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Ernest E. Smith on

Legal Bases for Opposing Wind Farms

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Wind energy is the fastest growing source of energy in the United States. In 2006 the country's wind power generating capacity increased by 27 percent. In 2007 the total wind power generating capacity shot up by 45 percent. According to the American Wind Energy Association, by the end of 2008 the country will have enough wind-generated electricity to provide electricity to over seven million homes.¹ Although the 2008-09 recession brought this development to a near halt, several incentives for renewable energy have been included in the American Recovery and Reinvestment Act of 2009,² and these provisions will almost certainly result in a renewed increase in utility-scale wind plants once the recession recedes.

The environmental community is divided on the desirability of wind plants. From the positive standpoint, such facilities produce no climate-changing gases and require virtually no water to operate. The latter is a special plus in areas such as the Midwest and other regions where water is usually in quite short supply. But no source of energy is completely free of adverse environmental impacts, and the sharp increase in the number of wind plants has been accompanied by a corresponding growth in the level of opposition, which is not limited to environmental organizations but often includes neighboring landowners as well. This opposition arises almost entirely because of the location of wind plants. They are constructed in areas with good wind resources, i.e., a wind speed averaging over 13 m.p.h. and within the necessary range of wind speeds approximately 40 percent of the time. Winds of this type are found primarily in prairies and grasslands, such as the plains of North Dakota, Kansas and the Texas panhandle, which were previously free of a network of roads or other linear features; ridge lines in or near scenic recreational areas, such as central and northern Maine; and migratory flyways or other bird-rich areas along the coastal plains or offshore areas such as Horseshoe Shoals off Nantucket.

Legal opposition to wind farms has primarily taken three basic forms. The first and most obvious is involvement in administrative hearings in states or counties that have permitting requirements. However, as the handful of reported cases involving regulatory hear-

1. See www.awea.org.

2. Pub. L. No. 111-5, 123 Stat 115.

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ings for wind farm permits make clear, in this as in virtually all similar situations, adverse rulings by a regulatory agency are difficult to overturn on appeal.

*Roberts v. Manitowoc County Board of Adjustment*³ is illustrative. Plaintiffs, who were neighboring landowners, advanced several procedural objections to the grant of a permit to a wind farm, including lack of adequate notice and the manner in which the hearing was conducted. They also complained that the county Board of Adjustment had misconstrued or ignored the legal standard for granting variances to the set-back provision in its ordinance. The Board had granted all of the wind company's requested variances simultaneously upon a showing that the applicant would incur additional expense by complying with the set-back requirement and that no public health or safety issues would result from granting the variances. On appeal the plaintiffs argued that the Board's actions violated the Wisconsin statute governing zoning ordinances. The statute states that an applicant for a variance must show special conditions resulting in unnecessary and special hardship unless variance is granted.⁴ The court of appeals rejected the argument. Citing the degree of deference given the interpretation and application of a county ordinance by a board of adjustment, the court concluded that the term "variance" as used in the county's Wind Energy System Ordinance did not have the same technical legal meaning as when used in a zoning context. Hence the ordinance could be properly construed as authorizing wholesale exceptions to the set-back requirement as part of the overall conditional use permit process and as not requiring a separate determination of each variance based on the demonstration of a hardship. Moreover, such a construction was consistent with the state's legislative decisions to promote renewable energy resources, including wind power, e.g. [Wis. Stat. § 66.0401](#).

In a jurisdiction such as Texas, which has neither a statewide nor a county process for permitting wind farms, involvement by neighboring landowners or environmental organizations in the location of wind plants is extremely difficult if not impossible. *Coastal Habitat Alliance v. Patterson*⁵ is an example of a failed attempt. Plaintiff was opposed to the construction of two large wind plants on the coastal plains near or within a major migratory flyway of over 400 bird species. Plaintiff filed suit in federal court to enjoin the construction of the wind farms on the ground that there had been no "consistency hear-

3. [721 N.W.2d 499](#) (Wisc. App. 2006).

4. [Wis. Stat. § 59.694](#) (7)(c).

5. [601 F. Supp. 2d 868](#) (W.D. Tex. 2008).

