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MASTER

LEGAL OBSTACLES AND INCENTIVES TO THE DEVELOPMENT OF SMALL SCALE HYDROECLECTRIC POWER IN KENTUCKY

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TABLE OF CONTENTS

PREFACE

This memorandum describes in detail the legal and institutional obstacles to the development of small scale hydroelectric energy at the state level. It is designed to aid the developer in the determination of which permits, licenses and laws of the state must be secured or complied with for the development of a project. However, the developer should be aware that the state regulatory system does not comprise the universe of hydroelectric regulation. The federal government also exercises extensive regulatory authority in the area.

This dual regulatory system is a function of the federalist nature of our government. Federalism permits both the federal government and the state government to regulate and license certain aspects of a developer's project. Principles of federalism often support a finding that the federal regulation in question will be superior to comparable state regulation. This superiority of federal law can divest the state of any regulatory authority in a given area. Typically, the developer, with this general principle in mind, is compelled to wonder why he must be concerned with the state system at all. The following discussion will examine the area of federal-state relationships with the aim of creating a more orderly understanding of the vagaries of the system.

Thus, the remainder of this introductory section will examine the dual regulatory system from the standpoint of the appropriate legal doctrine, the law of pre-emption, application of the law to the case of hydroelectric development and will conclude with an inquiry into the practical use of the doctrine by the Federal Energy Regulatory Commission. (Hereinafter the FERC).

A. The Law of Pre-emption[a]

As alluded to above, pre-emption is the term that describes, in a federalist system, the ability of the law of one sovereign to take precedence over the law of a lesser sovereign. Specifically, it is the supremacy of the federal law to the state law.

The doctrine of pre-emption is derived from the U.S. CONST. art. VI, cl. 2, which states: "...[t]his Constitution, and the Laws of the United States . . . and all Treaties . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This clause is the basis of federal supremacy. On its face, the supremacy clause purports to divest the states of authority. However, the principles of federalism do not support such a reading. The federal government is a government of delegated authority. Its laws can be supreme only within the scope of its delegation.[b]

Thus, before the doctrine of pre-emption can be invoked, the federal measure in question must be within an area of the authority delegated to the federal government. In other words, the federal action must have the capability to pre-empt the state action. It is implicit in the above statement that there are certain areas of regulation in which the federal government does not have a pre-emptive capability. Where pre-emptive capability

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a See generally Gunther, Constitutional Law ch. 5 § 2 (9th Ed. 1975); Tribe, American Constitutional Law § 6-23 et seq. (1978); and Engdahl, Constitutional Power ch. 12 (1974).

b See McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 405 (1819), "...government of the Union though limited in its power is supreme within its sphere of action."

is lacking, the state law will control.[c]

Once pre-emptive capability is determined to exist, further inquiry must be made to ascertain whether pre-emption exists. Whether a particular state measure is actually pre-empted by a federal measure depends upon the judicially-determined Congressional intent.[d] At this point, the difficulty becomes one of how to determine the intent of Congress.

The U.S. Supreme Court has, on a case by case basis, articulated factors which it declares to be indicative of the Congressional intent to pre-empt. At times the Court has examined the federal statutes to see if they deal with the matter exhaustively. From exhaustive federal regulation the Court infers an intent of no state regulation.[e] Where the Court can infer a need for national uniform standards, pre-emption will be appropriate.[f] The Court has also found pre-emption proper where there are contradictory federal and state

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c
See, e.g., Regents v. Carroll, 338 U.S. 586 (1950); where the Court held that the F.C.C. could, pursuant to the federal power of regulating interstate commerce, grant or deny or condition the grant of a radio broadcasting license. Here, the license condition required the unilateral disaffirmance of a contract with a third party. Such a condition violated state law which prohibited unilateral disaffirmance. The Court held that while the federal government has pre-emptive capability in the area of interstate commerce, it had no such privilege in the area of state contract law. Hence, state contract law was supreme.

d
See, e.g., City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973).

e
E.g., Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969).

f
E.g., Campbell v. Hussey, 368 U.S. 297, 301 (1961); stating "we do not have the question of whether [state] law conflicts with federal law. Rather we have the question of pre-emption . . . [Here] complementary state regulation is as fatal as state regulation which conflicts with the federal scheme." Cf. Florida Lime and Avocado Growers Inc. v. Paul, 373 U.S. 132 (1963) finding pre-emption inappropriate as federal law was concerned with minimum standard rather than uniform standard.

requirements making compliance with both impossible.[g]

Thus, given a finding of the pre-emptive capability of the federal law and a finding that an appropriate basis exists to infer that the Congressional intent was pre-emption, federal law will be superior to state law.

The following section will examine the application of these principles by the Court to the case of hydroelectric development.

B. Pre-emption and Hydroelectric Development

1. The Federal Power Act

In the area of hydroelectric development the Federal Power Act enjoys pre-emptive capability. This pre-emptive capability is based upon the Federal Commerce Clause.[h] That clause gives to the Congress the power "to regulate commerce . . . among the several states."[i] Federal jurisdiction to regulate commerce has been held to include the regulation of navigable waterways.[j] Thus, federal regulation of navigable waterways may preclude state regulation. However, the regulation of property rights is not a federal power and in that area the federal law does not have a pre-emptive capability. State property law will govern the rules pertaining to water rights.[k]

The U.S. Supreme Court has also addressed the issue of whether the Federal Power Act actually pre-empts state licensing authority. The Court held

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g
See Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824).

h
U.S. CONST. art. I, § 8, cl. 3.

i
Id.

j
Gibbons v. Odgen, 22 U.S. (9 Wheat) 1, 84 (1824), "...all America understands and has uniformly understood the word 'commerce' to comprehend navigation."

k
First Iowa Hydroelectric Coop. v. F.P.C., 328 U.S. 152, 171-176 (1946). Compare Regents v. Carroll, 338 U.S. 586 (1950).

that an applicant need not comply with state permit requirements to secure a federal license.[1] Further, the Court found that the intent of Congress was to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation.[m] Given that finding of intent, the section of the Federal Power Act which requires each applicant to submit satisfactory evidence of compliance with state law[n] was interpreted to only require the Federal Energy Regulatory Commission to consider state laws when granting a federal license, but not to require an applicant to comply with state law.[o] Thus, pre-emption of state licensing by federal licensing is appropriate, given the Congressional call for a "complete scheme" evidencing exhaustive and uniform regulation.

However, the FERC may by regulation require evidence of the applicant's compliance with any of the requirements of a state permit that the Commission considers necessary. Hence, the Commission has the discretionary authority to require compliance with state permit requirements.[p]

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1 First Iowa Hydroelectric Coop. v. F.P.C., 328 U.S. 152 (1946).

m Id. at 180.

n 16 U.S.C. § 802(b) (1976).

o First Iowa Hydroelectric Coop. v. F.P.C., 328 U.S. 152, 177-178 (1946).

p Id. See F.P.C. v. Oregon, 349 U.S. 435, 445 (1955). The State challenged the adequacy of license provisions approved by the Commission for the conservation of anadromous fish. The Court held that the Commission acted within its power and discretion by granting the license and that the state could not impair the license by requiring the state's additional permission or more stringent requirements.

2. The Public Utility Regulatory Policies Act of 1978

Into the already complicated dual system of hydroelectric power regulation, Congress has injected a surprisingly progressive piece of legislation: The Public Utility Regulatory Policies Act of 1978 (hereinafter cited as PURPA), signed into law by President Carter on November 9, 1978, as part of the 5-bill National Energy Act.[q] The eventual impact of PURPA, whose implementing regulations are being drafted as of this writing, is far from certain.[r] However, a few broad conclusions regarding state and federal jurisdiction can be made based on the legislation, itself, and the Conference Managers Report which accompanied it.

The traditional regulatory scheme of things has been that a person selling electric energy for ultimate distribution to the public would be considered an electric utility and subject to federal jurisdiction if the electricity is sold for resale or in interstate commerce, and state jurisdiction if it is sold intrastate directly to the consumer.[s] As explained above, this system results from the Federal Power Act, the Commerce Clause[t] and the doctrine of pre-emption.

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[q]The other four pieces of legislation comprising the National Energy Act are: National Energy Conservation Policy Act; Energy Tax Act of 1978; Powerplant and Industrial Fuel Use Act of 1978; and Natural Gas Policy Act of 1978.

[r]Rules implementing the legislation herein under discussion are to be issued by FERC by November 8, 1979, to be implemented by state regulatory authorities and nonregulated utilities by November 8, 1980.

[s]16 U.S.C. § 824 (1975), Section 201 of the Federal Power Act.

[t]One of the bases for Commerce Clause invocation is the fact that a utility selling to another utility for eventual resale is interconnecting to an interstate transmission grid and will "affect" interstate commerce even if both the selling and purchasing utilities are located within the same state. See F.P.C. v. Union Electric Co., 381 U.S. 90, reh. denied, 381 U.S. 956 (1965).

PURPA seeks to turn this system upside down in order to further the Congressional intent to encourage the development of small power production facilities, such as small scale hydroelectric plants.[u]

One aspect of this reordering is that a hydroelectric plant which meets the qualifications set out in § 201 of PURPA, i.e., becomes a "qualifying facility" (hereinafter cited as QF), could have its rates determined by a state public utility commission, in spite of the fact that its sales enter the interstate grid and are intended for resale. Although FERC will retain some jurisdiction by setting out the rate-making standards which the state commissions will be required to follow, the day-to-day administration of the wholesale rate-making involved will fall to the states for the first time.

This contravention of traditional jurisdiction is further extended by a provision in PURPA which gives FERC the discretion to exempt QF's from substantial portions of now-existing state and federal law.[v] This exemption authority is premised on the Act's purpose of removing obstacles to the development of small power production facilities. The exemption from certain provisions of federal law, such as parts of the Federal Power Act and the Public Utility Holding Company Act, serves the Congressional goal of removing the extensive scrutiny of organizational and financial details which accompanies governmental regulation of power companies and acts as a substantial disincentive to alternative

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[u]The scope of PURPA encompasses much more than the principles discussed in this introduction. Even the Title II sections which provide the jurisdictional authorities discussed herein apply to facilities other than hydro; e.g., cogenerators. For a complete discussion of PURPA's effects on small scale hydroelectric development see FEDERAL LEGAL OBSTACLES AND INCENTIVES TO THE DEVELOPMENT OF THE SMALL SCALE HYDROELECTRIC POTENTIAL OF THE NINETEEN NORTHEASTERN UNITED STATES, Energy Law Institute (second draft) (1979).

[v]§ 210 (e)(1) of PURPA.

energy development.[w] The exemption from state law, however, meets an additional concern. Without it, the states might have an argument to the effect that the field of wholesale rate regulation has no longer been pre-empted and they are therefore free to step into the void created by the removal of exhaustive federal involvement. Because this would have the effect of subjecting QF's to precisely the kind of utility-type regulation Congress sought to avoid, this idea of pre-emption by exemption was utilized.

Although provisions exempting QF's from certain state and federal regulations will only be implemented if FERC "determines such exemption is necessary to encourage . . . small power production,"[x] a recent FERC Staff paper on this section states: "It is clear from the Conference Report that Congress intended the Commission to make liberal use of its exemption authority."[y]

3. Federal Clean Water Act

A current example of this type of coordination between federal pre-emptive authority and day-to-day administration by the states is found in the area of water quality. Under the Federal Clean Water Act, authority has been conferred upon appropriate state agencies to monitor and enforce various aspects of water quality. Certain state agencies have also been designated to issue § 401

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[w] "...the examinations of the level of rates which should apply to the purchase by the utility of the . . . small power producer's power should not be burdened by the same examination as are utility rate applications, but rather in a less burdensome manner. The establishment of utility type regulations over them would act as a significant disincentive to firms interested in . . . small power production." Conference Manager's Report, accompanying § 210 of PURPA.

[x] § 210 (d)(1) of PURPA.

[y] STAFF PAPER DISCUSSING COMMISSION RESPONSIBILITIES TO ESTABLISH RULES REGARDING RATES AND EXCHANGES FOR QUALIFYING COGENERATION AND SMALL POWER PRODUCTION FACILITIES PURSUANT TO SECTION 210 of THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978, page 7; Docket No. RM79-55, Federal Energy Regulatory Commission, June 26, 1979.

water quality certificates and § 402 "point source" permits. As in what is expected to be the case with electric utility regulation under PURPA, in the area of water quality, there is no dispute as to which sovereign's law applies; the federal law applies and is administered by a state agency. The federal law establishes a minimum standard for the states to implement. Consistent with the law of pre-emption, a state may require a higher standard,[z] i.e., a standard which goes even further in carrying out the intent of Congress.

C. The Practical Use of Pre-emption

The above discussion has detailed the legal use of the pre-emption doctrine. The purpose of this section is to describe the doctrine in practice.

The FERC prefers that a developer comply with appropriate state permits before applying to it for a license. The preference is grounded in two rationales. First, the FERC is aware of the federal-state relationship and the possible political ramifications of totally ignoring state input. Second, the FERC must, in granting the license, make a determination that it is a project best suited to the comprehensive development of the waterway. The state has an interest in the use and development of its watercourses and its opinion of their development is important to the FERC. Hence, the FERC values state input where it is reasonable.[aa] Thus, the practical application of pre-emption dictates that the hydroelectric developer adhere to the state's legal and regulatory system.

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[z] See Florida Lime and Avocado Growers Inc. v. Paul, 373 U.S. 132 (1963).

[aa] See F.P.C. v. Oregon, 349 U.S. 435 (1955).

With respect to PURPA, the federal agency, FERC, will establish the guidelines for rates for sales and exchanges of power between electric utilities and qualifying small hydroelectric projects and will prescribe rules for exemptions from state and federal regulation. These standards and rules will be administered by state agencies, i.e., state public utility commissions. Accordingly, the developer of a SSH project should be aware of the FERC standards on rates and rules on exemptions and should know that he/she will be dealing directly with state agencies.

The regulatory system which is presently in place with regard to clean water will confront the developer at the state level. In most states, this federally-conferred authority will be administered by an agency such as the Department of Natural Resources. These agencies will require the developer to meet certain water quality standards, set by the state and federal government and will mandate that the SSH developer obtain the requisite certificate and permit, as required by the Federal Clean Water Act.

FLOW DIAGRAM OF REGULATION OF SMALL DAMS IN KENTUCKY

I. ACQUISITION

A. Title Search.

B. Acquisition of Ownership Rights.

(1) Acquire right to use flowing water.

(2) Acquire right to impound water on private land.

C. Record Deed of Transfer.

(1) Pay recording fee.

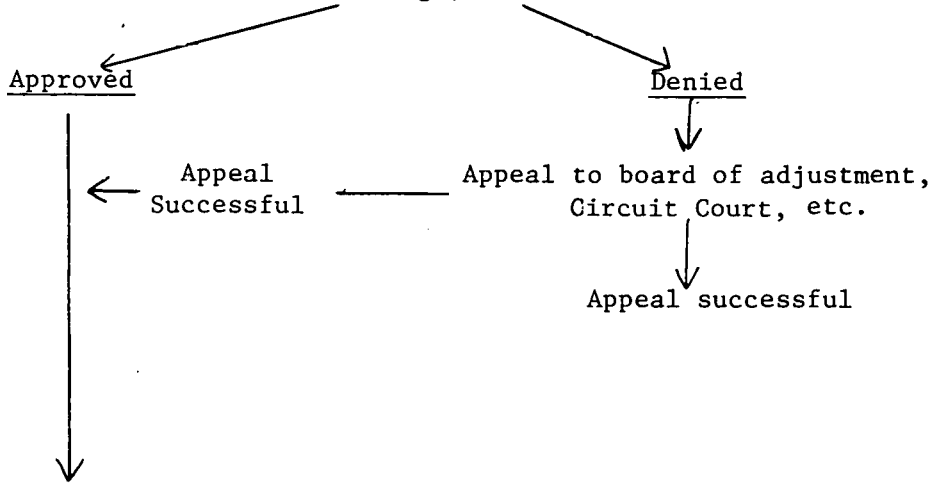
(2) Pay transfer fee.

