

# *CCUS/S Surface and Mineral Estate Agreements and Managing Competing Ownership Claims*

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## *Presenter*



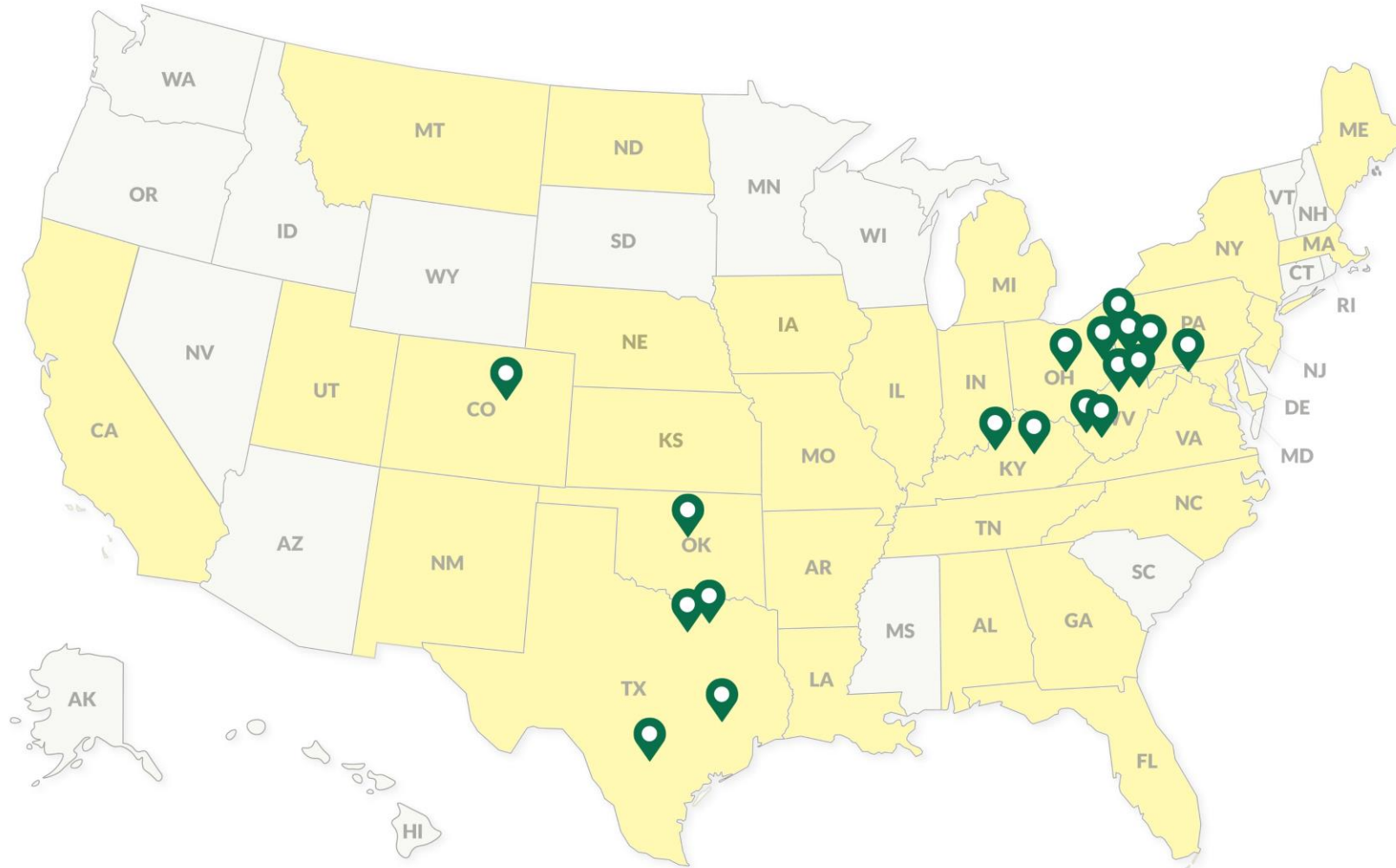
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## Office Locations

