



ACRELive!

**Environmental Issues for the Property
Practitioner**

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Communal Environmental Ecosystems and Single Project Development

1. Current regulatory environment – project-by-project consideration.
2. Land use challenges from climate change and renewable energy sources may not be adequately addressed with project-based decision making.
3. Who decides the development limits for specific project if a more systemic approach is required?
4. Who pays for systemic approaches both in terms of infrastructure and limitations on land use?

Property Rights for Constructing Renewable Projects

1. Conflicting Use Rights
2. Responsibility for Costs

Surface vs. Mineral Rights

- Most mineral producing states in east allow severance of mineral estates from surface
- Developers need to know if surface rights are subject to superior mining rights
- Requires review of “severance” deeds—often occurred in late 1800s
 - Surface could be subject to underground coal mining rights that allow surface “subsidence”
 - Surface could be subject to superior rights for “surface mining” or rights to install facilities for underground mining
- Language matters
 - Conveyance of “all the coal with right to remove all the coal” –implied waiver of right to surface support in WV

CO2 Storage (Carbon Sequestration)

- Who owns “pore space”?
- Bill in WV (modeled after ND Act) would:
 - Declare surface owner to be pore space owner absent clear prior severance
 - Prohibit future severance of surface/ pore space
 - Require CO2 injection project to secure consent of owners of 75 of the reservoir’s pore space
 - Non-consenting owner entitled to reasonable compensation per rules
 - Create trust fund and transfer liabilities to State after closure and waiting period
- Cost of title work?

Who Are Your Neighbors?



Ownership

- Ridge and western slope owned by farmer:
 - Wind developer obtained ROW to construct and operate turbines on ridge
- Eastern Slope owned by mine operator or its lessor
 - Wind developer obtained easements for access and laydown sites during construction
 - Did not secure “wind shed” protection on eastern slope
- Wind operator sued mine operator in nuisance and negligence for interfering with wind flow

American Rule:

No common law right to free flow of air

- “A man may be compelled to keep his...odors and noise at home but cannot be compelled to send his light and air abroad.” *Letts v. Kessler*, 42 N.E. 765, 767 (Ohio 1896)
- Maryland Court agreed. *Gestamp Wind North America, Inc. v. Alliance Coal, LLC* (Md. Ct. Special App. 2021)
 - Rejected “ancient lights” doctrine: no prescriptive easement for air/light over adjacent property
 - Absent agreement or regulation, property owner has no right to prevent neighbor from altering its property in ways that affect air and light on owner’s property
 - Owner owns at least as much of space above native ground as it can occupy or use

Communal Property Regimes and Changing Environmental Conditions

1. Surfside – Who should be responsible for Cap Ex?
 1. Property Owners
 2. Developers
 3. Government
2. Other Capital improvement issues impacted by Climate Change.