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ing" as required by the Texas coastal zone management plan. To receive grants and technical assistance under the Coastal Zone Management Act,⁶ as Texas had done many years earlier, a state must submit for approval a plan that requires a planning process for locating energy facilities that may significantly affect the coastal zone and a process for anticipating and managing the impact such an energy facility will have on the coastal region. The plan must also include a provision for assessing the suitability of sites, identifying interested parties, and providing for public participation and involvement in the permitting process by affected parties.

During the 1990s the Texas legislature began deregulating the state's electric industry and in doing so eliminated the pre-existing statutory requirement that electric-generating facilities obtain a certificate from the Public Utility Commission of Texas (PUCT). This legislative action automatically eliminated the process that the Texas coastal zone management plan required the PUCT and Texas General Land Office (GLO) to follow with respect to electric-generating facilities on the coastal plain. Plaintiff's suit, which both requested an injunction against the wind farms themselves and alleged denial of due process by the PUCT and GLO, was dismissed for lack of standing. Because the Coastal Zone Management Act does not contain a provision for a private cause of action, there was no legal basis for plaintiff's action against the wind farms. Plaintiff could not assert denial of procedural due process by state defendants because of its inability to demonstrate "redressability," which is one of the requisite elements of standing in federal court. The injury alleged by plaintiff was environmental harm resulting from large numbers of bird deaths, but plaintiff was unable to show that the procedural remedy sought would redress or prevent such an injury.

A second method of opposing wind farms has been through a claim of common law nuisance. In earlier litigation involving noisy, single wind turbines producing electricity for on-site use in residential areas, such claims had some success.⁷ A private nuisance action against a utility-grade wind plant may face significantly greater obstacles, for modern wind farms are quieter than older turbines, and the principal objection of plaintiffs is often that the wind plant will ruin the scenic vistas that their homes enjoy and thereby diminish their properties' value. Many, possibly most, courts in the country reject an argument based solely on these factors as a basis of nuisance, but they require a showing that the use or

6. [15 U.S.C. § 1451](#) *et seq.*

7. See, e.g., *Rose v. Chaikin*, [453 A.2d 1378](#) (N.J. Super. Ct. 1982).

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structure creates "a condition that substantially interferes with the use and enjoyment of the plaintiff's land by causing unreasonable discomfort or annoyance to persons or ordinary sensibilities,"⁸ such as excessively bright lights, loud noise, strong objectionable odors, or large amounts of dust and other particulates. Courts are split on whether aesthetic objections can be considered if coupled with other annoying factors.

The court in *Rankin v. FPL Energy, LLC*⁹ ruled that "unsightliness" could never be considered as a basis of nuisance. The plaintiffs, who were landowners in a scenic rural area, sought to enjoin the construction of what was billed as the world largest wind farm. It was to consist of 421 wind turbines up to 400 feet in height. The turbines and accompanying roads and other installations would stretch over approximately 47,000 acres. Plaintiffs argued that destruction of their scenic vista could be considered by the jury as part of the total "package" of problems that would be caused by the wind farm. The trial court rejected this argument and was upheld by the court on appeal. The second basic objection of plaintiffs was the noise level, and in ruling for the defendant the jury was apparently persuaded by plaintiffs' expert witness who testified that under EPA standards any noise level below 50 decibels was acceptable – a level that apparently would not be reached at the houses nearest the turbines.

The opposite conclusion was reached in *Burch v. Nedpower Mount Storm, LLC*,¹⁰ where homeowners living between a half-mile and two miles from a projected wind farm alleged essentially the same complaints as those advanced in *Rankin*. The court agreed that while unsightliness alone rarely justifies a finding of nuisance, it ruled that it can be considered if it is accompanied by other problems that interfere with the use and enjoyment of nearby property. Plaintiffs in *Burch* had the added problem that the West Virginia Public Service Commission (PSC) had granted the wind plant a siting certificate. The West Virginia Supreme Court disagreed with defendant's argument that the grant of a siting certificate precluded a suit in common law nuisance. However, in remanding the case for a hearing on plaintiffs' claim, the court took care to point out that although the PSC's action did not abrogate the lower court's jurisdiction, the certificate was "persua-

8. *Bible Baptist Church v. City of Cleburne*, [848 S.W.2d 826, 829](#) (Tex. App.—Waco 1993, writ denied).