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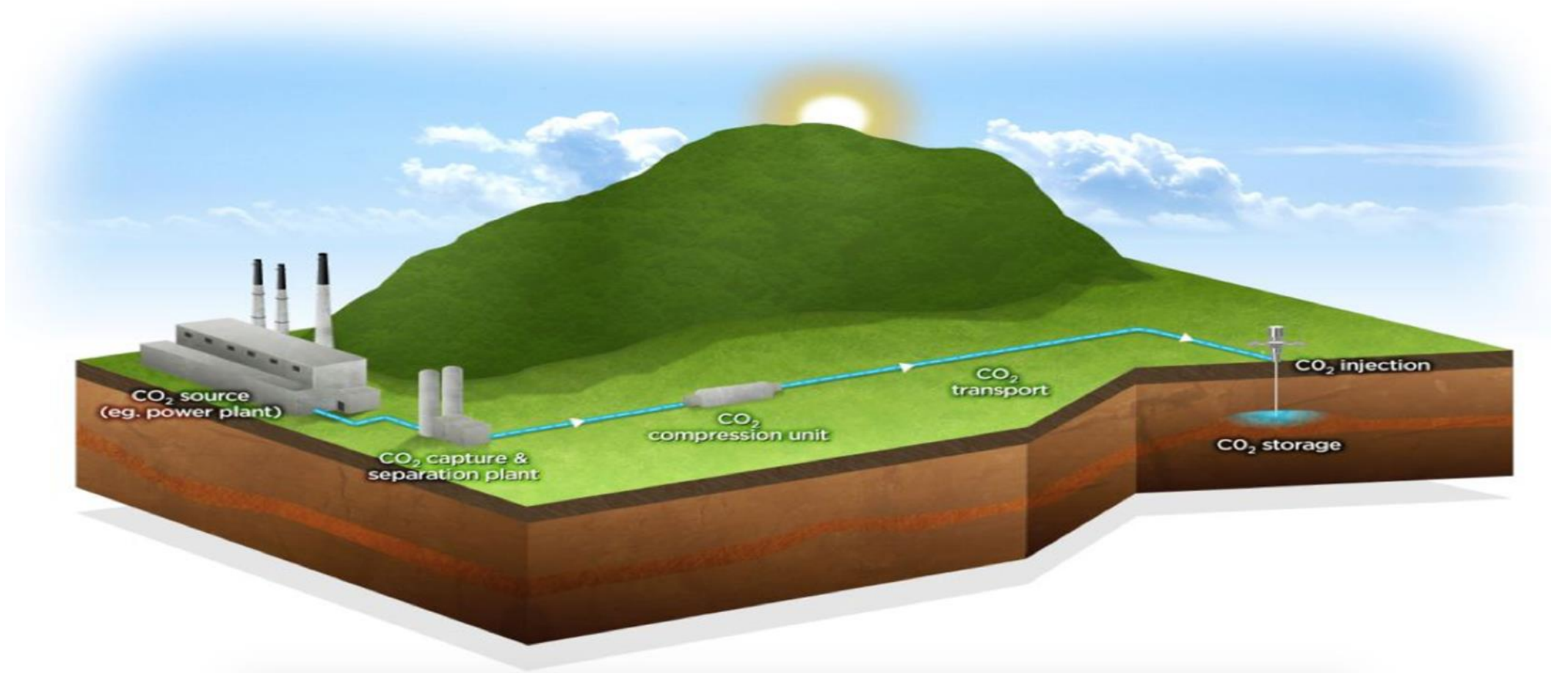
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# *Agenda*

- Surface Estate Agreements
- Mineral Estate Agreements



# CCUS/S



## *Surface Estate Agreements*

- Focus on: (i) securing the material rights needed for CCUS/S operations and (ii) the incidental surface and mineral estate rights impacted by CCUS/S operations
- Pay attention to non-split estate situations where fee owner has granted surface and/or mineral estate rights to third-parties
- Business risk analysis may be appropriate

## *Top Ten Surface Estate Agreement Considerations*

1. Title
2. Existing/potential surface estate uses
3. Consideration
4. Concurrent land use planning
5. Cost sharing
6. Reciprocal regulatory cooperation
7. Environmental liability
8. Term
9. Term extension
10. Remedies and damages

## *Mineral Estate Agreements*

- Focus on the incidental mineral estate rights impacted by CCUS/S operations
- Potentially applicable in non-split estate situations where fee owner has granted mineral estate rights to third parties
- Primarily applicable in split estate situations
- Business risk analysis may be appropriate



## *Top Ten Mineral Estate Agreement Considerations*

1. Title
2. Existing/potential mineral estate uses
3. Mineral trespass liability
4. Concurrent land use planning
5. Cost sharing
6. Reciprocal regulatory cooperation
7. Reciprocal data access
8. Term
9. Consideration options
10. Remedies and damages

## *Questions?*



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## *Some competing surface use examples*