II. SURVEY of land to be impounded upon or otherwise utilized.

A. Submit Bond to County Clerk.

B. Submit Map of Land to be Overflowed to County Clerk.

III. DETERMINE effect of local, area, and special district zoning laws and ordinances which regulate the height and size of structures and the location and use of buildings, structures and land.



IV. IS DAM SUBJECT TO NREP JURISDICTION?

Yes

Obtain: A. Permit to divert water.
B. Permit to impound water behind a dam.
C. Certificate of inspection.

No → judicial review is not available

May Need: A. Approval of utility lines in Wild Rivers System.
B. Approval of land/water use in Wild Rivers System.
C. Approval from local flood control district established by NREP.

(All orders of NREP may be appealed. Hearings are accessable to intervenors upon filing of a petition to NREP by the intervenor.)

V. IS THE ENTITY AN ENERGY UTILITY?

Yes

Subject to the jurisdiction of the Kentucky Energy Commission

Must: A. File for Certificate of Public Convenience and Necessity.
B. File an Environmental Compatability Statement (ECS) to NREP.
B. File for Certificate of Environmental Compatability (an ECS must be submitted before this certificate will be approved).

No

- Municipal electric utilities are exempt from Energy Commission jurisdiction and requirements except for Certificate of Environmental Compatability.
- Before a municipality may acquire an electric utility, it must submit the proposal to a vote of the city's residents.
- Sale of public utility franchise to city is via sealed bid.
- If accepted, the SSH developer must give to the city, within 30 days, a bond equal to 1/4 of the fair estimate of the cost of the facility.

VI. PERMIT TO CONSTRUCT TRANSMISSION LINES ON PUBLIC THROUGHWAYS MUST BE OBTAINED FROM DEPT. OF HIGHWAYS.

VII. CONTINUING OBLIGATIONS.

A. Dams and energy utilities are subjec to periodic safety inspection by the NREP and EC.

B. Taxes

(1) Corporate taxes.

(2) Special utility taxes

I. INTRODUCTION

Development of small scale hydroelectric sites (hereinafter cited as SSH) in Kentucky involves more than just rehabilitating a rundown hydroelectric site, leftover from some long since defunct mill. Development of SSH involves interaction with all levels of government; Federal, State and local. There are permits to acquire, fees to pay, taxes to weep at and inspections to curse at.

This paper will touch upon the major legal impacts in Kentucky at the state and local level. Many of these impacts have not as yet been implemented with regard to SSH, since in Kentucky most electricity is coal-generated and any hydroelectric power that does exist, is derived from huge T.V.A. or Army Corp of Engineer projects. Nevertheless, when SSH does begin to be developed in Kentucky, the impacts presented here will be important.

II. ACQUISITION

A. Generally

In order to encourage investment in any kind of productive water use, the water rights involved must be secured. This means the developer must not only obtain the rights to the dam structure itself and the land it is on, but he must also obtain the rights to receive and impound the water, to raise and lower the water level in the reservoir, and the right to run transmission lines across neighboring land to the utility grid (or to direct purchasers of the electricity if the developer is going to be a retail seller as well).

B. Land

Land needed by the SSH-developer (hereinafter cited as developer) includes not only the land upon which the dam and its buildings are located, but the land under the impounded water as well.

1. Title Search

Land acquisition begins with finding the land and then determining what rights are attached to it. Are there any easements attached to the land?[1] Does the land include water rights or have these rights been previously conveyed? Are there any liens against the land? Against the buildings and structures on the land?

To answer most of the above questions, the developer must conduct a title search. He must go down to the local registry of deeds at the county clerk's office and trace the history of the conveyances of the land in question to a point in time where the character and number of conveyed rights are clear. To avoid the legwork himself, the developer might want to put that responsibility on the seller, i.e., insert a clause in the conveyance contract to the effect that the developer will not close the deal unless such research is done by the seller. If there is a lien on the land or buildings, it would be prudent for the developer to have the seller pay that off before the conveyance is finalized. He must

[1] An easement is a right one landowner has in the property of another, allowing the non-owner to use the owner's land in a specified way. Or an easement may prevent the owner from using his land in a specified way.

be sure to get the seller's agreement to pay off the lien, in writing, in the conveyance contract. And, as with the title search, a clause should be in the contract which allows the developer to refuse to close the deal unless he is given a free and clear title.

Title research alone is not sufficient to ensure a free and clear title. The developer must determine if anyone has acquired prescriptive rights relating to the use of the land.[2] For example, if a waterfront development has sprung up around the reservoir of an old dam, and the homeowners have openly enjoyed and used a certain water level for the prescriptive period, those waterfront homeowners have a legally enforceable right to maintain the water level. The developer will not know whether such a right exists by looking at the deed alone. If such rights exist, he must obtain them.

2. Conveyance

(a) Recording

For a proper conveyance of real property, a deed must be executed and recorded in the county clerk's office where the property is located, or recorded in the county where the

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[2]Prescriptive rights are rights that users of property (although only those who are not owners of the property in question) acquire by using the property in an open and notorious way for a statutorily set number of years. The right acquired this way can only be the specific right used for the specified number of years, and nothing more. For example, a prescriptive right acquired to walk across neighboring land will not allow the prescriptive user to then build a house on the land.

A prescriptive user may acquire legal rights in another's land if he uses it in an open and notorious manner for seven (7) years. KY. REV. STAT. ANN. § 413.060 (Baldwin 1972). Statutes of limitation for other types of prescriptive uses are found in chapter 413 of the KY. REV. STAT. ANN.

greatest portion of the property is located. The deed must state the date of maturity of any debts or obligations secured by the deed, the name and address of the individual who prepared the deed, as well as the name and address of the seller.[3]

In order for the deed to be recorded, the deed must plainly state the origin of the title conveyed, i.e., did the seller acquire it by recorded instrument, by gift, or by inheritance, clearly specifying the next immediate source from which the seller received his title.[4]

If these requirements are not adhered to, the deed will not be legally recorded.[5] Furthermore, unless legally recorded, the deed will be invalid against creditors.[6] Reservations or exceptions of doubtful meaning, as well as other confusing and ambiguous language contained in the deed, will be construed in a manner most favorable to the purchaser.[7]

Deeds executed in Kentucky may be admitted to record in a variety of ways. They may be admitted to record:

(1) On the acknowledgment, before the proper clerk, by the party making the deed;

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[3] KY. REV. STAT. ANN. §§ 382.010, .100, .110, .335 (Baldwin 1972).

[4] Id. § 382.110.

[5] OP. ATT'Y GEN. 150 (1977).

[6] KY. REV. STAT. ANN. § 382.270 (Baldwin 1972).

[7] See Clark v. Pauley, 291 Ky. 637, 165 S.W.2d 161 (1942); Campbell v. Wells, 278 Ky. 209, 128 S.W.2d 592 (1939).

(2) By the proof of two subscribing witnesses, or by the proof of one subscribing witness, who also proves the attestation of the other;

(3) By the proof of two witnesses that the subscribing witnesses are both dead; and also like proof of the signature of one of them and of the grantor;

(4) By like proof that both of the subscribing witnesses are out of state, or that one is so absent and the other is dead, and also like proof of the signature of one of the witnesses and of the grantor; or

(5) On the certificate of a county clerk of this state, or any notary public, that the deed has been acknowledged before him by the party making the deed or proved before him in the manner required by subsection (2), (3) or (4).[8]

Deeds executed outside of Kentucky but within the United States may be admitted to record when certified under the seal of the office of anyone (i.e., judge, city clerk, clerk of the court, notary public, mayor of a city or secretary of state) authorized to take acknowledgment of the deeds.[9]

(b) Fees

For filing the deed, the county clerk will collect from the recorder of the deed various fees.[10]

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[8] KY. REV. STAT. ANN. § 382.130 (Baldwin 1972).

[9] Id. § 382.140.

[10] Id. § 382.460. Fees are collected pursuant to the schedule outlined in KY. REV. STAT. ANN. § 64.012 (Baldwin Supp. 1978).

(c) Taxes

The grantor (seller) named in the deed must pay a transfer tax (a tax on the conveyance of real property) imposed at the rate of one cent per $10 of value stated in the deed. This tax is payable to the county clerk. There are, however, certain exceptions to the transfer tax. The following types of transfers are not subject to the transfer tax:

(1) A transfer of title to or by any governmental arm, be it Federal, State or local;

(2) Transfers which confirm or correct previously recorded deeds;

(3) Transfers on sales for delinquent taxes;

(4) Transfers between husband and wife, or parent and child, with only "nominal consideration" paid;

(5) Transfers pursuant to mergers of corporations; and,

(6) Transfers under a foreclosing proceeding.[11]

The deed will not be recorded unless this tax is paid. Nor will the deed be recorded unless all other outstanding taxes are paid (i.e., property taxes still owing).[12]

C. Facility and Equipment

In addition to the land involved, the developer must also acquire title to the dam structure and its attached buildings. Normally these

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[11] KY. REV. STAT. ANN. § 142.050 (Baldwin Supp. 1978).

[12] Id. § 382.260 (Baldwin 1972).

structures will be conveyed in the same deed conveying the land upon which they are attached.

The developer must also acquire ownership of the machinery and equipment he will need to rehabilitate the hydro site. It should be noted that machinery and equipment can have liens on them, similar to those attached to land and buildings. These may be liens of business creditors, tax liens for unpaid property or storage and use taxes on the equipment. The developer should make sure that he obtains free and clear ownership of all machinery and equipment. There should be a clause in the conveyance contract stating that the deal will not be closed unless the property is free and clear of any and all encumbrances; and a clause explaining that if there are any such encumbrances, the seller, not the developer, will have to accept full responsibility for them.

It is beyond the scope of this paper to outline the pitfalls of normal conveyances of property, but in arming himself against the unscrupulous seller, the developer, or his attorney, should be familiar with Kentucky's Uniform Commercial Code,[13] and Kentucky's laws concerning mechanics and materialmen's liens,[14] and fradulent conveyances.[15]

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[13] See Id. § 355.1-101 et seq.

[14] See Id. § 376.000 et seq.

[15] See Id. § 378.000 et seq.

D. Riparian Rights

1. Common Law: Generally

Riparian rights are those rights that a person posseses incident to his ownership of riparian land. Riparian land is the land owned to the water's edge of a stream or a lake, as well as the land under the water as far as the middle, or "thread," of the watercourse. However, if the owner of the land bordoring water does not own the land below the water to the thread, he is a littoral owner instead of a riparian owner. Where the original grant of land runs to the bank of a navigable or non-navigable stream, the property conveyed is presumed to extend to the thread of the stream, unless the instrument of conveyance specifies otherwise.[16]

Some riparian rights recognized in Kentucky are: (1) reasonable access to the entire body of water on which the riparian owner's land borders;[17] (2) the right to use all water necessary for domestic purposes;[18] and, (3) the right to have the water of a stream flow to the riparian's land in its natural course, not unreasonably diminished in quantity and quality.[19]

2. Watercourse Defined: Navigable or Non-navigable

(a) Surface Waters

Surface water becomes a natural watercourse at the point where it begins to form a distinct channel with bed and banks,

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[16] Sutton v. Terrett, 301 Ky. 506, 192 S.W.2d 382 (1946).

[17] See Commonwealth, Dept. of Hwys. v. Thomas, 427 S.W.2d 213 (Ky. 1968).

[18] See Banks v. Frazier, 111 Ky. 909, 64 S.W. 983 (1901).

[19] See Fackler v. Cincinnatti N.O. & T.P. Co., 229 Ky. 339, 17 S.W.2d 194 (Ky. 1929).

and a current. Time is a factor in determining whether the channel is "distinct." If water has always flowed in the channel, albeit intermittently, it will be considered a watercourse. Note, however, the individual seeking to classify the stream as a "watercourse" has the burden of proving that the stream in question has the attributes of a watercourse.[20]

(b) Navigable Watercourse

A stream is navigable by law in Kentucky if it can float logs downstream during spring high waters, unassisted by man.[21] Thus, even a stream that is dry part of the year could be considered navigable.

Riparian rights on a navigable watercourse are subordinate to the public right to navigate such waters and to make improvements in aid of such navigation.[22] This "public right" may be exercised by federal, state and local governments.

Since any right the developer may have in a navigable stream is inferior to the public easement of passage, the right is subject to any improvement the state or federal government may make for purposes of navigation. The consequences of such action may indeed be harsh. Though an improvement might result in substantial injury to the

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[20] See Withers v. Berea College, 349 S.W.2d 357 (Ky. 1971).

[21] See Banks, at 909, 64 S.W. at 983, Accord, Natcher v. City of Bowling Green, 264 Ky. 584, 95 S.W.2d 255 (1963).

[22] See Thomas, 427 S.W.2d at 213.

developer's ability to generate power, he will be left without a remedy.[23]

3. Right to Flow

In the several states of the United States there are two generally recognized theories of riparian flowage rights: (1) the "natural flow theory" and (2) the "reasonable use theory."

(a) Natural Flow Theory

Under the natural flow theory each riparian owner has the privilege to use the water to supply his natural wants, and to make extraordinary or artificial uses so long as these uses do not materially affect the quantity or quality of the water and recognized uses by a lower riparian owner.[24]

(b) Reasonable Use Theory

Under the reasonable use theory, a riparian owner cannot unreasonably make use of the water in such a way that a lower riparian owner is harmed. Mere detention of water is not, in and of itself, an injury and cannot alone constitute an unreasonable use.[25]

(c) The Kentucky Synthesis

Kentucky has mingled these two theories to come up with a doctrine which says that a riparian owner may not "unreasonably" change the "natural flow" of water so as to cause substantial

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[23] See Richard R. Powell, The Law of Real Property, § 723 et seq. (1977).

[24] See City of Louisville v. Tway, 297 Ky. 565, 180 S.W.2d 278 (1944).

[25] Id.

damage to a lower riparian owner.[26] Reasonableness of use under the Kentucky approach becomes a balance of harm to the lower riparian owner matched against the reasonableness of the upper riparian's use. Basically, what this boils down to is that a riparian owner may not use his lands and riparian rights in such a way that will substantially injure the property of either an upper or lower riparian owner.[27] Clearly, this is in effect the reasonable use theory, irrespective of what it is called. Thus, an upper riparian has the right to detain and use the water by means of a dam for his purposes if he does not make such an unreasonable use as would leave the lower riparian owner without ample flowage for all purposes which the lower riparian previously needed to use it for.[28]

Note, however, that since riparian rights are subordinate to the public right to navigate, a municipality could erect a dam under this pretext, while simultaneously causing the water

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[26] See Commonwealth, Dept. of Highways v. S & M. Land Co., 503 S.W.2d 495 (Ky. 1972). See generally, City of Louisville v. Tway, 297 Ky. 565, 180 S.W.2d 278 (1944); Natcher, at 584, 95 S.W.2d at 255; Fackler v. Cincinnati N.O. & T.P. Co., 229 Ky. 339, 17 S.W.2d 194 (1929).

[27] See, e.g., in Daugherty v. City of Lexington, 249 S.W.2d 755 (Ky. 1952), the court held that a riparian owner could not use his land in a manner which unreasonably endangered source of city's water supply.

[28] See Fackler, at 339, 17 S.W.2d at 194.

to back up on an upper riparian's land; even without the consent of the upper riparian.[29] Yet, a municipality can only do this if the dam aides navigation; generation of power alone will not be enough.

4. Riparian Rights as Property

(a) Generally

Equipped with a knowledge of riparian rights, the developer must acquire them from other riparian landowners to the extent the dam and its operation will affect these rights.

Kentucky has held that certain riparian rights are property for condemnation purposes, requiring compensation. Included among these compensable property rights are the right of access to the navigable stream,[30] and the right to the maintenance of the ordinary high water mark.[31] Applying these property rights to the SSH-developer, it seems clear that in Kentucky a developer will have to acquire these and other riparian rights.