9. [266 S.W.3d 506](#) (Tex. App.—Eastland 2008).

10. [647 S.E.2d 879](#) (W.Va. 2007).

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sive evidence of the reasonableness and social utility of the appellees' use of the property to operate a wind power facility."¹¹

The evidentiary weight of a regulatory determination in favor of a wind farm's location obviously creates an additional hurdle for an action in nuisance, but even in states without a permitting process, wind-generated electricity is promoted not only by strong federal tax incentives but often by clearly articulated legislative policies, such as renewable portfolio standards that require a steadily increasing percentage of electricity within a state to come from renewable sources, including wind. Courts frequently consider clearly articulated governmental policies in determining whether a lawfully operated business should be enjoined as a common law nuisance, along with factors such as harm to the community as a whole if the defendant's operations are enjoined. These factors, along with the sharply decreased noise levels of modern wind turbines, make it increasingly unlikely that a suit to enjoin construction of a wind farm on grounds of common law nuisance will succeed. They do not, however, eliminate the possibility that a court may still be willing to award damages, based on diminished property values and reduced enjoyment of nearby homes.¹²

The third principal basis for legal actions advanced against wind farms has been environmental statutes. The best known and longest-running controversy over the location of a wind farm to date has involved two federal cases dealing respectively with state vs. federal jurisdiction and the applicability of the National Environmental Policy Act (NEPA).¹³ The litigation concerned Cape Wind, which is proposed for Horseshoe Shoals off Nantucket Sound in federal waters. The wind plant, as proposed, would consist of 170 industrial wind turbines spread across approximately twenty-six square miles. The turbines would be located in a popular sailing area that is also used by commercial and sport fishermen. Because the turbines and attached rotor blades would be over 400 feet high, they would be visible from Nantucket Island, a historic site and popular tourist destination. Not surprisingly, the proposal has resulted in vigorous opposition from landowners on Nantucket Island and a wide variety of business, tourist, environmental, sailing, fishing, and citizens' groups. Various groups organized primarily to oppose the wind

11. 647 S.E.2d at 894.

12. See, e.g., *Boomer v. Atlantic Cement Co.*, [257 N.E.2d 870](#) (N.Y. Ct. App. 1970).

13. [42 U.S.C. §§ 4321-70](#) (2000).

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farm filed two suits in an attempt to enjoin construction. Plaintiffs lost the first suit,¹⁴ which was based on an argument that Massachusetts and the federal government had concurrent jurisdiction over the area. The second case,¹⁵ which was brought by the Alliance to Protect Nantucket Sound, was based in significant part on NEPA. The Alliance argued that in granting Cape Wind a permit under the Rivers and Harbors Act¹⁶ to erect a 197-foot monitoring tower on Horseshoe Shoals the Army Corps of Engineers had violated NEPA regulations that require draft findings of "no significant impact" to be made available for public comment whenever "[t]he nature of the proposed action is one without precedent."¹⁷ The Alliance argued that because granting a permit to a private entity for a wind tower on federal offshore land was unprecedented, the Corps was required to circulate either the draft Environmental Assessment upon which the finding was based or the finding itself before issuing a permit for the monitoring tower. The Alliance was unsuccessful in its claims. The First Circuit Court of Appeals agreed with the Corps and the lower court that the impact of the wind monitoring tower, which was a single temporary structure, would have no significant impact on Horseshoe Shoals and would produce information for the government as well as for Cape Wind.¹⁸ Moreover, the tower was not unprecedented; there was a somewhat similar tower at Martha's Vineyard and several other "pile supported structures" within Nantucket Sound itself.¹⁹