- Structures – commercial, industrial, and residential
- Agricultural use – crops, livestock
- Recreational use – commercial/personal/public
- Utility lines – electric, water, gas
- Telecommunications towers
- Roads
- OG well locations
- OG gathering and transmission lines
- Surface mining
- Subsidence from underground mining – planned or unplanned
- Windmills
- Solar panels
- Geothermal operations

## From Heaven to Hell

- *Cujus est solum, ejus est esque ad coelum et ad inferos*
  - Whoever's is the soil, it is theirs all the way to Heaven and all the way to Hell
    - *Bury v. Pope*, 78 Eng. Rep. 375 (1587)
    - Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Book ii, Ch. 2, p. 18 (1766)
- The *ad coelum* doctrine is not without its limitations
  - *R. v. Earl of Northumberland* (The Case of Mines), 1 Plowden 310, 75 Eng. Rep. 472 (1568)
    - “by the law all mines of gold and silver within the realm, whether they be in the lands of the Queen, or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other incidents thereto as are necessary to be used for the getting of the ore.”
  - *U.S. v. Causby*, 328 U.S. 256 (1946)(navigable airspace is public domain)
  - *Chance v. BP Chemicals, Inc.*, 670 N.E.2d 985 (Ohio 1996)(like air rights, landowner's subsurface rights are not absolute and extend only so far as landowner can reasonably and foreseeably use subsurface)(injection well)



## *How did landowners get their mineral rights?*

- Common-law rule: landowners can develop all minerals except gold or silver
- In the East, land grants included (almost) all mineral rights
  - Exception: N.Y. asserts ownership of gold and silver, if any, as successor to the Crown
- In the Midwest, nearly all mineral rights passed into private hands
  - Except, under Congressional grants, certain interests in gold, silver, copper and lead, and under Act of 1807, all discovered and undiscovered lead mines in the Northwest Territory
- In the West, the federal government has more often retained mineral rights
  - *See, e.g.*, the Stock-Raising Homestead Act of 1916, 43 U.S.C. § 299 (all patents subj. to reservation to US of “all the coal and other minerals” w/ “right to prospect for, mine and remove the same”)
- Mineral severances emerge throughout Appalachia in the 19<sup>th</sup> century

# Dictionary definitions of “surface” and “minerals”

- BLACK’S LAW DICTIONARY (11<sup>th</sup> ed. 2019)
  - “Surface”
    - 1. The top layer of something, esp. of land
    - 2. *Mining law*. An entire portion of land, including mineral deposits, except those specifically reserved
      - The meaning of the term varies, esp. when used in legal instruments, depending on the language used, the intention of the parties, the business involved, and the nature and circumstances of the transaction
    - 3. *Mining law*. The part of the geologic section lying over the minerals in question
  - “Mineral”
    - 1. Any natural inorganic matter that has a definite chemical composition and specific physical properties that give it value
      - <most minerals are crystalline solids>
    - 2. A subsurface material that is explored for, mined, and exploited for its useful properties and commercial value
    - 3. Any natural material that is defined as a mineral by statute or caselaw

## *Judicial definitions of “surface” and “minerals”*

- *Faith United Meth. Ch. and Cem. of Terra Alta v. Morgan*, 745 S.E.2d 461 (W. Va. 2013)
  - “The word ‘surface,’ when used in an instrument of conveyance, generally means the exposed area of land, improvements on the land, and any part of the underground actually used by a surface owner as an adjunct to surface use (for example, medium for the roots of growing plants, groundwater, water wells, roads, basements, or construction footings.”
    - Did the court leave anything out?
- Judicial definitions of “minerals” are more scatter-shot

# Judicial definitions of “surface” and “minerals”

- Manner-of-enjoyment test
  - *Spurlock v. Santa Fe Pacific Railroad Co.*, 694 P.2d 299 (Ariz. App. 1984)(“all minerals whatsoever” included “all commercially valuable substances separate from the soil”)
    - Reasonable surface destruction permitted for minerals specifically identified or commercially known at time of deed, but no such interference for minerals that were unknown or w/o commercial value at time of deed
- Ordinary-and-natural-meaning test
  - *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99 (Tex. 1984)(“minerals” includes “all valuable substances...regardless of whether their presence or value was known at the time of conveyance”)
- Surface-destruction test
  - *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971); *Reed v. Wylie*, 554 S.W.2d 169 (Tex. 1977) and 597 S.W.2d 743 (Tex. 1980)(valuable substances like iron ore, lignite and coal aren’t “minerals,” if they can only be produced through surface mining)
- Exceptional-characteristic test
  - *Compare Murray v. BEJ Minerals, LLC*, 908 F.3d 437 (9<sup>th</sup> Cir. 2018) with *Murray v. BEJ Minerals, LLC*, 494 P.3d 80 (Mont. 2020)(dinosaur fossils aren’t “minerals” just because they’re rare)
- Community-knowledge test
  - *Dunham v. Kirkpatrick*, 101 Pa. 36 (1882)(“Certainly, in popular estimation petroleum is not regarded as a mineral substance any more than is animal or vegetable oil”)

