Migratory Bird Treaty Act
- Potential *tort* claims: private nuisance, public nuisance, negligence, negligence *per se*, trespass, invasion of privacy
- But, hurdles in getting injunctive relief make it difficult to stop a project completely

What is a Nuisance Generally?

- Nuisance
 - A condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities
 - An interference with the private use and enjoyment of another's land is unreasonable when the gravity of the harm outweighs the social value of the activity alleged to cause the harm
- Key element for a nuisance claim is unreasonable interference; the test is not "no interference"



What is Not a Nuisance?

- Aesthetics
 - The project is abnormal
 - The project is out of place in its surroundings
 - Makes me want to cry when I see the project
 - No one wants to stay at my bed and breakfast if they have to look at the project

Rankin v. FPL Energy, LLC, 266 S.W.3d 506 (Tex. App.—Eastland 2008, pet. denied)

- Claim for injunction and damages against Horse Hollow Wind Farm (421 turbines, Taylor & Nolan County, TX)
 - Wind farm abnormal, out of place in its surroundings
- Court acknowledges aesthetic impact of wind farm caused property values to decline (objective harm)
 - Analogy made to condemnation with no obligation to pay
- Court nonetheless rejects aesthetic-based nuisance claim for policy reasons
 - Wind farm is a lawful activity
 - Aesthetic-based nuisance claim based on emotional responses
 - Too subjective
 - Gives neighbors right to zone surrounding property if recognized

What is Not a Nuisance?



- Unreasonable fear or apprehension
 - Fear of tower collapsing near home unreasonable where tower engineered for a larger model than turbine in place
 - Fear of blades or ice chunks being thrown from wind turbine unreasonable where safety features installed to eliminate those dangers

Factors for Nuisance Claims

- Other projects and transmission lines in area
- Other commercial or industrial developments in area
- Proximity to urban area or other development
- Distance between home of neighbor and the project
- Distance between neighboring property line and the project
- Compliance with siting standards
- Project design
- Recreational property versus primary residence

Good Defense Factors for Nuisance Claims

- Whether owner moved to property after the project was permitted or built
- Evidence of negotiations with neighbor over a project lease — case is about price, not nuisance
- Local support for the project
- The project is already built rather than still under construction
- The size of the project and relative location to property
- Whether the project causes interference inside home versus other areas on property
- Steps taken by the project in design or construction to reduce the impact on neighboring properties

Cerny v. Marathon Oil Corp., 480 S.W.3d 612 (Tex. App.—San Antonio 2015, pet. denied)

- Plaintiffs asserted private nuisance claim on the basis that alleged traffic, dust, noise, and foul odors from defendants' oilfield operations worsened plaintiffs' existing health problems, created new health problems, and damaged their properties' foundation
- San Antonio Court of Appeals affirmed summary judgment against plaintiffs' nuisance claim, holding:
 - Plaintiffs failed to present expert evidence in compliance with *Havner* "excluding other potential causes of the [plaintiffs'] alleged injuries and property damage," such as the other oil and gas operations in the vicinity
 - Proper to strike Plaintiffs' own affidavits stating personal observations on dust, noise, odors, and traffic

Muscarello v. Ogle County Bd. of Comm'rs, 610 F.3d 416 (7th Cir. 2010)

- Special use permit granted for construction of 40-turbine wind farm in Ogle County, Illinois
- Neighboring land owner brought constitutional due process-related claims, trespass, and nuisance claims
- Constitutional claims dismissed
- Trespass and nuisance claims dismissed as unripe because “windmills have not been built”
- Bottom line
 - Physical or perceived invasion required
 - Little room for pre-construction nuisance claims
- *See also Loughhead v. 1717 Bissonnet, LLC*, 500 S.W.3d 488 (Tex. App.—Houston [14th Dist.] 2016, no pet.)

Remedies

- Money damage claims
 - Loss in market value in landowner's property
 - Past loss of use and enjoyment
 - Future loss of use and enjoyment
 - Punitive damages where malicious conduct shown
 - No attorneys' fees for nuisance claims (in Texas)
 - Pre-judgment and post-judgment interest
- Injunction
 - Possible but unlikely because plaintiff
 - Would have to show probable right to relief, irreparable injury and imminent harm, and no adequate remedy at law
 - Would typically need to post a bond

Different Project Stages Present Different Opportunities and Risks

A. Project Design

Examples: wind farm radar systems; monopole power lines

B. Site Selection

Example: power line routing

Example: low level radioactive waste disposal

Example: wind farms

C. Permitting/Approval

Example: power line "need" opposition

Example: low level radioactive waste project

Example: "No permit" projects

D. Construction ("temporary nuisance")

Example: urban vs. rural fracing

E. Operation ("permanent nuisance")

Example: Cerny gathering system

Each Industry Has Its Own Risks

A. Upstream Oil and Gas

- disposal risk
- drilling noise
- flaring
- infrastructure damage

B. Downstream Oil and Gas

- spill risk
- fire and explosion risk

C. Conventional Power

- wildlife impacts (transmission lines)
- emissions/toxic tort
- condemnation/aesthetics

D. Renewable Power

- aesthetics
- noise/visual impacts
- wildlife impacts

Strategies for Limiting Risk

- Addressing risks during design, siting phases
- Early discussions with regulators, legislators, other government officials
- Comprehensive media relations
- Community open houses
- Minimize need for variances
- Comply with industry/company standards
- Documenting action beyond what is required
- Seek allies: similar businesses, industry groups, customers
- Designate company spokesman for conflict resolution, preferably someone with a local presence

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