(b) Acquisition via Easements

An easement is basically a right or privilege to use another's land in a specific way, or it may be a right of another that prevents you from using your land in a specific way. In either case, nothing passes under an easement but

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[29] See Natcher, at 584, 95 S.W.2d at 255.

[30] See Thomas, 427 S.W. 2d at 213.

[31] See Natcher, at 584, 95 S.W.2d at 255.

what is necessary for its reasonable use and proper enjoyment.[32] Furthermore, the grantor of an easement does not have to expressly reserve any rights which he may exercise consistent with his fair enjoyment of his property; such rights remain with him because they are not granted.[33] For example, a dam owner, having acquired a riparian owner's flowage rights by easement, has no authority pursuant to such easement to prevent that riparian owner from fishing or swimming in the water adjacent to the riparian's water; there is nothing inconsistent with fishing or swimming, and regulated flow. In any event, the developer should devise the easement so that it runs with the affected land and not merely with the owner of the land. If the easement ran only with the owner of the neighboring land, then the dam owner would have to reacquire (and therefore spend additional money) the easement with each subsequent purchaser of the riparian land.[34]

E. Eminent Domain

The power of eminent domain can be a valuable tool for the developer, useful in avoiding legal entanglement and saving money.

The right of eminent domain allows the holder of that right to take

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[32] See City of Williamstown v. Ruby, 336 S.W.2d 544 (Ky. 1960).

[33] Id.

[34] A further use of easements by the developer will be in the creation of a transmission line easement over neighboring lands, enabling the developer to construct and maintain a transmission line to the utility grid. Again, the developer should make sure this easement runs with the land.

private property; however, an essential qualification is that the taking must be for a necessary public use.[35] And, as with all takings, the land must be paid for.[36]

1. Surveys

A SSH-developer may, without fear of any trespass action being brought against him, conduct examinations and surveys on neighboring land for his proposed dams, reservoirs, ponds, locks, bridges, power stations, roads, conduits and transmission lines. Lands expected to be overflowed may also be entered upon for examination. Of course, the developer will be subject to liability for actual damage done.[37]

Before entering upon any land for these purposes, the developer must deposit with the clerk of the county in which the property is located, a bond to the state in a sum fixed at not more than double the last assessed valuation of the property to be surveyed or examined. This bond must be conditioned to indemnify all persons for actual damages sustained on account of making the examination or survey.[38]

When the location of the dam and the land that may be overflowed is determined, the president and the secretary of the development corporation must sign and deliver to the county clerk a map clearly showing the land to be taken.[39]

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[35] See Natcher, at 584, 95 S.W.2d at 255.

[36] See Thomas, 427 S.W.2d at 213.

[37] KY. REV. STAT. ANN. § 416.130 (Baldwin Supp. 1978).

[38] Id.

[39] Id.

2. Condemnation

When the developer cannot, by agreement with the owner, acquire the property rights, privileges or easements needed for any of the uses or purposes referred to in the above section, the development corporation may condemn such property, property rights, privileges or easements in the manner provided by the eminent domain laws of Kentucky. However, the developer is liable for any damages resulting from overflowing any property, private or public, when constructing or maintaining the dam.[40]

3. Transmission Lines

The developer may construct and maintain transmission lines free of any charge, along any right of way used as a state highway, county road, public way or dedicated road outside the city limits, and over, under or across any of the waters of Kentucky outside the city limits. However, these fixtures must not interfere with, obstruct or endanger the travel on and along the highway or road, nor obstruct the navigation of the waters. To ensure this latter point, the location of all transmission lines and other appliances are subject to the reasonable direction and regulation of the authorities having control of these throughways.[41]

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[40] See Id. §§ 416.540 to 416.680.

[41] Id. § 416.140.

Before the lines may be placed, the developer must obtain a permit from the Bureau of Highways.[42] If the lines or poles are found to be unreasonably interfering in any way with the convenient, safe and continuous use and maintenance of the affected highway, the Bureau of Highways may order the owner of these lines to remove or relocate them at his own expense, within 30 days after receiving notice by the Bureau. If the owner fails to obey this order, the Bureau will remove the lines and poles, charging the cost to the owner.[43]

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[42]The state has reserved to itself the right to grant the named utilities permission to use county road rights-of-way and has not delegated the right to the county or any other political subdivision. OP. ATT'Y GEN. 538 (1971).

[43]KY. REV. STAT. ANN. § 416.140 (Baldwin Supp. 1978).

III. LIABILITY

A. Common Law

Once the hydro site is owned by the developer, ensuing injury or damage to others as a consequence of that ownership may impose liability on the developer. If a breach occurs, there may be a damage to people as well as property. There may be a taking of private or public property, although no damage to the property per se occurs, if the value of the property in question is rendered worthless by the action of the dam owner. A myriad of other claims could also arise. However, most claims affecting the developer will fall into four categories: (1) suits in negligence; (2) suits in trespass; (3) suits in nuisance; and, (4) suits claiming a taking of land and/or other property without compensation.

1. Negligence

A suit in negligence claims that some actor did not fulfill his legally recognizable obligation to act in a certain manner so as to avoid unreasonable harm to others. In the case of a dam owner, the dam owner is under the obligation to properly construct and maintain his dam in a fashion not reasonably expected to injure others.[44] Thus, if a dam owner used flashboards during

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[44] In Shell v. Town of Evarts, 296 Ky. 602, 178 S.W.2d 32 (1944), the Court articulated the standard of care owed by a dam owner: "[I]t is unlawful to gather water on one's premises for useful...purposes subject to the obligation to construct reservoirs with sufficient strength to retain the water under all contingencies which can reasonably be anticipated, and afterwards to preserve and guard it with due care...." See also Winchester Water Works Co. v. Holliday, 241 Ky. 762, 45 S.W.2d 9 (1931). Shell also expressly rejected the doctrine of Rylands v. Fletcher in Kentucky.

highwaters and those flashboards were reasonably expected to break, then any damage resulting from the breaking of the flashboards and the ensuing flooding would be compensable by the dam owner.[45] The key is that there must be a causal relationship between the negligent act and the ensuing damage.[46] For an act of God (i.e., a severe storm, unprecedented in an area's history) to relieve the dam owner from liability for injuries to lower riparian owners resulting from the dam breaking, such act of God must have been the sole cause. If, in the example of the flashboards, the flashboards would have broken in a normal storm, then the dam owner cannot escape liability. One factor a court will look at in determining the reasonableness of the dam owner's operation is his adherence to prescribed standards of construction, maintenance and operation.[47]

The developer should take note that if his anticipated action of operating a dam in a certain fashion is reasonably expected to result in negligent action on his part, then a potentially affected landowner may petition the court for an injunction.[48] But an injunction will not be issued based upon the mere "fear" that damage may result at some time in the indefinite future.[49]

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[45] See S & M Land Co., 503 S.W.2d at 495.

[46] See Winchester, at 762, 45 S.W.2d at 9.

[47] See Land Development, Inc. v. Louisville Gas & Electric Co., 459 S.W.2d 150 (Ky. 1970).

[48] See Banks, at 909, 64 S.W. at 983.

[49] See Chapman v. Beaver Dam Coal Co., 327 S.W.2d 397 (Ky. 1959).

2. Trespass

Basically, one trespasses on another's property if he or some object under his control or direction unlawfully ("unlawfully" usually means an "uninvited" person or thing entering upon the land in question) enters upon another's property. Thus, if impounded water backs up on an upper riparian's land, he can maintain an action in trespass against the dam owner. Or, if the developer enters another's land for surveying purposes, he may be liable for trespass.[50] Injunction or damages could ensue, depending on the available course of action.

3. Nuisance

An action in nuisance is very similar to an action in trespass, but with one major difference; while a trespass is an unlawful action in and of itself, a nuisance is an otherwise lawful action which, because of the circumstances, creates an unreasonable interference with the use and enjoyment of another's property. Both trespass and nuisance interfere with the use of another's property: trespass involves a physical invasion, nuisance involves an interference of one owner's land caused by a certain use of a neighboring owner's land. A nuisance furthermore, may be either public or private.

A private nuisance results from an action which unreasonably interferes with one private property owner's use and enjoyment of

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[50]The developer will not be liable if he first followed the procedure outlined in the Eminent Domain section.

his property. A public nuisance on the other hand, affects the public at large in that it unreasonably interferes with the state's police-power duty to protect the health, safety and welfare of the public. Clearly, there are occasions where both a public and a private nuisance suit may be initiated against the same activity.

Thus, where a dam owner is operating a dam, badly in need of repair, or in a reckless manner, an action in nuisance, public or private, may ensue. Both an injunction and damages are available as remedies. Furthermore, rights obtained by prescription do not include a right to maintain a public nuisance.[51]

4. Taking

A taking occurs when property is unlawfully taken from a property owner without just compensation.[52] Most taking cases

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[51]Although there is a case, Ireland v. Bowman & Cockrell, 130 Ky. 153, 113 S.W. 56 (Ky. 1908), in Kentucky, which says the right to maintain a dam that is a public nuisance can be acquired by prescription, and although this case has never been specifically overruled, the modern trend is opposite, as evidenced by a more recent Kentucky case: W.G. Duncan Coal Co. v. Jones, 254 S.W.2d 720 (Ky. 1953). Jones indicates that prescription cannot be relied on to establish a right to maintain a public nuisance. Thus, applying Jones to a dam badly in need of repair (i.e., a public nuisance) it seems that a right to maintain this dam cannot be acquired by prescription.

[52]"Lawful-means" to take land are through eminent domain procedures and through police-power takings. If taken by eminent domain, compensation must be given. If taken via police power, no compensation is required. Basically, land taken by eminent domain procedures must be used for the public benefit, whereas land taken by police-power procedures, is taken to prevent a public harm.

deal with the distinction between noncompensable police-power taking and compensable taking by eminent domain. Such a resolution is not within the scope of this paper, but note that in virtually every state, there is confusion regarding the distinction between a compensable and noncompensable taking. Note, however, that while a SSH developer may have the power of eminent domain in Kentucky, land taken by eminent domain must be compensated for.[53]

Thus, if the dam owner impounds water on another's land, thereby denying that individual the use and enjoyment of that land now underwater, this is a taking requiring compensation by the dam owner.

However, where the federal or state government takes the dam owner's property to regulate navigation (either directly or via regulations which render the value of the property negligible), no compensation is required. The damage sustained does not result from taking property from a riparian owner but instead, it results from the lawful exercise of power to which interests of riparian owners are subservient, i.e., the public power to regulate navigation on navigable waterways.[54]

B. Statutory Laws

1. Milldams

Kentucky's Milldam Act prohibits anyone from building a dam

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[53] See KY. REV. STAT. ANN. §§ 416.540 to 416.680 (Baldwin Supp. 1978).

[54] U.S. v. Rands, 389 U.S. 121 (1967).

ten miles from the head of a navigable stream. It also prohibits anyone operating a mill or factory from doing anything injurious to a vested interest in any waterwork then existing in the watercourse. Violaters will be fined no less than $50 nor more than $500. However, this Act does not apply to dams constructed for the purpose of generating, by water power, electricity for distribution and sale.[55]

2. Polluters

Water "pollution" is defined in Kentucky to mean "any alteration of the physical, thermal, chemical, biological, or radioactive properties of the waters of Kentucky in such a manner, condition, or quantity that will be detrimental to the public health or welfare, to animal or acquatic life or marine life, to the use of such waters as present or future sources of public water supply or the use of such waters as recreational, commercial, industrial, agricultural or other legitimate purposes."[56] Where the injury, death or destruction of fish or other wildlife results from such pollution or from any violation of the orders, rules, regulations, or other determinations of the Bureau of Environmental Protection (hereinafter cited as BEP) of the Department for Natural Resources and Environmental Protection, the person responsible will be liable for the cost

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[55] KY. REV. STAT. ANN. § 182.010 et seq. (Baldwin 1972).

[56] Id. § 224.050 (Baldwin Supp. 1978).

of replenishing such fish or wildlife.[57] This liability of the dam owner is enforceable in court.[58]

3. NREP Repair Costs

Whenever the Secretary of the Department for Natural Resources and Environmental Protection (NREP) makes repairs on the dam himself, the owner of the dam will be liable for all costs of such action, including applicable overheads. A lien in the amount of such costs will be automatically created on all property owned by the dam owner at or proximate to such dam or reservoir. This lien will be enforceable in court. Following the conclusion of enforcement of the lien in court, the Secretary of NREP may make application to the court for a foreclosure sale of the property to satisfy any judgment obtained.[59]

4. Drainage and Reclamation Act of 1918

The circuit court of any county may establish and maintain a levee and reclamation district. The proceedings to establish such a district are to be ex parte and commenced upon the petition of at least 25% of the landowners or the owners of 25% of the land in the proper district. The Board of Commissioners for a levee and reclamation district may control all water power created by

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[57]For rules, regulations and other promulgations of Kentucky agencies, see "Kentucky Administrative Regulative Service" (KARS); available through the office of the Administrative Registrar; Legislative Research Commission, Frankfort, Ky. 40601. Tel. 502-223-8303.

[58]KY. REV. STAT. ANN. § 224.020 (Baldwin Supp. 1978).

[59]Id. §§ 151.297; 151.299 (Baldwin 1972).

the construction of any dam in the district, and it may also construct and maintain any hydroelectric power plants to develop such power for the use of the district, as long as such improvements do not impair navigation. Or the Board may remove any water obstruction (i.e., a dam) it deems necessary to remove. If repairs to any dam become necessary by reason of the act or negligence of the owner, the owner must make repairs at his own expense; failure to so repair within 30 days after notification by the Board makes the dam owner guilty of a misdemeanor.[60]

Any person who will be affected by the Board's proposed improvements may file objections to the court organizing the district.[61] Furthermore, a landowner in the drainage district may petition the County Judge for a withdrawal of his lands from the drainage district. Appeal from the judgment affecting the withdrawal petition may be taken to the Circuit Court and then to the Court of Appeals if need be. However, all appeal costs are to be paid by the petitioner.[62]

5. Eminent Domain

For a discussion of eminent domain liability see the discussion supra at pages 13-16 and 20-21.

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[60] Id. §§ 268.020, .050, .130, .510, .580, .610 (Baldwin Supp. 1978).

[61] Id. § 268.650.

[62] Id. § 269.260.

IV. NREP

A. Generally

1. Organization

The most significant Department concerned with dam construction, maintenance and operation in Kentucky is the Department for Natural Resources and Environmental Protection (NREP). The NREP is headed by a Secretary. A Bureau of Natural Resources (hereinafter cited as BNR) and a Bureau of Environmental Protection (hereinafter cited as BEP) are created within NREP. Each Bureau is headed by a Commissioner who is directly responsible to the Secretary.[63]

In addition to any other powers which might be vested in NREP, it has the power to prevent, abate and control all water pollution.[64] It may also issue permits pursuant to the Federal Water Pollution Control Act (FWPCA).[65] Additionally, NREP has significant powers with respect to dams. The Secretary is to conduct investigations, research, experiments, training programs and demonstrations, and collect and disseminate information relating to the safe construction,

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[63] Id. § 224.005 et seq.

[64] "Water" for purposes of NREP jurisdiction means and includes any and all rivers, streams, creeks, lakes, ponds, impounding reservoirs, springs and all other bodies of surface water, natural or artificial, situated wholly or partly within Kentucky's jurisdiction. Id. § 224.005.

"Water pollution" means the physical, thermal, chemical, biological or radioactive alteration of the waters of Kentucky in such a manner, condition or quantity that will be detrimental to the public health or welfare, to animal or aquatic life or marine life, to the use of such waters as present or future sources of public water supply or to the use of such waters for recreational, commercial, industrial, agricultural or other legitimate purposes. Id.