## *Adventures in applying the judicial definitions*

- Pore space
  - Compare *Tate v. United Fuel Gas Co.*, 71 S.E.2d 65 (W. Va. 1952)(depleted pore space belongs to SO)(American rule) with *C. Ky. Nat. Gas Co. v. Smallwood*, 252 S.W.2d 866 (Ky. Ct. App. 1952)(depleted pore space remains property of MO)(English rule)
  - See also W. VA. CODE § 22-11B-18(a)(“Title to pore space in all strata underlying the surface of lands and waters is vested in the owner of the overlying surface strata”)(CO<sub>2</sub> storage)
- Mine voids
  - Compare *Continental Res. of Ill., Inc. v. Ill. Methane, LLC*, 847 N.E.2d 897 (Ill. Ct. App. 2006)(English rule) with *Clayborn v. Camilla Red Ash Coal Co.*, 105 S.E. 117 (Va. 1920)(American rule)
  - See also VA. CODE § 45.2-402 (statutory presumption of English rule after July 1, 1981)



## First of two general rules for split estates

- **GENERAL RULE NO. 1**: MO usually has the right to enter the surface estate in order to search for, develop, and remove the minerals
  - Exception that proves the rule: *Calvert Joint Venture # 140 v. Snider*, 816 A.2d 854 (Md. 2003)
- Notwithstanding *Calvert*, severance of minerals from surface usually creates an easement, either express or implied, that benefits the mineral estate (the ***dominant estate***) and burdens the surface estate (the ***servient estate***)
  - If express, MO's use can't exceed those terms (**read your deed**)
  - If implied, MO's use must be reasonable as defined by state law
- SO retains the right to use servient estate, but must avoid unreasonable interference with MO's use
  - Under ***obstruction doctrine***, SO may be liable for damages or subject to injunction if MO is wrongfully denied access for mineral development
    - *Haverhill Glen, LLC v. Eric Petroleum Corp.*, 67 N.E.3d 845 (Ohio App.—7<sup>th</sup> Dist. 2016)(obstruction by SO triggered OGL force-majeure clause)

## *Second of two general rules for split estates*

- **GENERAL RULE NO. 2**: MO's surface right is not unlimited, and is usually subject to the following limiting principles:
  - Reasonable use
    - MO generally has discretion to determine the *kinds* of surface uses (e.g., build roads, set up power stations, use water) and the *location* of those uses, w/o SO's consent and w/o further compensation
    - What's "reasonable"?
  - Accommodation doctrine
    - *Lyle v. Midway Solar, LLC*, 618 S.W.3d 857 (Tex. App. – El Paso 2020)
  - In accordance with deed/lease terms
  - In accordance with statutes and regulations
    - Emergence of environmental protection laws throughout the 20<sup>th</sup> century
    - Land use planning/zoning challenges
    - NIMBYism

## Managing the competing surface uses

- Do nothing and see what happens
  - **Not recommended**
- Buy the minerals (or buy the surface)
  - How much do you need to buy? Is it enough to just be one of the co-tenants?
  - Do you only have to buy the executive or participating interests?
    - See *Lesley v. Veteran's Land Bd.*, 352 S.W.3d 479 (Tex. 2011)(EO breached duty to NEMO by placing covenants prohibiting mineral development into subdivision lots)
- Marketable record title acts
  - Not available in all states; may not apply to minerals
  - Fact-specific; depends on timing and savings events
- Dormant mineral acts
  - Not available in all states; may not apply to all minerals
    - Compare ORC 5301.56(B)(1) (excludes coal) w/ MD. CODE ANN. Envir. § 15-1201 (includes coal)
  - Fact-specific; depends on timing and savings events