Although actions brought by private litigants based on environmental concerns have been unsuccessful to this point, future developments may see action – and certainly enforcement of regulations – by federal agencies. Depending upon the proposed or actual location of a wind farm, Section 4 of the Clean Water Act (CWA), [33 U.S.C. §1344](#) (a); the Migratory Bird Treaty Act (MBTA), [16 U.S.C. §§ 703-712](#); the Bald and Golden Eagle Protection Act (BGEPA), [16 U.S.C. §§ 668-668d](#); and the Endangered Species Act (ESA), [16 U.S.C. §§ 1531-1544](#), are some of the environmental statutes in addition to NEPA that seem likely to apply to a wind farm. The Clean Water Act would presumably

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14. *Ten Taxpayer Citizens Group v. Cape Wind Assocs., LLC*, [278 F. Supp. 2d 98](#) (D. Mass. 2003), *aff'd*, [373 F.3d 183](#) (1st Cir. 2004).
 15. *Alliance to Protect Nantucket Sound, Inc. v. U. S. Dep't of the Army*, [398 F.3d 105](#) (1st Cir. 2005), *aff'g* [288 F. Supp. 2d 64](#) (D. Mass. 2003).
 16. [33 U.S.C. § 401](#) (2000).
 17. *Alliance to Protect Nantucket Sound*, [398 F.3d at 115](#) (citing [40 C.F.R. § 1501.4](#) (e)(2)(ii) (2005)).
 18. *Id.* at 113.
 19. *Id.*

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apply to proposals to fill or dredge wetlands and hence apply even to private land, especially if the wind farm were to be located in a coastal area.

The other three acts are the ones most often cited by environmental groups opposed to wind farms proposed in flyways or previously pristine habitats. Section 703 of the MBTA prohibits pursuing, hunting, taking, capturing or killing any "migratory bird," a term that, by a 1972 statutory amendment, now includes raptors. The BGEPA contains similar provisions. The former was originally passed to implement a 1917 treaty between the United States and Canada to protect migrating birds from excessive hunting pressures, and several federal courts have interpreted the statute as limited to this purpose.²⁰ However, other federal courts have construed it more broadly, applying it to a commercial farming operation where migrating birds were poisoned by pesticide-treated alfalfa fields²¹ and to an electric cooperative whose power poles were not capped or otherwise equipped with any equipment that would prevent the electrocution of birds that landed on them.²² The ESA, which prohibits killing, capturing, taking or harming a federally listed endangered species, has been construed more broadly than the MBTA in that its prohibition of "harm" has been interpreted by the Fish and Wildlife Service to prohibit habitat modification,²³ and this regulatory prohibition has been sustained by the U.S. Supreme Court.²⁴ It would presumably be enforced against wind farms proposing to locate turbines, roads and other infrastructure in the habitats of federally listed species.²⁵

The cases to date, although few, are clearly harbingers of things to come, and there is good reason to believe that wind farms will face the same opposition as any energy-related development, whether coal mining, oil and gas development, natural gas pipelines, or electric transmission lines.

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20. See, e.g., *Mahler v. U.S. Forest Service*, [927 F. Supp. 1559, 1579](#) (S.D. Ind. 1996); *Newton County Wildlife Ass'n v. U.S. Forest Service*, [113 F.3d 110](#) (8th Cir. 1997), *cert. denied*, [522 U.S. 1108](#) (1998).
 21. *United States v. Corbin Farm Service*, [444 F. Supp. 510](#) (E.D. Calif. 1979), *aff'd*, [578 F.2d 259](#) (9th Cir. 1978).
 22. *United States v. Moon Lake Electric Ass'n, Inc.*, [45 F. Supp. 2d 1070](#) (D. Colo. 1999).
 23. Attempts to incorporate a similar concept into the MBTA have been unsuccessful. See *Seattle Audubon Society v. Evans*, [952 F.2d 297](#) (9th Cir. 1991).
 24. *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, [515 U.S. 687](#) (1995).
 25. See Stayton Bonner, *Gone with the Wind?*, [Texas Parks and Wildlife Magazine 24](#) (Oct. 2009) for the potential impact on wind farms if the Lesser Prairie Chicken is classified as an endangered species.

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For additional information on Energy Law, see David J. Muchow and William A. Mogel, [Energy Law and Transactions](#); [Energy Law page](#).

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