[65] Id. § 224.034.

operation or maintenance of dams or reservoirs.[66] The Secretary is authorized to examine and approve or disapprove all applications for construction permits for dams not otherwise excepted by regulations, and is to establish standards for the safe construction, enlargement, repair, alteration, maintenance or operation of a dam or reservoir.[67] He has the power to enter and inspect any property or premises for the purpose of investigating either actual or suspected sources of pollution or contamination, or for the purpose of ascertaining compliance or noncompliance with laws, rules or regulations under his authority.[68]

2. Prohibition Against Pollution

No person shall directly or indirectly pollute the waters of Kentucky in contravention of the standards adopted by NREP, or any of the rules, regulations, permits or orders of NREP. When the injury, death, or destruction of fish or other wildlife result from pollution, or from violation of any orders, rules, regulations or other determinations of NREP, the person responsible for these consequences is liable to the state in an amount reasonably necessary to restock or replenish such fish or wildlife. These damages are enforceable in court. In addition, polluters or violators of rules or regulations are liable for a civil

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[66] Recall that "dam" for purposes of chapter 151, supra, (the water resource management chapter) includes only those dams 25 feet or more in height or those with an impounding capacity of fifty-acre feet or more at maximum water level. Id. § 151.125.

[67] Id.

[68] Id. § 224.033.

penalty not to exceed $10,000 for each day during which a violation continues. The violator may also be enjoined from continuing the action.

Furthermore, any person who willfully or with criminal negligence violates any rules or regulations, or who knowingly provides false information in any document filed or required to be maintained by NREP will be guilty of a misdemeanor and upon conviction, is liable for a fine not less than $1000 nor more than $15,000, or imprisonment or both. Finally, anyone who violates any provision of chapter 224 other than the pollution prohibition will be liable for a civil penalty not to exceed $1000 for each day during which the violation continues, and in addition, may be concurrently enjoined from continuing the action.[69]

3. Orders, Hearings and Appeals

Whenever the Secretary finds, after an investigation, a condition endangering people or natural resources where delay would be prejudicial to the interests of the people of Kentucky, he may, without prior hearing, order the person in control of such condition to discontinue, abate or alleviate the condition. This order must be immediately complied with. Within ten days, the person(s) affected will be given an opportunity to present proof, at a hearing, that such condition or activity does not violate any prohibitions of NREP.

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[69] Id. § 224.060, .110, .994.

[70] Id. § 224.071.

In any other circumstances where NREP has reason to believe that a violation of any rule or regulation has occurred, it shall issue and serve written notice of the applicable provision alleged to have been violated. The person named in the notice must answer the charges at a hearing before NREP within 21 days after the date on the notice, unless the person complained against waives, in writing, the 21-day period. Note that in this hearing, any person not previously heard in connection with the issuance of any order or the making of any decision by NREP, including but not limited to the issuance, denial, modification or revocation of any permit, may demand a hearing if he considers himself aggrieved. To obtain the hearing, the aggrieved person must file with NREP a petition alleging that such order or determination is contrary to law or fact and is injurious to him. This provision is the gateway for many potential intervenors! The right to demand a hearing pursuant to this proviso, however, is limited to a period of 30 days after the petitioner has had actual notice of the order or determination or could have had such notice.[71]

After the conclusion of the hearing, a finding of fact and conclusion of law will be made within 30 days, unless, upon written request, an extension is granted. Upon receiving the finding, all parties actually involved in the proceeding have the right to file exceptions within 7 days. Otherwise, the decision will become a final order of the Department thereby precluding any further

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[71] Id. § 224.081.

petition to NREP.[72]

Appeals may be taken from all orders, within 30 days from the rendition of such order, to the Franklin Circuit Court. The party or parties affected must file in the court a petition stating fully the grounds upon which the review is sought. After the case has been properly docketed, any party directly affected by the issues on appeal, may, upon written notice to the other parties involved and in the discretion of the Court, be permitted to intervene. Appeals to the Court of Appeals from orders of the Circuit Court may be taken in the manner provided for in the Kentucky Rules of Civil Procedure.[73]

B. Water Policy

1. Generally

Basically, Kentucky water policy law articulates a desire to make the most beneficial use of the state's water resources. Among the powers given NREP within this section is the power to regulate the construction, maintenance and operation of all dams and other watercourse barriers.[74]

For purposes of the relevant statutory provisions, "dam" is defined as "any artificial barrier, including appurtenant works, which does or can impound or divert water, and which either (1) is or will be 25 feet or more in height from the natural bed of

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[72] Id. § 224.083.

[73] Id. § 224.085. Kentucky Rules of Civil Procedure may be found in Vol. 18 of KY. REV. STAT. ANN. (Baldwin 1972).

[74] Id. § 151.110 (Baldwin Supp. 1978).

the stream or watercourse at the downstream toe of the barrier, as determined by NREP or (2) has or will have an impounding capacity at maximum water storage elevation of 50 acre feet or more." The word "stream" or watercourse means "any river, creek, or channel having a well defined bank, in which water flows for substantial periods of the year to drain a given area, or any lake or other body of water in the Commonwealth."[75]

2. Permit to Divert Water

Before a developer, private or public, may divert water from a stream, lake or other body of water, he must obtain a permit from NREP. However, if the amount of water diverted is less than a set amount established by regulation by NREP, no permit is required.[76]

Any water diverted pursuant to the above permit must be recorded and then submitted in a report to NREP in a manner prescribed by regulation. Failure to comply with this reporting obligation will subject the permit holder to a civil penalty of not more than $1000; in addition, the permit holder may be enjoined from continuing his water diversion and have his permit revoked.[77]

All permits issued will be specific in terms of quantity, time, place and rate of diversion. These permits, however, represent only

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[75] Id. § 151.100.

[76] Id. §§ 151.140, .160, 401 K.A.R. 4:010 exempts from this permit requirement, water diversions of less than 10,000 gal./day.

[77] KY. REV. STAT. ANN. § 151.160 (Baldwin Supp. 1968).

a limited right of use and do not vest ownership and absolute right to withdraw or use the water. Thus, notwithstanding the existence of a permit, the Water Resources Division of NREP may temporarily allocate the available public water supply among water users and restrict the use by permit holders during times of drought or other similar emergency.[78]

Permits may be amended upon application to NREP by the permit holder. Permits may also be amended by NREP when the required reports indicate that the permit holder is using a substantially different amount of water than permitted.[79]

3. Permit to Impound Water Behind Dam

An additional permit allows an owner of land contiguous to public water to impound water behind a dam in the natural stream bed or on his land. However, he can only do this when the flow of the stream or level of the lake will not fluctuate in such a manner that will impair existing uses or unreasonably interfere with a beneficial use by another water use.[80]

Any dam placed across a natural stream must be approved in writing by the Division of Water Resources of NREP before any construction can begin.[81] Moreover, NREP may take whatever action

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[78] Id. § 151.170, .200 (Baldwin 1972 and Supp. 1978). "Public water" is water occuring in any stream, lake or other body of water which may be applied to a useful and beneficial purpose. Id. § 151.120.

[79] Id. § 151.170.

[80] Id. § 151.210 (Baldwin 1972).

[81] Id. § 151.250.

that it deems necessary to maintain, repair or remove the dams and reservoirs owned by Kentucky.[82] An important requirement for approval of the permit is that unless they are waived by the Division, all plans and specifications submitted for approval must be drawn by an engineer licensed in Kentucky. Another requirement is that the dam must provide an outlet for the release of water. The dam owner will be notified about his application's status within 20 days, i.e., whether it is denied or approved. Unlike most administrative decisions, there is no judicial review if the permit is denied.[83]

Any deviation from the approved plans or any commencement of construction before approval will subject the violator to a civil penalty of not more than $1000, and in addition, the violator may be enjoined from continuing the prohibited action. Each day that the violations occur constitutes a separate offense.[84]

4. Certificate of Inspection

To ensure the public safety, within sixty days after completion of an on-site inspection of an existing dam, NREP may grant or deny a certificate of inspection. If denied, the owner of the dam will be notified in writing, indicating the reasons for denial. The certificate will not be issued unless the following conditions have been met:

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[82] Id. § 151.291.

[83] Id. § 151.260.

[84] Id. § 151.990.

(1) The proposed action in the judgment of NREP will be conducted in such a way that the safety of the public is adequately provided for;

(2) All information requested by NREP has been provided; and,

(3) The changed flow of the stream or level of the reservoir will not significantly interfere with a beneficial use by other water users.

In granting the certificate of inspection, NREP may impose conditions on the operation, maintenance, and control of the dam which are necessary for the protection of public health, safety or welfare. NREP may also establish hazard categories for dams based on size, type and downstream floodplain use; and may impose different conditions based on these different categories.[85]

The certificate of inspection will be for a definite period of time not to exceed five years. The duration will be stated in the certificate. NREP may also modify a certificate of inspection or the conditions attached to it. These modifications will become

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[85] Id. § 151.293 (Baldwin Supp. 1978). There are three "hazard categories": high, moderate and low. The high hazard category indicates a potential for loss of life or loss of critical public utilities. The moderate hazard category indicates a potential for significant property damage or loss of less critical public utilities. The low hazard category indicates a potential for minimal property damage. 401 K.A.R. 4:040; see also NREP Engineering Memorandum No. 5 (2-1-75).

For moderate and high categories, "sub-surface" investigations must be performed by a licensed engineer at the cost of the dam owner. 401 K.A.R. 4:030 10.

While this section is validly enacted, it has not been implemented as of yet; and there is no indication when it will be implemented. Telephone conversation with Dave Booth, Water Resource Division of NREP (June 19, 1979).

effective 90 days following issuance by NREP, except during a state of emergency (as determined by NREP) when life or property would be endangered by delay. In the emergency situation, the modifications become effective immediately.[86]

Any plans submitted to NREP by the dam owner, pursuant to the requirements of the certificate, must be the responsibility of and signed by a licensed engineer, experienced in the design and construction of dams. The qualifications of the engineer will be determined by NREP.[87]

Notwithstanding the certificate of inspection, NREP may conduct regular inspections of dams and reservoirs to ensure the public safety. These inspections will be at intervals determined by the Secretary of NREP.[88]

Whenever NREP determines that the conditions of the certificate have been violated or the public safety is endangered by the failure or incapacity of the dam, whether or not a certificate was required, it may order the dam owner to take whatever action is necessary to render the dam safe. If NREP determines that the dam has been abandoned, or the owner fails to satisfactorily comply with NREP, or that the danger to life or property will not permit delay, NREP can declare that an emergency exists and take action to mitigate the danger. This action may include, but is not limited to:

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[86] KY. REV. STAT. ANN. § 151.293 (Baldwin Supp. 1978).

[87] Id.

[88] Id. § 151.294 (Baldwin 1972).

(1) Taking full charge and control of the dam;

(2) Lowering the water level or emptying the reservoir;

(3) Performing any necessary remedial or protective work at the site;

(4) Taking such other steps as may be necessary to safeguard life and property; or,

(5) Removing the dam.

The dam owner will be liable for the costs.[89]

5. Kentucky Wild Rivers Act

a. Generally

The General Assembly of Kentucky, in order to preserve the natural beauty and the historical, archeological, aesthetic and cultural values associated with many of the State's streams, has enacted the Wild Rivers System.[90] The system is to be administered by the Secretary of NREP, who shall adopt such rules and regulations as are necessary for the preservation and enhancement of the areas of those streams within the system. Streams within the system are designated by the Governor and General Assembly and meet the following criteria: "streams or sections of streams that are essentially free-flowing with shorelines and scenic vistas essentially primitive and unchanged, free from evidence of the works of man, and pleasing to the eye."[91]

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[89] Id. § 151.294 (Baldwin 1972).

[90] Id. § 146.220.

[91] "Free flowing" means existing or flowing in a natural condition without impoundment, diversion, straightening, or other modification of the waterway. The existence, however, of dams, diversion works, and other minor structures at the time any stream is proposed for inclusion in the Wild Rivers System does not automatically bar its consideration for such inclusion. Id. § 146.230 (Baldwin Supp. 1978).

The Secretary of NREP determines the general boundaries of the protected areas. This is to be accomplished in such a way that it includes "at least the visual horizon from the center of the stream, but not more than 2,000 feet from the stream center." Once the boundaries have been approved by the General Assembly, the Secretary of NREP is authorized to acquire the necessary property interests; this acquisition authority includes the power to condemn property. However, no land or interest in land can be acquired within any incorporated municipality or county when such entities have a valid ordinance or zoning plan in effect which substantially protects the same interests the Wild Rivers System seeks to protect.[92]

Any state agency must notify the Secretary of NREP regarding any studies, proceedings or other activities within their jurisdiction which affect a stream within the system. For example, the Energy Commission would have to notify NREP if it received a proposal for a hydro-site on a stream included in the system.[93]

b. Land Uses Permitted

Once a stream area is established, only certain land uses are permitted. New roads, structures or buildings may be constructed only where necessary to further the general purposes of the Wild Rivers System. In addition, all land disturbances,

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[92] Id. §§ 146.250, .280.

[93] Id. § 146.280.

such as strip mining, and instream distrubances, such as dredging, are prohibited. There are no prohibitions against uses of the stream in existence at the time the stream was included in the system. Furthermore, utility lines may be constructed as approved by the Secretary of NREP in writing, on the condition that the affected land be restored as nearly as possible to its former state.[94]

B. Natural Preserves System

The Kentucky Nature Preserves Act provides for the creation of a system of nature preserves in Kentucky. The system includes natural areas which are useful for scientific research; the teaching of biology, natural history and ecology; habitats for plant and animal species; and places of natural interest and beauty. A "natural area" includes an area of land or water or both, in public or private ownership, which maintains its natural character, though it does not have to be completely natural and undisturbed. "Nature Preserve" means a natural area formally dedicated under the provisions of the Nature Preserves System.[95]

Nature preserves are administered by a Nature Preserves Commission in conjunction with NREP.[96] While the Nature Preserves Commission does not have condemnation powers, another public body could exercise its eminent domain powers and acquire nature preserves land after a finding

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[94] Id. § 146.290.

[95] Id. §§ 146.410 to 146.530.

[96] The Nature Preserves Commission makes policy both separately and jointly with the NREP. However, the NREP is the enforcement mechanism of the Commission. Conversation with Dave Rosenbaum, Assistant Director of Water Resources Division, NREP (July 23, 1979).

by the Nature Preserves Commission of the existence of an imperative and unavoidable public necessity for such other use.[97]

D. Forestry

NREP supervises all forestry property. NREP may initiate and coordinate programs, adopt rules and regulations, and enter and inspect any premises in order to carry out its function as it pertains to State forests. NREP may receive by donation, purchase or lease, lands for forestry purposes and it may convey, exchange or lease such lands.[98] However, no such lands may be acquired by condemnation. Nor can any person acquire State forestry land by adverse possession.[99]

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[97] KY. REV. STAT. ANN. § 146.80 (Baldwin 1972).

[98] Id. §§ 149.010, .020.

[99] One acquires title to land by adverse possesion in Kentucky by occupying the land in question in an open and notorious manner for seven (7) years. Id. § 416.130 (Baldwin Supp. 1978).

V. ENERGY UTILITIES

A. Generally

1. The Energy Commission

All energy utilities in Kentucky are subject to the various requirements of the Energy Commission. An energy utility means any person or corporation, except a city, who owns, operates or manages any facility used or to be used for, or in connection with the generation, production, transmission or distribution of electricity to or for the public, for compensation. Thus, the Energy Commission only regulates those electric utilities that sell directly to the consuming public. Consequently, a wholesale SSH developer who plans to or is presently selling electricity only to another energy utility or to a municipal utility, is not subject to any of the Energy Commission's requirements. A private industry generating hydro power for its own use is also not subject to the Energy Commission's jurisdiction.[100]

The Commission is a body corporate, with power to sue and be sued and consists of three members appointed by the Governor. It has exclusive jurisdiction over the regulation of rates and service of all energy utilities. The Commission may adopt reasonable regulations to implement its purposes.[101]

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[100] Id. § 278.040. Note, however, that sales for resale (wholesale sales) of electricity are under the jurisdiction of the Federal Energy Regulatory Commission (FERC) even though they are not under the jurisdiction of the Kentucky Energy Commission.