## Managing the competing surface uses

- Abandonment
  - Doesn't apply to fee interests, but may apply to leaseholds
    - See ORC 5301.332, 58 P.S. §§ 901 *et seq.*, and W. VA. CODE §§ 36-4-9a and 9b; *Gerhard v. Stephens*, 442 P.2d 692 (Cal. 1968)
- Prescription
  - LA. REV. STAT. ANN. §§ 31:28 to 31:79 (mineral servitude), §§ 31:80 to 31:104 (royalty interests), and §§ 31:114 to 31:148 (leaseholds)
- Taxation and sale
  - See John C. Lacy, "Access to Mineral Rights in the United States: Consideration of the 'Not In My Basement' Problem," 2013 No. 2 RMMLF-INST Paper No. 7B
    - Suggested that SO should have special right to redeem and acquire delinquent mineral assessments
    - Also suggested that land use regulations should designate special "mineral development" zones and private mineral severances should be prohibited
- Adverse possession

## *Managing the competing surface uses*

- Can we follow the *Lyle* example?
  - Reserving drill sites for future OG development may be easier than making similar accommodations for mining/quarrying
  - Some competing surface uses may be more compatible than others
- MO can waive (or temporarily suspend) right to use surface w/ written waiver
  - Parties
  - Description
  - Waiver
    - What are the exact rights being waived?
    - Binding effect on successors and assigns
    - Is waiver time-limited?
  - Execution: signature; acknowledgment; recording



## *Questions?*



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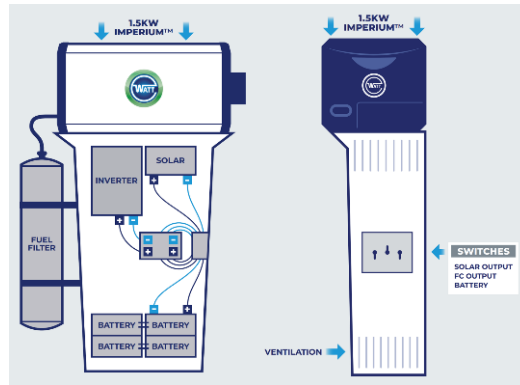
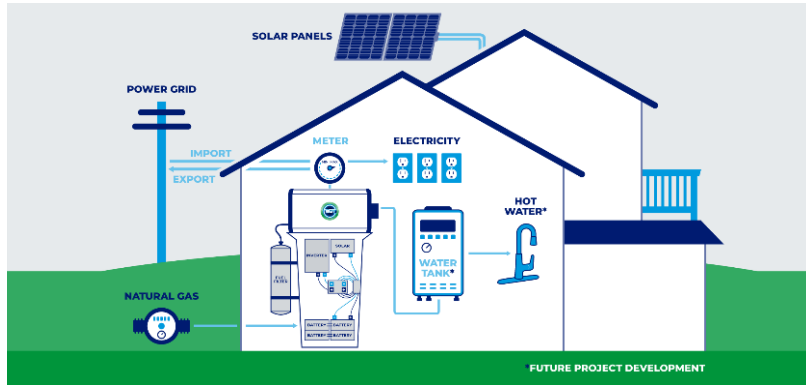
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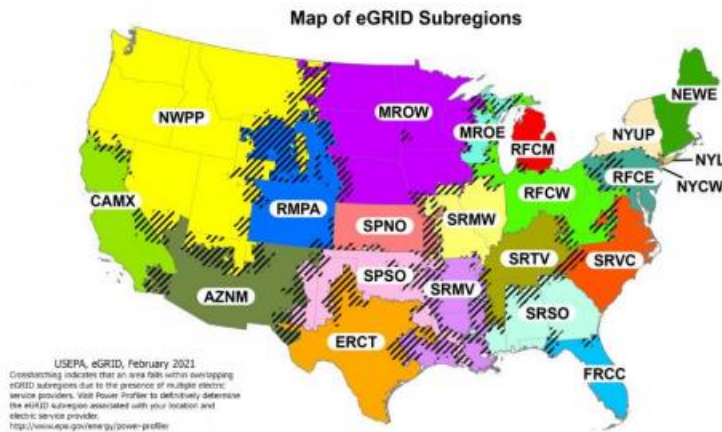
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# Hope Gas Residential Fuel Cell Program



WATT Fuel Cell Home Integration

WATT Fuel Cell Home Installation



USEPA, eGRID, February 2021  
 Crosslinking indicates that an area falls within overlapping eGRID subregions due to the presence of multiple electric service providers. Visit Power Profile to definitively determine the eGRID subregion associated with your location and electric service provider.  
<http://www.epa.gov/eeis/gp/power-profile>

	%H2 (Injected in NG pipelines)	Avoided CO <sub>2</sub> Emissions (Weighted Average)
Today	0%	33%
Tomorrow	20%	48%
<i>Infrastructure Changes Required</i>		
The Future	40%	62%
	60%	76%
	80%	91%

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