[101] Id. § 278.040.

2. Division of Kentucky into Service Areas

In order to encourage the orderly development of retail electric service, the State of Kentucky has been divided into geographical areas. Each area establishes the territory in which each retail electric supplier may supply retail electric service. No retail electric supplier may furnish retail electric service in the certified territory of another retail electric supplier.[102]

The boundaries of the certified territory of each retail electric supplier are set as a line or lines substantially equidistant, (unless the lines are so intertwined in an area that really nothing can be "equidistant"), between its existing distribution lines and the nearest existing distribution lines of any other retail electric supplier in every direction. This results in an area which, in its entirety, is located substantially in closer proximity to one of its existing distribution lines than to the nearest existing distribution line of any other retail electric supplier. Upon request to the Energy Commission, a retail electric supplier will be required to file to the Commission a map or maps showing all of its existing distribution lines. The Commission will then prepare, within 120 days, a map or maps of uniform scale to show the boundaries of the certified territory of each retail electric supplier, and will then issue the maps to the retail electric suppliers. Any retail electric supplier

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[102] "Retail electric service" means electric service furnished to a consumer for ultimate consumption, but does not include wholesale electric energy furnished by an electric supplier to another electric supplier for resale, Id. § 278.010.

who feels itself aggrieved by reason of the designated territory, may protest to the Energy Commission within 120 days after issuance of the map. The Commission will, after hearing, and in its discretion, revise the certified territories.

In this hearing, the Commission will be guided by the following conditions as they existed on June 16, 1972:

(1) The proximity of existing distribution lines to such certified territory;

(2) Which supplier was first to furnish retail electric service, and the age of existing facilities in the area;

(3) The adequacy and dependability of existing distribution lines to provide dependable, high quality retail electric service at reasonable costs; and,

(4) The elimination and prevention of duplication of electric lines and facilities supplying such territory.[103]

3. Right to Service Area

Each retail electric supplier has the exclusive right to furnish retail electric service to all electric-consuming facilities located within its certified territory, and only those located within its territory. However, any retail electric supplier may extend its facilities through the certified territory of another supplier if such extension is necessary for connection of the original retail

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[103] Id. § 278.017.

electric supplier's facilities to serve its consumers within its own territory.[104]

If the Energy Commission, after a hearing, determines that any retail electric supplier is not rendering adequate service to an electric-consuming facility, it (the Commission) may enter an order specifying how the supplier is inadequate and further order correction of the deficiency within reasonable time, as noted on the order. If the retail electric supplier fails to comply with this order, the Commission may authorize another retail electric supplier to furnish retail electric service to such facility.[105]

Notwithstanding the effect of certified territories, a retail electric supplier may contract with another retail electric supplier for the purpose of allocating territories and consumers between such retail electric suppliers and designating which territories and consumers are to be served by which of the respective suppliers. This contract must be approved by the Energy Commission.[106]

4. Certificate of Convenience and Necessity

Every project meeting the definition of an energy utility must first obtain a certificate of convenience and necessity from the Energy Commission, showing that there is a need and demand for the service sought to be rendered, before beginning construction. An

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[104] Id. § 278.018. An "electric consuming facility" is one which utilizes energy from a central-station source. Id. § 278.010.

[105] Id. § 278.018. "Adequate service" means having sufficient capacity to meet the maximum estimated requirements of the customer to be served during the year following the commencement of permanent service and to meet the maximum estimated requirements of other actual customers to be supplied from the same lines or facilities during such year and to assure such customers of reasonable continuation of service. Id. § 278.010.

[106] Id. § 278.018.

existing retail electric supplier, who is merely expanding his service connections to electric-consuming facilities located within its certified territory, has no need to acquire an additional certificate. Upon the filing of an application for such a certificate, and after a public hearing of all parties interested, the Commission may issue or refuse to issue the certificate. Note that unless the construction authorized by the certificate begins within a year after the granting of the certificate, (exclusive of any delay due to the order of any court or failure to obtain any necessary grant or consent), the authority conferred will be void. In such a case, a new certificate will have to be obtained. Furthermore, no energy utility may apply for or obtain any franchise, license or permit from any city or other governmental agency until it has obtained from the Energy Commission, a certificate of convenience and necessity.[107]

Note too, that all carriers or conveyors of electricity or electric power are declared to be common carriers and subject to the obligation incident thereto. Thus, unjust and unreasonable charges for service are unlawful and charging of special rates, rebates or kickbacks, are unlawful and shall be deemed unjust discrimination.[108] Moreover, no common carrier may contract for relief from its common law liability.[109]

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[107] Id. § 278.020.

[108] Id. §§ 276.020, .290 (Baldwin 1972).

[109] KY. CONST. § 196.

5. Certificate of Environmental Compatability

In addition to the certificate of public convenience and necessity, and notwithstanding any other provision of the law to the contrary, no developer of an energy utility may begin construction of any hydro facility without first obtaining from the Energy Commission a certificate of environmental compatability. This requirement, however, does not apply to those facilities for which an application for a certificate was filed with or granted by the Public Service Commission (hereinafter PSC) prior to June 21, 1974.[110]

Prior to making application for this certificate, a "statement of environmental compatability" (hereinafter ECS) of the proposed site must be sent to NREP or any local pollution control district exercising concurrent jurisdiction with NREP. A fee, prescribed by regulation, must accompany this application. The ECS must contain information which NREP or its local arm considers necessary in making its report to the Energy Commission. "Among the factors which will be considered relevant are":

(1) A complete description of the proposed project; and,

(2) Comments on the effects of:

(a) the proposed facility on the waters of Kentucky;

(b) air pollutants from the proposed facility on public health and welfare;

(c) the treatment, handling and disposal of solid waste from the proposed facility;

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[110] KY. REV. STAT. ANN. § 278.025 (Baldwin Supp. 1979).

(d) noise pollution if any; and,

(e) other adverse environmental effects which cannot be avoided.[111]

NREP will give its report and analysis to the ECS within 60 days, noting any recommendations or objections to the proposed facility. The Commission, upon request by NREP, may extend this period by 30 days. Upon receipt of this report, (or if the period for filing the report has expired without receipt of such report), the Commission will conduct a public hearing on the application which will be open to all interested persons. In granting or denying the application, the Commission shall consider the community needs, the industrial development, customer requirements, and the economics of the facility, all of which will be balanced against any adverse environmental factors.[112]

6. Effect of 400 Kilovolt Transmission Line.

When the proposed facility requires a new electric transmission line of 400 kilovolts or more, the Energy Commission is mandated to publish notice of the public convenience and necessity certificate hearings in a newspaper or newspapers of general circulation in the counties and municipalities within which the transmission facility will be located. This notice must run for at least four days during the 30 days immediately preceding said hearings. The Commission will not issue the certificate for a new electric transmission line

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[111] Id.

[112] "Interested" person means any person whose living environment would be affected by the construction of the hydro facility. Id. § 278.025.

of this capacity unless it is determined by the commission that the proposed route of the line will reasonably minimize adverse impact on the scenic and environmental assets of the general area concerned. This determination will be consistent with engineering and other technical and economic factors appropriate for consideration in designing the route of the line. At this public hearing, all persons residing on or owning property affected by the proposed transmission facility may be heard.[113]

7. Rates

Every energy utility may demand, collect and receive fair, just and reasonable rates for the services rendered.[114] To ensure these reasonable rates, each energy utility may employ in the conduct of its business suitable and reasonable classification of its service, patrons, and rates. Note, that if the utility is not municipally owned, then it will have to petition the Energy Commission for any rate increase, regardless of whether it is operating under a franchise from a local government.[115] But, the Commission's authority to regulate rates and services, and to enforce statutory provisions does not include the authority to compel an energy utility to furnish service over and above what is adequate and reasonable, or to forego

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[113] Id. § 278.027 (Baldwin Supp. 1978).

[114] Id. § 278.030.

[115] OP. ATT'Y GEN. 200 (1977).

the use of reasonable classifications as to service and rates.[116]

8. Procedure

Under rules prescribed by the Energy Commission, each energy utility must file with the Commission, schedules showing all rates established by it and collected and enforced. Additionally, the utility must keep copies of its schedules open to public inspection pursuant to rules the Commission prescribes.[117]

No energy utility may discriminate in rates or service. However, a utility may grant free or reduced rate service to its officers, agents or employees and may exchange free or reduced rate service with other utilities for the benefit of the officers, agents and employees of both utilities. Moreover, any utility may grant free or reduced rate service to the United States government, to charitable institutions, and to persons engaged in charitable work. It may also grant free or reduced rate service for the purpose of providing relief in case of flood, epidemic, pestilence or other calamity.[118]

No changes in rates may be made by any utility except upon 20 days (less time if, upon application, the Energy Commission agrees)

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[116] See Marshall County v. South Central Bell Tel. Co., 519 S.W.2d 616 (1975). In Marshall, the PSC had the authority to require the cost of a particular kind of service in a particular area to be borne system-wide rather than by the patrons of the particular area and to require the utility to provide an advanced quality of service to a particular area, if the area, as to other comparable areas, was spreading the cost system-wide and was furnishing the advanced quality of service.

[117] KY. REV. STAT. ANN. § 278.160 (Baldwin Supp. 1978).

[118] Id. § 278.170.

notice to the Energy Commission, stating plainly the changes proposed to be made and the time when the rate changes will go into effect. On the other hand, the Energy Commission may not order a rate change unless it gives the identical kind of notice to the affected utility. Any aggrieved person may petition, within that 20 day period, for a hearing, and will be entitled to one before any order by the Commission is prescribed.[119]

Whenever any utility files with the Energy Commission for a rate change, it must follow the Commission's procedure. These procedures will likely result in a hearing.[120]

The Energy Commission also has the power to regulate those rates and service schedules of a utility which are fixed by agreement with any city.[121] It may also establish a system of accounts to be kept by utilities subject to its jurisdiction, and it has access to property, books and records of the utility for inspection and

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[119] Id. § 278.180

[120] Id. § 278.190. A hearing is likely because the Energy Commission may call one upon its own motion or under complaint by any of the following:
(1) any mercantile, argicultural or manufacturing society;
(2) any body politic or municipal organization;
(3) any utility or any ten (10) patrons of the utility complained of; or,
(4) by any ten (10) complaintants of all or any of the aforementioned classes.

The complaint must allege that the rates are unreasonable or unjustly discriminatory, or that any regulation or act affecting the utility's service is unreasonable, unsafe, insufficient or unjustly discriminatory. Id. § 278.190(1); § 278.260.

[121] Id. § 278.200. Under this proviso, a city in granting a public utility a franchise, whether an entirely new franchise or a renewal, has the right to prescribe the character of service to be rendered and the rates to be charged at the beginning; thereafter exclusive power to regulate rates and service is vested with the Energy Commission. People's Gas Co. v. Barboursville, 291 Ky. 805, 165 S.W.2d 567 (1942).

examination. Each utility must file with the Commission any reports, schedules or other information which the Commission reasonably requires. Whenever it is necessary in the performance of its duties, the Commission may investigate and examine the condition of any utility subject to its jurisdiction. This investigation may be conducted with or without a hearing, but if without a hearing, then no order will be given until a hearing is given to the affected parties. The Commission may also investigate, with or without notice, a utility, when complaints as to rates or service are received. But again, no order shall be given without a formal public hearing.[122]

Whenever the Energy Commission, upon its own motion or upon complaint, and after a hearing held upon reasonable notice, finds that any rate or service of a utility is unjust, unreasonable, unsafe, improper, inadequate or insufficient, the Commission shall by order, prescribe alleviating rates and services.[123]

In general, hearings, rehearings, judicial review, and appeals are conducted pursuant to statutory guidelines.[124]

B. Municipal Utilities

1. Tennessee Valley Authority

The Tennessee Valley Authority (hereinafter T.V.A.) Act is intended to be the complete law of Kentucky with respect to any municipal acquisition and operation of electric plants acquired

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[122] KY. REV. STAT. ANN. §§ 278.220, .230, .250, .260 (Baldwin Supp. 1978).

[123] Id. §§ 278.270, .280.

[124] Id. §§ 278.310 to 278.450 (Baldwin Supp. 1978).

after June 1, 1942.[125] Thus, it is not necessary for any municipality, proceeding under T.V.A. purview, to obtain a certificate of convenience and necessity, license, permit, or other authorization from any board, commission (this includes the Energy Regulatory Commission) or other agency of Kentucky, in order to acquire and operate an electric plant.[126] There is one exception, however: the municipality will still have to obtain a certificate of environmental compatability before any construction of an electricity generating facility may commence.[127] Moreover, before any municipality will have authority to acquire an electric plant, the proposal must be endorsed by a majority vote in the municipality affected.[128]

Before a municipality may acquire an existing electric plant, via condemnation proceedings, the municipality must make an effort to buy the privately owned plant for a reasonable price. Absent such an agreement, condemnation proceedings may begin.[129] Under its power of condemnation, a city has the right to acquire: all lands, easements and rights of way, either upon, under or above the ground; any existing electric plant; or that part of any plant within the corporate limits of the city. The city may also acquire any and all real estate, franchise or personal property reasonably necessary or desirable in connection with the construction or operation or

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[125] "Acquire" includes construction, purchase, leasing, inheritance, receiving as a gift, or obtaining via condemnation proceedings pursuant to Id. §§ 96.580 to 96.600; 96.550 (Baldwin 1972).

[126] Id. § 96.880.

[127] Id. § 278.025 (Baldwin Supp. 1979).

[128] Id. § 96.640 (Baldwin 1972).

[129] Id. § 96.590; 96.600.

maintenance of its newly acquired electric plants. Note, however, that this power of the city does not apply to facilities principally and primarily used to generate electricity outside the area served by the municipality, or in a newly acquired service area already served by a utility.[130]

In addition to powers relating to the construction of a municipal electric plant, the board of directors for such plant may acquire franchises and enter into contracts to sell electricity to any other municipality or county or their inhabitants. Although a municipality, operating under the T.V.A. Act, may not compete with a rural electric cooperative corporation (hereinafter RECC) or another municipal electric plant, it may enter into cooperative agreements with them. Such agreements may provide for the exchange of electrical service, the cooperative use of transmission lines and other facilities as well as the common use or exchange of other services or facilities.[131]

2. Sale of Public Utility Franchise by City

At least 18 months before the expiration of any franchise acquired by an electric producer, the legislative body of each city must provide for the sale of a new franchise to the highest and best bidder on terms that are fair and reasonable to the city, to the purchaser of the franchise and to the patrons of the utility. The terms shall

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[130] Id. §§ 96.010, .538, .580, .590 (Baldwin 1972); see Nicholsville v. Blue Grass Electric Coop Corp., 514 S.W.2d 414 (Ky. App. 1974).

[131] KY. REV. STAT. ANN. §§ 96.560, .579, .890 (Baldwin 1972).

specify the quality, quantity and price of the service.[132] If the old franchise holder is not the highest and best bidder, however, the city is not compelled to sell the franchise to an outsider.[133]

Each person desiring to bid for the franchise offered for sale must first deposit with the proper officer of the city, cash or a certified check equal to 5% of the fair estimated cost of the plant required to render the service. This deposit will be forfeited to the city if the bidder, upon acceptance of his bid by the city, fails to pay the bid price and to give a sufficient bond in a sum equal to 1/4 of the fair estimated cost of the proposed plant within 30 days after confirmation of the sale. The bond must be conditioned to be enforceable if the person giving it fails in his obligation to render the service. Reasonable time will be given to erect and operate a suitable plant for rendering the contracted-for-service.[134]

Any city may also acquire a franchise and contract to furnish electricity to any other city, in the same manner as described above.[135] However, no municipality in which there is an existing electric plant may construct a similar facility or obtain the existing facility in any fashion other than by purchase. Moreover, any utility providing electric service in any area annexed by the city subsequent to

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[132] Id. § 96.010.

[133] See Kentucky Utilities Co. v. Bd. of Commrs., 254 Ky. 527, 71 S.W.2d 1024 (1933).

[134] KY. REV. STAT. ANN. § 96.020 (Baldwin 1972).

[135] Id. §§ 96.045, .120, .130. For other general provisions concerning the establishment and operation of municipal electric plants by cities of the first, second, third and fourth classes, see generally Id. §§ 96.040 to 96.310 (Baldwin 1972); 96.535 (Baldwin 1972); 96.537 (Baldwin Supp. 1978); 96.538 (Baldwin 1972); 96.540 (Baldwin 1972).

June 16, 1960, has the dominant right to continue to provide electric service in that area to consumers then being served, and to any new consumers located nearer to its facilities than to the facilities of any other utility, as all such utilities were located prior to annexation.[136]

3. Rates of Municipally-owned Utilities

The Energy Commission, by regulation, may require the appropriate authorities annually to report, on a prescribed form, data relating to rates, finances, and operation of municipally-owned electric utilities. The rates charged for services by municipally-owned electric utilities may not be increased unless a public hearing is held after a reasonable notice. The rates charged for services and the standards of services maintained by municipally-owned electric utilities must be the same for customers inside and outside the corporate limits.[137]

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[136] Id. § 96.538 (Baldwin 1972). To the extent that subsection (2) of 96.010 provides that a city does not have to offer an electric franchise for sale in an annexed area already served by an electric utility in favor of service by a municipal plant, it was impliedly repealed by § 96.538. Nicholasville, 514 S.W.2d at 414.

[137] KY. REV. STAT. ANN. §§ 278.046, .047 (Baldwin Supp. 1978). There is some confusion in Kentucky as to the exact jurisdiction of the Energy Commission with regard to municipally-owned electric utilities. Case law indicates that all operations of a city utility are exempted from the jurisdiction of the Energy Commission. See McClellan v. Louisville Water Co., (Ky. 1961). (In 1961, there was no separate "Energy Commission" but its purview was incorporated in the then Public Service Commission). Moreover the Energy Commission itself indicated that it has no jurisdiction over municipally-owned electric utilities. Telephone conversation with Jim Grider of the Energy Commission (July 24, 1979). Footnote 137 cont'd on page 54.

C. Rural Electric Cooperative Corporations (RECCs)

1. Generally

Three or more inidviduals, partnerships, associations or private corporations, a majority of whom are citizens of Kentucky, may organize to conduct an electric generation, transmission, distribution or service nonprofit cooperative corporation to furnish energy to any person or corporation, by executing, filing and recording articles of incorporation. RECCs will be subject to the jurisdiction of the Energy

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[137]Footnote 137 cont'd. There is a statute, however, KY. REV. STAT. ANN. § 278.047 (Baldwin Supp. 1978), which clearly indicated that a municipally-owned electric utility must conduct a hearing before any rate change takes place. However, there is not statutory language which indicates under whose authority this hearing requirement is imposed. The Energy Commission has never implemented § 278.047 and assumes it was inserted into chapter 278 of the KY. REV. STAT. ANN. by mistake. Telephone conversation with Jim Grider of the Energy Commission (July 24, 1979). In any event, the Energy Commission completely disregards this statute (so far). And yet, an opinion of the Kentucky Attorney General specifically indicates that § 278.047 applies to all municipally-owned electric utilities, including those under T.V.A. purview. OP. ATT'Y GEN. 78 (1977).

Cognizant of the above, the municipal SSH developer should regard § 278.047 as a statute enacted but not implemented and proceed with caution accordingly. On the other hand, if the statute is just inserted in the wrong chapter, then municipals must conduct a hearing in any event.

Commission.[138]

RECCs are operated on a nonprofit basis for the mutual benefit of its members and patrons. No person may become a member (or remain one) except a farmer, a person engaged in the production of agricultural products or livestock, a cooperative association as defined in the Farm Credit Act, or another RECC. Furthermore, no person other than the original incorporators may become or remain a member without capital stock, unless, in addition to complying with all membership requirements, such person uses electricity supplied by the RECC or by a corporation that is a member of the RECC or by another RECC, or is a corporation furnishing electric energy. Additionally, neither the incorporators nor any member of any RECC will be personally responsible for any debt, obligation or liability of the RECC, except for promissory notes given for the purchase of common stock in the corporation.[139]

RECCs may do business with their members and with nonmembers to the extent that not more than 25% of its total business is derived from nonmembers (this includes governmental units). However, an RECC cannot sell electricity to a municipally-owned electric utility, either directly or indirectly, unless the RECC was connected to the

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[138] Id. §§ 278.020, .030, .040, .045 (Baldwin Supp. 1978). For the purpose of determining whether an RECC is actually operating on a nonprofit basis, the Kentucky Department of Revenue may require it to file schedules and reports showing that it has no franchise value over and above the value of its tangible property. See Inter-County RECC v. Reeves, 294 Ky. 458, 171 S.W.2d 978 (1943).

[139] KY. REV. STAT. ANN. §§ 279.090, .095 (Baldwin Supp. 1978).

municipal electric utility on or before June 21, 1974. This prohibition does not prevent an RECC from interconnecting for exchanges of energy with any such municipal utility which, on June 21, 1974, owned and operated an electric generating facility adequate to supply the electric requirements of the municipality.

Any two or more RECCs may enter into an agreement for their consolidation to provide service in a contiguous territory.[140]

Other electric companies are required to sell to RECCs if the RECC is willing and able to pay the same rates for such energy as are paid by other consumers in the same territory, using a comparable amount of energy. Note that this provision does not forbid discrimination based on the load factor or diversity factor.[141]

2. Fees for Articles and Amendments

For action upon filing and recording articles of incorporation, articles of consolidation, articles of dissolution or amendments to these articles, the RECC must pay to the Secretary of State a sum not to exceed $2, and must also pay to the county clerk a sum not to exceed $3. These fees will be in lieu of all recording taxes.[142]

3. Taxes

RECCs are exempt from all profit taxes, gross and net taxes, sales taxes, occupation taxes, privilege taxes, income taxes, taxes on electric current consumed and from some excise taxes.[143] In lieu

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[140] Id. §§ 279.120, .125, .170.

[141] Id. § 279.150.

[142] Id. § 279.200 (Baldwin 1972).

[143] Id. RECCs are not exempt from the excise taxes levied under KY. REV. STAT. ANN. ch. 138.

of all of these taxes, and except for franchise taxes, property taxes,[144] and the utilities gross receipts tax for schools,[145] RECCs must pay to the state treasurer an annual tax of $10.[146]

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[144] Inter-County RECC, at 458, 171 S.W.2d at 978.

[145] OP. ATT'Y GEN. 507 (1974).

[146] KY. REV. STAT. ANN. § 279.200 (Baldwin 1972).

VI. LOCAL REGULATIONS

A. Land Use

1. City and County

The developer must seek permits and whatever else may be required by the zoning boards of the area he plans to develop. Not every area has a zoning board or zoning plan. Cities and counties may zone on an interim or permanent basis to promote health, safety, morals and the general welfare of the planning unit, to facilitate orderly and harmonious development, and to promote and protect the visual or historical character of the planning unit.[147]

A variance may be sought by the developer if he does not like the zoning requirements. However, a variance may not contradict zoning regulations. Before any variance is granted, the planning board of the locality must find all of the following:

(1) The specific conditions in detail which are unique to the applicant's land and do not exist on other land in the same zone;

(2) The manner in which the strict application of the provision of the zoning regulation would deprive the applicant of a reasonable use of the land in the manner equivalent to the uses permitted other landowners in the same zone;

(3) That the unique conditions and circumstances are not the result of actions of the applicant taken subsequent to the adoption of the zoning regulation; and,

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[147] Id. § 100.201 (Baldwin 1972).

(4) Reasons that the variance will preserve, not harm the public safety and welfare, and will not alter the essential character of the neighborhood.[148]

For the variance to be granted, there must be a showing of unnecessary hardship.[149]

Exceptions from required approval of the local planning unit are any proposals affecting land use by any department, commission, board, authority, agency or instrumentality of state government, and public utilities operating under the jurisdiction of the Kentucky Energy Commission or Federal Energy Regulatory Commission (FERC). However, upon request of the Planning Commission, the public utility excepted must provide the Planning Commission, of the planning unit affected, information concerning service facilities which have been located on or relocated on private property. Similarly, adequate information concerning state proposals are to be furnished to the planning unit by the respective state department, commission, or board.[150]

2. Area Planning

Although local Planning Commissions preempt any area planning,[151] two or more adjacent counties, one of which has a city having a population of more than 50,000 and not more than 200,000 inhabitants,

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[148] Id. §§ 100.243, .47.

[149] See Bray v. Beyer, 292 Ky. 162, 166 S.W.2d 567 (1942).

[150] KY. REV. STAT. ANN.§§ 100.324, .361 (Baldwin 1972).

[151] See Northern Kentucky Area Planning Commission v. Campbell County, 509 S.W.2d 277 (Ky. 1974).

may consolidate their planning operations by the creation of an area Planning Commission. Once an area planning unit is created by the cities and counties affected, it will constitute a political subdivision with the power to sue and be sued, and the right to levy an annual tax which shall not exceed 5¢/$100 of assessed valuation of property.[152]

The area Planning Commission is to make recommendations to local legislative bodies regarding land use and zoning. The commission is to develop a master plan for the entire area within its jurisdiction, covering both incorporated and unincorporated territories. This master plan is to include studies of the population and economy of the area and recommendations regarding future land use.[153]

It is prohibited by statute for any developer to construct or authorize the construction of any public utility, privately or publicly owned, within the area planning unit's boundaries unless the proposal has been reviewed and recommendations are made by the area Planning Commission upon proper presentation and hearing.[154]

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[152] KY. REV. STAT. ANN. § 147.610 (Baldwin Supp. 1978).

[153] Id. § 147.650.

[154] Id. § 147.680. Section 147.710, however, has not been actively implemented as it pertains to energy utilities; energy utilities are not subject to an area planning unit's approval. Telephone conversation with William Sawyer, General Counsel, Kentucky Energy Commission, on July 27, 1979. Thus, in effect, energy utilities are not under the jurisdiction of any local landuse planning unit, whether municipal, county or area.

Anyone aggrieved by the Commission's ruling on the above matter may appeal the decision or action to the Circuit Court of the county in which the major portion of the land affected by such decision or action lies. Such appeals must be taken within 30 days after notice of the Commission's action has been given. The aggrieved party has to file a statement of appeal in the Court Clerk's office, setting forth the grounds for such appeal, with a certified copy of the Commission's decision attached.[155] Any person violating the prohibition of construction will be fined a sum not less than $100 but not more than $500.[156]

3. Soil and Water Conservation

a. Soil and Water Conservation Commission

Although the Soil and Water Conservation Commission is a state agency, its regulations are implemented by the various soil and water conservation districts scattered throughout the state. The Commission's basic function is to determine the administrative and practical feasibility of the soil and water conservation districts. The Commission has the power to deny the petition for the establishment of a district.[157]

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[155] KY. REV. STAT. ANN. § 147.710 (Baldwin 1972).

[156] Id. § 147.990.

[157] Id. §§ 262.080, 130.

b. Soil and Water Conservation Districts

Once established, a soil and water conservation district is to be a body corporate and politic; its governing body is to be a Board of Supervisors. The purpose of the district is to conserve and develop all renewable natural resources within the district. To achieve its purpose, the Board of Supervisors for the district may acquire, via any lawful means (including condemnation proceedings) any property rights or interests in property, and may construct, improve and maintain structures necessary or convenient for the performance of authorized operations. The Board may develop a comprehensive soil conservation plan in order to conserve soil resources, and control and prevent erosion. Land use regulations may be adopted by the Board of Supervisors in order to control erosion and prevent flooding. However, no such regulation may be adopted until it is approved by 90% of the votes cast by referendum in the district. In order for the referendum to be valid, the owners of at least 80% of the land within the district must have voted.[158]

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[158] Id. §§ 262.100 to 262.150, .200, .290, .310, .350, .360. (Baldwin 1972 and Supp. 1978). Referendums on adoption, amendment, supplementation or repeal of land-use regulations shall not be held more often than once in 6 months. Id. § 262.410 (Baldwin 1972).

Any landowner within the district may at any time file a petition with the board asking that any or all of the land-use regulations prescribed by the Board be changed or repealed. On the other hand, the Board may petition to the Circuit Court to compel observance of land-use regulations promulgated by the Board where the Board finds violations of them. The Board may also recover costs and expenses of its work to bring lands in violation of the regulations into conformity; assessing interest at the rate of 5% per annum.[159]

Any landowner or occupier may file with the Board of Adjustment of the Board of Supervisors, a petition seeking a variance, claiming that there are a great many practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the land-use regulations upon his land. Appeals from the Board of Adjustment's decision may be taken to the Circuit Court of the county within which the lands of the petitioner lie.[160]

c. Watershed Conservancy Districts

Watershed conservancy districts may be formed as sub-districts within a soil and water conservation district. Their purpose is to develop and execute plans and programs relating to any phase of the conservation of water, water usage, flood prevention and control, and the control of erosion and floodwater

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[159] Id. §§ 262.410, .430.

[160] Id. §§ 262.490, .500, .520. A Board of Supervisors of a soil and water conservation district that has adopted land-use regulations must provide for the establishment of a board of adjustment. Id. § 262.460.

and sediment drainage. Once formed, a watershed conservancy district is to constitute a political sub-division and is to be administered by a Board of Directors.[161] The Board may acquire, by purchase or condemnation, title to lands, including easements and flowage rights,[162] as are necessary for the purpose of the district.[163] The Board may also construct, improve, operate and maintain such structures as may be necessary for its authorized purpose. The determination of a watershed project's necessity is to occur through the procedure of notice, hearing and an election on the question of such project. However, only owners of benefitted land will be eligible to vote. Any benefitted owner seeking to challenge the election must, within 40 days after publication of such notice of the decision, file an action in the Circuit Court of the county in which his lands are located. Failure to file within the 40-day period will prevent any subsequent challenge by the landowner.[164]

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[161] Id. §§ 262.700, .705, .740, .745 (Baldwin Supp. 1978).

[162] If this is the situation, the developer will have to acquire these rights from the local watershed conservancy district.

[163] A watershed conservancy district exercising condemnation power under this section does not by such condemnation, acquire fee simple title, but acquires only an easement to make use of such land as may be necessary for purposes of the particular project. OP. ATT'Y GEN. 763 (1963).

[164] KY. REV. STAT. ANN. § 262.745, .778 (Baldwin Supp. 1978).

4. Obstruction of County Roads

Where a county road passes over a dam, the dam owner must keep the dam in good order and place railings (at least 14 feet from the pierhead and floodgates) on both sides of the dam. Additionally, every owner of a dam, which was built after 1914 and which obstructs a county road by backing up water or otherwise, must, whenever it is necessary for the safe and convenient crossing of the road or the pond created by the backflow, build and keep in repair a bridge over the dam or pond. This bridge must be at least 14 feet wide and include railings on both sides.[165]

B. Water Use

1. Water Resources Authority of Kentucky

The Governor, the Secretary of NREP, the Commissioner of the Department of Fish and Wildlife and others are members of a body of politic called the Water Resources Authority of Kentucky. This authority deals with the development and maintenance of an adequate drinking water supply in Kentucky. Among its powers are the power to construct, maintain, repair and operate water resource projects in Kentucky, and the power to acquire interests in any land, via any legal means, including condemnation.[166]

2. Water Districts

A water district may be established for the purpose of furnishing

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[165] Id. § 178.300.

[166] Id. § 151.330. "Water resource project" means any construction, development, improvement or any other activity intended to conserve and develop the water resources of Kentucky. Id. § 151.100.

a water supply to the citizens of the county.[167] These water districts have the right to acquire rights-of-way or land by purchase and condemnation. Any two or more of the water districts may join and operate sources of water supply together, acting jointly under the purview of one Commission.[168] However, this Commission of joint water districts does not possess condemnation powers.[169]

3. Flood Control and Water Usage

For the purpose of protecting against floods and highwater, cities of all classes are authorized to establish flood control systems. To help implement these flood control systems, the Secretary of NREP may establish flood control districts. These districts will operate and maintain flood control works located within the cities or counties of the district.[170]

Each city may acquire all convenient rights of way and other property by any legal means, including condemnation, if it becomes necessary in order to fulfill its flood control purposes.[171]

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[167] Id. § 79.010 (Baldwin 1972). "Sources of water supply" for purposes of water districts' authority, includes impounding reservoirs and all other appurtenances useful in connection with developing and furnishing a supply of water under pressure into the water distribution system. Id. § 74.420.

[168] Id. §§ 74.090, .430, .440 (Baldwin Supp. 1978).

[169] OP. ATT'Y GEN. 432 (1971).

[170] KY. REV. STAT. ANN. §§ 104.030, .450 to .680 (Baldwin 1972).

[171] Id. § 104.070.

4. Levee, Drainage and Reclamation of Lands

a. Levees

In counties of less than 200,000 people, when it becomes conducive to the public health, convenience or welfare, or when it will be of public benefit or utility, the County Judge may establish and aid in the construction of any levee along a river or watercourse within the county or on its border.[172]

b. Drainage and Reclamation Act of 1912

Any County Judge may, for the purpose of draining or reclaiming low, swampy or overflowed land in the county, locate, establish and have constructed any levee, ditch, drain and have straightened, widened, or deepened any creek or non-navigable watercourse. The County Board of the Drainage Commission may remove obstructions from natural drains that constitute an outlet for any public ditch. The cost of any repairs or improvements of any natural drain, under this authority, must be borne by the owner of the affected land. Orders of the Drainage Commission may be appealed.[173]

c. Drainage and Reclamation Act of 1918[174]

Any owner affected by proposed changes, amendments and corrections to the reclamation plan of the county may file an

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[172] Id. § 266.010 (Baldwin Supp. 1978).

[173] Id. §§ 267.020, .070, .100, .470.

[174] Id. § 268.010 (Baldwin 1972). For a full discussion, see page 23, supra Note, however, that "drain" for this Act, includes any canal, channel, watercourse, conduit, stream, creek, river, pond or lake.

objection to the granting of the proposed plan before the date named in the notice of the proposal. The objection is to be filed to the Fiscal Court organizing the reclamation district.[175]

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[175] Id. § 268.010 (Baldwin Supp. 1978).

VII. INCIDENTAL IMPACTS

A. Compacts and Agreements

Kentucky is a member of various compacts and agreements which may indirectly impact on the SSH developer by lobbying the Kentucky agencies who directly impact on the SSH developer.

1. Breaks Interstate Park Compact

This Compact is between Kentucky and Virginia and was created to develop and operate the Breaks Interstate Park. The Park is located along the Russel Fork of the Levisa Fork of the Big Sandy River. The Compact is administered by the Breaks Interstate Park Commission. All governmental agencies of Kentucky are authorized to cooperate with this Commission. The Commission may condemn land for its purposes.[176]

2. Falls of the Ohio Interstate Park Compact

This Compact is between Kentucky and Indiana and was created to develop and operate an interstate park located along the Ohio River at the Falls of the Ohio, in Louisville, Kentucky. Each participant state will exercise the power of eminent domain to acquire property, located within its state, required by the Falls of the Ohio Interstate Park Commission to effectuate the purposes of the Compact.[177]

3. Interstate Environmental Compact

This Compact's purpose is to assist and participate in the

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[176] Id. § 148.220 (Baldwin 1972).

[177] Id. § 148.241.

national environmental protection programs as set forth in Federal legislation; to promote intergovernmental cooperation for multi-state action relating to environmental protection through interstate agreements; and, to encourage cooperative and coordinated environmental protection by the member states and the Federal government. The members may enter into agreements for the purpose of controlling interstate environmental pollution.[178]

4. Ohio River Valley Water Sanitation Compact

The guiding principle of this Compact is that pollution by sewage or industrial waste, originating in member states, must not injuriously affect the various uses of the interstate waters. The Compact is administered by the Ohio River Valley Water Sanitation Commission. To effect the purpose of the compact, all member states agreed to treat sewage and industrial waste entering the Ohio River and its tributaries. The member states are: Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Tennessee and West Virginia.[179]

5. Southern Growth Policies Agreement

This Agreement is between Kentucky and several of its neighboring states. The purpose of the Agreement is to provide for improved facilities and procedures for study and analysis, and planning of government policies and activities of regional

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[178] Id. § 224.610.

[179] Id. § 224.190.

significance. A Board is created which is to prepare a statement of regional objectives and identify projects deemed to be of regional significance. Two or more of the party states, desiring to prepare a single or consolidated plan or a land use plan for any interstate area lying partly within each state, may, by acting through the Governors of the states, designate the Board as their joint agency for the purposes of the Agreement.[180]

6. Tennessee River Basin Water Pollution Control Compact

This Compact is composed of those states located in the Tennessee and Cumberland River Basins. The Compact's governing Commission promotes, coordinates, and maintains pollution control and water quality standards in the Tennessee River Valley area. The Commission cooperates with T.V.A., collects and maintains water quality data, and engages in long-range water quality planning. This Compact, like the Ohio River Valley Water Sanitation Compact, deals primarily with the control of sewage and industrial waste.[181]

7. Tennessee-Tombigbee Waterway Development Compact

This Compact promotes the development of a navigable waterway connecting the Tennessee and the Tombigbee system to Mobile, Alabama. The Compact's members are: Kentucky, Florida, and the states through which this waterway will eventually flow: Alabama,

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[180] Id. § 147.580 (Baldwin Supp. 1978).

[181] Id. § 224.195 (Baldwin 1972).

Mississippi, and Tennessee. The Tennessee-Tombigbee Waterway Development Authority administers the Compact.[182]

B. Agencies

1. State and National Parks

Kentucky's parks are administered by the Department of Parks (hereinafter DOP), which is headed by a single Commissioner. DOP administers all functions of the state relating to the operation of the state parks, shrines, monuments, and museums, except those allocated to the Historical Society. DOP may condemn any land or any interest in land within areas of Kentucky for park sites.[183]

No unauthorized person may enter a wildlife sanctuary to unduly disturb the wildlife; authorization is via a permit issued by DOP. Violators of this provision will be fined not less than $10 nor more than $100. Nor may anyone violate the posted rules and regulations in the parks. Violators of this provision will also be fined not less than $10 nor more than $100, and in addition, may be imprisoned for not less than one day nor more than ten days.[184]

2. Fish and Wildlife

The Department of Fish and Wildlife Resources is a state agency with eminent domain power to acquire land deemed necessary to protect or conserve wildlife. The Department is administered,

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[182] Id. § 182.300.

[183] Id. §§ 148.011, .021, .121.

[184] Id. §§ 148.029, .991 (Baldwin Supp. 1978).

and its rules and regulations enforced by, the Fish and Wildlife Commission, which is headed by a Commissioner. He is obligated to enforce all laws and regulations of the Department. The Department may also, with the approval of the Commissioner of the Executive Department for Finance and Administration, and the consent of the Governor, enter into any agreement with the United States Government or one of its departments or agencies, or with any individual, with regard to the preservation, protection and propagation of wildlife.[185]

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[185] Id. §§ 150.015, .024, .250 (Baldwin 1972).

VIII. FINANCIAL CONSIDERATIONS

A. Loans and Grants

1. Kentucky Development Finance Authority

This Authority was created under the Kentucky Development Finance Act and has, as part of its purpose, the promotion of business and economic development opportunities in Kentucky. Among the powers of the Authority are: (1) the power to assist any person or corporation making application to the government for financial assistance under any program, which assistance may include the expenditure of available funds to obtain the advice of experts in the preparation of applications of business and industry, when such experts are not available among Authority employees; and (2) to establish a nonprofit mortgage insurance corporation to insure business and industrial loans.[186]

When it has been determined by the Authority that the establishment of a particular industrial project accomplishes the purpose of the Authority, it may contract to loan, from the industrial development finance fund, an amount not in excess of 50% of the estimated cost of such industrial project. The project must concern a tract of land of not less than 25 acres located within or near the corporate limits of a city, that has been acquired and operated by an incorporated organization whose members or shareholders make no profit, and have as its primary purpose the encouragement and development of industrial and manufacturing enterprises. A similar

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[186] Id. §§ 150.001, .005, .020 (Baldwin Supp. 1978).

low interest loan or grant may be acquired if the project will serve two or more counties or is developed by a city, county, riverport authority or local development authority.[187]

Before granting loans on industrial subdivision projects, as described above, the Authority must first determine: (1) that the local development agency holds funds or property or has obtained from other independent and responsible sources, firm commitments for funds at least 50% of the estimated cost of establishing the project; and (2) that the sum of these funds and the loan made by the Authority is adequate to acquire clear title to the land to be used for the project. The Authority may also lend money to any applicant on a coparticipation basis with a business development corporation, and to local development agencies.[188]

2. Business Development Corporations

A business development corporation is empowered to make loans to any person, firm, corporation, joint-stock company, association or trust, and to establish and regulate the terms

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[187] Id. § 150.110 (Baldwin Supp. 1978). There has never been an application to the Development Finance Authority for a SSH facility loan; consequently, there has been no determination as to whether "manufacturing" will include the generation of electricity. The Finance Authority did indicate, however, that a key factor in determining eligibility for a loan is the degree to which the applicant's business is labor intensive. In any event, the SSH developer would have to exhaust normal financial routes (i.e., banks or loan companies) before applying to the Development Finance Authority. Telephone conversation with Rodney Dempsey, Assistant Director of the Kentucky Development Finance Authority (July 24, 1979).

[188] Id. §§ 154.120, .125 to .146 (Baldwin 1972).

and conditions with respect to these loans, in order to promote its purpose of developing the economic welfare of Kentucky. Any 25 persons, the majority of whom are Kentucky residents, may create a business development corporation.[189]

The business development corporation may not approve any application for a loan unless and until the person applying for the loan proves he has applied for the loan through ordinary banking channels and was denied by at least one bank or other financial institution. Interest may be charged on these loans at a rate of not more than the higher of: (1) the statutorily-based rate schedules (the legal interest rate; for the most instances it is 6%); or, (2) 2% in excess of the prime rate prevailing on unsecured commercial loans among the majority of the New York City clearing house member banks on the first day of the month in which the loan is made.[190]

3. Riverport Authority

Any one or more governmental units by act of their legislative body may, with the approval of the Kentucky Port and River Development Commission, establish a developmental riverport authority. The riverport authority will have the power of

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[189] Id. § 155.020 (Baldwin 1972).

[190] Id. §§ 155.020, .030; 360.010. Business Development Corporations also have never had an application concerning SSH facilities, and thus, like the Development Finance Authority, have had no opportunity to determine the eligibility of SSH developers. Furthermore, and also like the Development Finance Authority, the degree to which the applicant's business is labor intensive, is a major factor in determining eligibility. Telephone conversation with Dick Dickonson, Director of Louisville Business Development Corporation (July 24, 1979).

condemnation to aid it in its purpose of establishing, developing, operating or expanding river ports and their facilities, and water navigation.[191]

4. The Kentucky Port and River Development Commission

The Port and River Development Commission is to aid in the promotion and development of river-related industry, agriculture, and commerce in Kentucky. Additionally, it is to assist in the development and promotion of local port authorities, and to analyze, plan and aid in systematically developing river-related resources via the development of services and facilities.[192]

B. Taxes

1. Generally

There are many types of taxes any business is subject to; the SSH developer is no exception. He will have to pay property taxes, income taxes, and sales taxes, as well as special taxes for dealing in electricity.

In Kentucky, taxes are to be uniform within classes and assessed at fair cash value.[193]

2. Real Estate Transfer Tax[194]

3. Corporate Taxes

a. Corporation Organization Tax

Corporations in Kentucky are subject to a tax on their

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[191] Id. §§ 265.520, .530.

[192] Id. § 154.315.

[193] KY. CONST. §§ 171, 172, 174.

[194] This was discussed supra, at 6, sub-paragraph (c). See KY. REV. STAT. ANN. § 142.050 (Baldwin Supp. 1978).

capital stock, payable at the time of incorporation, merger, consolidation or amendments increasing the number of authorized shares. The rate imposed is as follows:

(a) for par-value shares:

(i) 1¢/share for shares amounting to or less than $20,000;

(ii) 0.5¢/share for shares equal to at least $20,000 but less than or equal to $200,000;

(iii) 0.2¢/share for shares greater than $200,000;

(b) for no par-value shares:

(i) 0.5¢/share for shares amounting to or less than $20,000;

(ii) 0.25¢/share for shares equal to at least $20,000 but less than or equal to $200,000;

(iii) 0.2¢/share for shares greater than $200,000.[195]

Upon the filing of an amendment to articles of incorporation changing the number of authorized shares, the tax that would be due is computed only on the additional number of shares. However, a consolidated or merged corporation does not have to pay this organization tax unless there is an increase in the number of authorized shares over the aggregate number of shares of the constituent corporations prior to the consolidation

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[195]KY. REV. STAT. ANN. §136.060 (Baldwin 1972). For general procedures and fees concerning formation of a corporation, see c. 271A of KY. REV. STAT. ANN. Note also, that all utilities are organized as corporations and therefore are subject to the corporation taxes unless otherwise excepted.

or merger. Yet, if an out-of-state corporation consolidates or merges with a Kentucky corporation, the tax must be paid on the number of shares of capital stock of the out-of-state corporation. In any event, the corporation organization tax shall not be less than $10.[196]

b. Corporation License Tax

For the privilege of doing business in the state, every corporation organized under the laws of Kentucky, every corporation having its commercial domicile in Kentucky, and every out-of-state corporation owning or leasing property located in Kentucky, must pay an annual license tax to the state of 70¢/$1000 of capital employed in the business.[197] The minimum license tax will be $10.[198]

c. Corporate Income Tax

Every corporation receiving compensation in Kentucky must pay a tax for each taxable year at the rate of 4% of the first $25,000 taxable net income and 5.8% of the excess.[199] If the estimated corporation tax is reasonably expected to exceed $5,000, the corporation must make a declaration of estimated tax.[200]

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[196] KY. REV. STAT. ANN. § 136.060 (Baldwin 1972). Filing fees are indicated in the schedule outlined in § 271A.630 (Baldwin Supp. 1978).

[197] "Capital" is to be computed pursuant to subsections (2) and (3) of Sections 136.070 and 136.071 (Baldwin Supp. 1978).

[198] Id. § 136.060 (Baldwin 1972).

[199] Id. § 141.010, .040.

[200] Id. § 141.042.

Any corporation having income allocable to interstate business, shall allocate and apportion its net income between intra- and inter- state business.[201] Note too, that corporations may carry forward and deduct net operating losses for the first year of operation and, subsequently, deduct it from the next years' net income. However, to qualify for this carry-over, the corporation must have a minimum permanent investment in real property in the state, owned or leased, of $100,000.[202]

Returns must be filed with the Department of Revenue by April 15 or the 15th day of the fourth month after the close of the fiscal year. Payment is due at this time.[203]

Exempted from the corporation income tax are RECCs.[204] Additionally, a municipality is not subject to this tax on the income from public utilities operated by it, even though the utility service is furnished to persons other than residents of the city.[205]

d. Corporate Property Tax

(i) Property Tax Generally

Property is assessed by the local assessors and taxed at their rates; rates which may and do vary from locality to locality. The tax is payable by the owner of the property.

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[201] Id. §141.120 (3) to (9).

[202] Id. §141.012.

[203] Id. §§ 141.160, .220 (Baldwin 1972).

[204] Id. § 279.200.

[205] See Commonwealth v. Commonwealth ex rel. Reeves, 292 Ky. 597, 167 S.W.2d 709 (1942).

(ii) Property in General

Property subject to tax for purposes of the SSH developer includes the land around and under the reservoir, the dam and its appurtenant structures, easements, rights-of-way, transmission lines and poles, and the machinery and equipment used to generate the water power.

Kentucky values its property at its fair cash value.[206] The fair cash value of a SSH facility is, of course, hard to accurately determine. It will be up to the developer to persuade local officials that a particular valuation is the proper one.

(iii) Corporate Property Tax in Kentucky

A corporation pays the same rate of property tax as does the individual in Kentucky.[207] Real property

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[206] KY. CONST. § 171; KY. REV. STAT. ANN. § 132.190 (Baldwin 1972). The value of property for tax purposes is its fair cash value as of the assessment date, and not what it was worth in the past or might be worth in the future. Atlantic States Coal Corp. v. Letcher County, 246 Ky. 549, 55 S.W.2d 408 (1932). Moreover, the fact that a willing purchaser is not obtainable at the time of assessment does not import that the property has no taxable value. In such a case, the net revenue that may be realized from the operation of the property, the prospects of continued operation, its physical condition, and the value of the various components of which the property exists, may be considered in fixing the value. Carr's Fork Coal Co. v. Perry County Bd. of Suprs., 263 Ky. 642, 93 S.W.2d 359 (1936).

[207] KY. CONST. § 174.

(improvements and lands) is taxed at the rate of 31.5¢/$100 of valuation. Machinery is taxed at the rate of 15¢/100 of valuation.[208] Privately owned leasehold interests in industrial buildings, including SSH facilities,[209] owned and financed by a tax-exempt governmental unit or statutory authority, are taxed at the rate of 1.5¢/$100 valuation.[210] This last rate is merely an extension of the general exemption from property taxes that exists for municipal property used for a public purpose.[211]

All taxable property shall be assessed as of January 1 of each year.[212]

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[208]KY. REV. STAT. ANN. § 132.220 (Baldwin 1972). The Kentucky Department of Revenue indicated that machinery, for purposes of this tax, includes turbines for generating electricity. Telephone conversation with Kenneth Gilbert, Assistant Director, Sales Tax Div. (June 8, 1979).

[209]Telephone conversation with Bradley Niece, Dir., State Assessment and Inheritance, Property Tax Div., Ky. Dept. of Revenue (July 23, 1979).

[210]KY. REV. STAT. ANN. § 103.285 (Baldwin 1972). Where a building and grounds were owned by the city, land leased to an electrical manufacturing concern, so long as the property was owned by the city, would be exempt from normal property taxes as public property used for public purposes. OP. ATT'Y GEN. 144 (1964).

[211]KY. CONST. § 170.

[212]KY. REV. STAT. ANN. § 132.220 (Baldwin 1972).

(iv) Location of Property

The location of the property taxable is important because of the varying rates and assessments imposed by the different localities in which the property is located.

Real and personal property are taxable where located.[213] Thus the land, dam and transmission lines, are all taxed in the locality where they are situated. The poles, lines and easements for the lines, where the land on which the lines are located is not attached to the dam owner's land, are taxed as personal property and not as real property.[214] Where an easement for the lines or for flowage rights exists on land connected to the dam owner's land, however, they will be taxed as real property.[215] The significance of this distinction lies in the fact that real and personal property have different rates of taxation.[216]

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[213] Id.

[214] See Inter-County REEC v. Reeves, 294 Ky. 458, 171 S.W.2d 978 (1943).

[215] Id.

[216] See generally KY. REV. STAT. ANN. § 132.020 (Baldwin Supp. 1979).

All property subject to taxation for state purposes is also subject to taxation in the county,[217] city, school or other taxing district in which it is located. However, machinery used in manufacturing is exempt from local taxes for as long as it is actually engaged in manufacturing.[218] Also exempt from this tax are all privately owned leasehold interests in industrial buildings owned and financed by a tax-exempt governmental unit.[219]

4. Sales and Use Taxes

a. Sales Tax

A sales tax is imposed upon all retailers at the rate of 5% of the gross receipts derived from direct sales of tangible personal property to an ultimate consumer, i.e., one who will make ultimate use of the property and not resell it.[220]

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[217] The rate of county taxation of property cannot exceed $0.50/$110 of valuation. Id. § 68.090 (Baldwin Supp. 1978).

[218] "Manufacturing" includes the generation of electricity. Ky. & W. Va. Power Co. v. Holliday, 216 Ky. 78, 287 S.W. 212 (1926). Machinery used in manufacturing includes SSH machinery, whether a private user of the generated electricity or a public utility. Reeves v. Louisville Gas & Electric Co., 290 Ky. 25, 160 S.W.2d 391 (1942). See also United Shoe Machinery Corp. v. McCracken County, 265 S.W.2d 570 (Ky. 1959).

[219] KY. REV. STAT. ANN. § 132.020 (Baldwin Supp. 1979).

[220] Id. § 139.200 (Baldwin 1972). "Gross receipts" means the total amount of the sale, lease or rental price of retail sales, valued in money, whether received in money or otherwise. Id. § 139.050 (Baldwin Supp. 1978). "Tangible personal property" includes electricity. Id. § 139.160.

These taxes are collected by the retailer from the consumer. Moreover, there is a presumption that all gross receipts are taxable. Consequently, the burden of proving that a sale of tangible personal property (a sale of electricity, for the purpose of the SSH developer) is not a retail sale (i.e., it is instead a sale to a retailer who plans to sell the electricity again) is upon the person who makes the sale, unless he takes from the purchaser a "certificate" to the effect that the property is purchased for resale. With this certificate in hand, the original seller is not liable for the tax, rather the original purchaser is liable when he subsequently sells it to the ultimate consumers.[221]

Persons engaged in the business of making sales at retail are required to secure a permit from the Department of Revenue.[222]

b. Use Tax

An excise tax is imposed on the storage, use or other consumption, in Kentucky, of tangible personal property at the rate of 5% of the sales price of the property. There is also imposed a 5% use tax on the intrastate storage, use or other consumption of any machines, machinery, tools or other equipment brought into the state for use in construction, building or repairing any building, reservoir or dam, hydraulic or

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[221] Id. §§ 139.210, .260 (Baldwin 1972).

[222] Id. § 139.260.

power plant, transmission line, tower, excavation, grading or other improvements or structures. The lessee of these machines is liable for this tax. However, this additional use tax does not apply where those machines are either sold within the state or where they were bought for use solely in Kentucky.[223]

c. Exemptions From Sales and Use Taxes

The sales and use tax does not apply to electricity sold to Kentucky residents for residential uses.[224] However, this exception does not apply where charges are billed to an owner or operator of a multi-unit residential rental facility or trailer park, classified as other than residential. Also exempt are sales to any arm of the state government, to cities, counties or special districts.[225] Sales by a municipality are not exempt,[226] and neither the sales nor the use tax is applied to machinery for a new and expanded industry.[227] Finally, all

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[223] Id. § 137.310 (Baldwin 1972), .320 (Baldwin Supp. 1978).

[224] Id. § 139.470 (Baldwin Supp. 1979). Determination of eligibility for this exemption is made by the Department of Revenue.

[225] Special districts are defined in Section 65.005 (Baldwin Supp. 1978). This exemption only applies if the electricity is used solely in a governmental function. Id. § 139.470. (Baldwin Supp. 1979).

[226] See Conington v. State Tax Comm., 257 Ky. 84, 77 S.W.2d 386 (1969).

[227] KY. REV. STAT. ANN. § 139.480 (Baldwin Supp. 1978). SSH would fall into this category since, pursuant to Section 139.170, "machinery for new and expanded industry" means machinery incorporated for the first time into plant facilities and which does not replace machinery in such plants. Telephone conversation with Kenneth Gilbert, Ass. Dir., Sales Tax Div., Ky. Dept. of Rev. (June 8, 1979).

Yet, materials and supplies having a useful life of less than a year which were used in the operation, maintenance and repair of machinery were not exempt from the sales and use tax where the materials and supplies consisted basically of non-exempt replacement parts for machinery which was not exempt. Mansbach Metel Co. v. Commonwealth, 521 S.W.2d 85 (Ky. App. 1975).

energy used in the course of manufacturing, processing, mining, or refining is exempt to the extent that the cost of the energy used exceeds 3% of the cost of production.[228]

Note, that in addition to the above exemptions, the use tax does not apply to those items for which a sales tax has already been imposed. This is the case even where the sales tax was paid to another state, where the other state allows a similar credit. This credit is only good to the extent the tax paid to the other state equals the Kentucky tax. Any difference must be made up.[229]

5. Storage Tax

Personal property of residents or nonresidents stored in their original package, shipped into this State and placed in a public storage facility for the purpose of shipment to another destination, (and so designated on the original bill of lading), is considered to be property in transit and consequently is taxed at a special rate, in lieu of the normal use tax rate of 5%. Such stored property is taxed annually by the State at a rate of 1.5¢/$100 of the fair cash value of such personal property.[230]

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[228] KY. REV. STAT. ANN. § 139.480 (Baldwin Supp. 1978).

[229] Id. § 139.510 (Baldwin 1972).

[230] Id. § 132.095.

6. Utility Taxes[231]

a. Administrative Regulatory Cost Tax

The Department of Revenue each year assesses the utilities in proportion to their gross receipts derived from intrastate business for the preceding calendar year at a rate not to exceed 1.5 mills on intrastate gross receipts.[232] This tax helps defray the cost incurred by the Energy Commission in regulating the energy utilities. The tax is collected by the Kentucky Department of Revenue. It is to be in lieu of all other fees levied by any city or other political subdivision for the control or regulation of utilities. A $50 minimum assessment is applied to companies with revenues of $50,000 or less. To ascertain the amount of the assessment, each energy utility, must, on or before March 31 of each year, file with the Energy Commission a report of its gross intrastate receipts for the preceding calendar year.[233]

b. Utility Gross Receipts Tax for Schools

Energy utilities are liable for a utility gross receipts license tax for schools imposed at a rate of 3% of the gross receipts derived from furnishing electricity within the respective county. This tax is tabulated and payable monthly.[234]

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[231] These taxes are in addition to the corporation taxes unless otherwise noted.

[232] KY. REV. STAT. ANN. § 278.130 (Baldwin Supp. 1978). The assessment for the fiscal year 1977-78 was 1.02 mills. All State Reg. Tax Rep. (CCH) § 580-005.

[233] KY. REV. STAT. ANN. § 278.130 (Baldwin Supp. 1978).

[234] Id. § 160.613.

However, this tax will not be computed on gross receipts derived from furnishing electricity used in the course of processing, mining or refining, to the extent that the cost of energy used exceeds 3% of the cost of production. Nor will it be computed on gross receipts derived from furnishing electricity which is to be resold. Note too, that because this tax may be passed on to the consumers directly as a rate increase,[235] the amounts paid are not deductible by the utility for state income tax purposes,[236] even though the utility is ultimately liable for the tax.[237]

Upon request to the Fiscal Court by the school district, and after notice and hearing, a municipality owned utility, as well as an energy utility, may be directed, by the Fiscal Court, to pay the 3% tax.[238] Whether or not an RECC increases its rates, it must pay this utility gross receipts tax.[239]

c. Utility Property Tax

Every energy utility must pay an annual tax on its operating property to the state (and to the extent such

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[235] Rate increases of 3% are authorized pursuant to Section 160.617 (Baldwin Supp. 1978). This amount, however, must be separately stated on the customer's bill and so identified.

[236] OP. ATT'Y GEN. 814 (1974).

[237] See Luckett v. Electric & Water Plant Bd., 558 S.W. 2d 691 (Ky. 1977).

[238] KY. REV. STAT. ANN. § 160.603 (Baldwin Supp. 1978). OP. ATT'Y GEN. 822 (1973).

[239] OP. ATT'Y GEN. 507 (1974).

property is liable to taxation, shall pay a local tax as well) at the same rate as other non-utility taxpayers. The Department of Revenue will determine the fair cash value of the operating property of a domestic energy utility as a unit. The fair cash value of the property valued as a unit will then be apportioned to the localities based on the average of (1) the property factor and (2) the business factor. The location of operating property and the proportion which the length of line or route operated in the particular taxing district bears to the total length of lines or routes operated in Kentucky will be considered in this allocation. Thirty days after notice, state taxes are paid to the state treasury and local taxes are paid to local officers.[240] Thus the utility property is assessed by the state but taxed at local rates. This tax precludes any other local property tax on utilities.[241]

d. Utility Income Tax

Energy utilities, with the exception of RECCs and municipal electric utilities, are subject to an income tax to the same extent as other corporations.[242]

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[240] KY. REV. STAT. ANN. §§ 136.050, .110, .120, .160, .170 (Baldwin 1972 and Supp. 1978).

[241] Telephone conversation with Bradley Niece, Dir. State Assessment & Inheritance/Prop. Tax Div., Ky. Dept. of Revenue (July 23, 1979).

[242] See KY. REV. STAT. ANN. § 141.040 (Baldwin Supp. 1978). See also Corporate Income Tax Section, supra.

e. Municipal Utilities

(i) Non-T.V.A.

Each municipal-energy utility must pay to the school district in which its property is located an amount not to exceed the rate determined by multiplying the book value of the property of the utility as of the beginning of each year, by the current tax rate levied for school purposes by the school district. However, no payment may be made under this provision except pursuant to a resolution of the governing board of the utility, adopted by a unanimous vote of the members of the board.[243]

(ii) Municipal Utilities Under T.V.A.

Each energy utility shall pay for each tax year, to the state and each taxing jurisdiction in which the utility operates, a tax-equivalent from the revenues derived from its electric operations for that year.[244]

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[243] KY. REV. STAT. ANN. § 96.536 (Baldwin 1972). Book value, as used in this section, means the cost of tangible property plus additions, extensions and betterments, less reasonable depreciation or retirement reserves.

[244] Id. § 96.820 (Baldwin Supp. 1978). "Tax equivalent" means the amount in lieu of taxes computed according to Section 96.820, which is required to be paid by each board to the state and to each taxing jurisdiction in which the board operates.

IX. SOURCES OF INFORMATION

Other than the NREP and other agencies already mentioned, there are two additional sources of information which might be helpful to the SSH developer in his analysis of the economic, energy, labor, and other perspectives of Kentucky which will aid him in determining the need and possibility of developing SSH in Kentucky.

A. Department of Commerce

The Kentucky Department of Commerce assembles and keeps information relating to natural resources, industrial sites, labor supply, water, fuel, power, wage rates, taxation and assessments. This information is available to any enterprise which, in the discretion of the Commissioner of the Department, is "legitimate," and which contemplates location or operation within Kentucky. The department is the primary industrial and commercial development agency of Kentucky in matters relating to the private sector of the State's economy.[245]

B. Department of Energy

The Department of Energy (hereinafter cited as DOE) is a research and development agency of Kentucky. Within DOE, the Bureau of Energy Research is responsible for conducting and coordinating energy related research and development acitivities conserving renewable energy resources. The Bureau also has the responsibility for providing technical assistance to encourage the commercial application of new

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[245] Id. § 152.060.

energy technologies by industry and others in Kentucky. The Bureau of Production of DOE is responsible for energy resource information.[247]

C. Kentucky Geological Survey

Established and maintained at the University of Kentucky is a bureau of geological research and information known as the Kentucky Geological Survey. Its duty is to make a continuous geological survey of Kentucky. The Survey will periodically report on its findings; these reports, as well as maps and other publications are available to the public,[247] and may prove useful to a SSH developer.

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[246] Id. §§ 152A.090, .120 (Baldwin Supp. 1978).

[247] Id. §§ 151.010, .030, .040 (Baldwin 1972).

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