IADC Committee Newsletter

ENVIRONMENTAL AND ENERGY LAW

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IN THIS ISSUE

Following our well-attended and groundbreaking CLE at the Mid-Year Meeting on the same topic, Jeromy Brown submits an overview of wind power and nuisance litigation. In this second installment of two, Mr. Brown provides a summary of legal claims involving wind power development.

Wind Power and Nuisance Litigation Part II

ABOUT THE AUTHOR

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ABOUT THE COMMITTEE

The Environmental and Energy Law Committee assists all members whose practice relates to environmental and energy areas consisting of regulatory compliance, permitting issues and litigation. The Committee conducts monthly conference calls and publishes newsletters to keep our members abreast of current issues relating to the energy field and environmental practice. The members also present educational seminars, and provide an opportunity to network with fellow practitioners in those fields to enhance practice opportunities across the country and internationally.

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IV. *LEGAL CLAIMS INVOLVING WIND POWER DEVELOPMENT*

Wind farms, though an alternative and renewable source of energy, do leave an imprint on the environment[1]. Issues that must be considered include noise from the turbines, flickering, impact upon wildlife, discharge of ice from blades, and even aesthetics. These issues, among others, are the issues that most readily give rise to the claims of nuisance that most trial attorneys are likely to encounter. These are the issues that we will now address in regard to nuisance litigation.

Claims against companies operating wind farms normally arise because a neighboring or nearby landowner or tenant alleges they, or the surrounding environment, have been impacted in some fashion by the operations of the wind farm. Such claims can arise under alleged violations of regulations, ordinances or statutes. Regardless of whether a specific law is claimed to have been violated, virtually all claims against a wind farm involve nuisance or "nuisance like" arguments.

When nuisance law is applied to factual scenarios involving wind energy power production, the ultimate result is a balancing of the needs of the public against inconveniences, or injuries, which might be imposed upon either the public or the individual. There are of course two general categorizations of nuisance, public and private.

In jurisdictions of the United States, a public nuisance is generally defined as:

(1) …an unreasonable interference with a right common to the general public.

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

a. Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

b. Whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

c. Whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor know or has reason to know, has a significant effect upon a public right.

Rest. 2nd of Torts, Sec. 821B (1979).

A private nuisance is normally defined as "…a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Restatement (Second) of Torts*, §821D (1979). To establish legal causation of a private nuisance, additional factors must of course be proven. Those issues will be addressed through discussion of reported cases below.

1. Aesthetics

Perhaps the most immediate impact a wind farm has upon surrounding areas is the very presence of the wind farm. As alluded to above, the towers of a modern wind turbine are often 260 – 400 feet tall. The blades of the turbines can easily be 200 – 250 feet long. When structures of such a large scale are placed upon a natural landscape, without question, the landscape forever changes. This change has been one of the primary focuses of

[1]This paper does not discuss issues involved with the environmental impact of actual construction of a wind farm, though that is often a point of contention.

litigation involving wind farms. In *Genesis Power Ltd v. Franklin District Council*, [2005] N.Z.R.M.A. 541 (Env.C.), when considering whether to allow a wind farm to be installed along a coast line, a court in Auckland, New Zealand wrote:

The adverse effects of the…[installation of the wind farm]…on the visual amenity of the area would be significant because the scale of the turbines was such that they would dominate the surrounding area and undermine the visual integrity of the natural character and landscape of the coastal environment.

In the *Genesis* litigation, the tribunal ultimately held the wind farm could be installed. That action was actually one wherein the energy developer sought a permit to install the wind farm, so opponents to the wind farm did not have available to them the same type of relief found in true nuisance actions.

Nuisance was the cause of action chosen for the attack in *Burch v. Nedpower Mount Storm, LLC*, 220 W. Va. 443. Therein, the West Virginia Supreme Court ruled that a request for an injunction to prohibit the installation of a wind farm could not be dismissed by the trial court without a hearing on the merits. In the action, several allegations were made relating to the construction of the wind farm, one of which was "unsightliness". The court ruled "…mere unsightliness alone would be an insufficient basis for invoking equitable powers such as an injunction, but if the unsightliness was accompanied by other actions that result in a nuisance, then unsightliness itself may be a basis for abatement of a nuisance". *Id*. at 456.

Other courts take a different view upon the aesthetic impact. In *Rankin v. FPL Energy, LLC*, 266 S.W. 3d 506, 510, the court discussed the issue of the impact the view of a wind turbine farm has upon those neighboring it. Therein, the court opined:

It is because Plaintiffs' emotional response to the loss of their view due to the presence of numerous wind turbines substantially interferes with the use of enjoyment of their property…that the question…is whether Plaintiffs' emotional response is sufficient to establish a cause of action. One Texas court has held that an emotional response to Defendants' lawful activity is insufficient…[In Texas] no case or other authority specifically gives a nuisance in fact [a] cause of action based on fear, apprehension or other emotional reaction resulting from the lawful operation of industry.

The court went on to discuss, as a matter of fact, that a wind farm certainly does away with "…unobstructed sunsets, panoramic landscapes, and starlit skies…" upon the great western Texas plains. Without question, the court acknowledged the loss of the landscape view impacted Plaintiffs. However, Texas case law balanced the interests of one individual to a view across his neighbors' land against the ability of the neighbor to use the land in a lawful manner and for a lawful purpose. *Id*. at 512. Therein, using land in a lawful manner won the day.

The lesson to be learned from these cases is simply this – when defending a wind farm company for a claim of aesthetic impact, the practitioner should try to isolate the aesthetic impact from all other factual allegations of interference with the use and enjoyment of the property. Depending upon the law of the jurisdiction, it could well be that an emotional response to the way a neighbor's property looks is not sufficient to maintain a claim of nuisance against the power company.

2. Noise

The next issue, and perhaps the most litigated issue involving wind farms, is that of noise. As will be discussed in the oral presentation, noise from wind turbines is primarily generated from blades turning in the wind. Noise levels may fluctuate depending upon technical issues, such as the pitch of the blades, the speed of the wind and even the surrounding environment. One of the first areas of research that needs to be accomplished when defending a wind farm company for claims of nuisance involving noise involve determining whether or not there are any local regulations or ordinances governing noise levels in the area and what state or national regulations might exist involving noise levels in your jurisdiction. The defending attorney will also need to secure a sound engineer who can measure noise levels in the field and determine the validity of allegations involving noise.

In the *Fägerskiöld v. Sweden* decision, App. No. 37664/04, Eur. Ct. H.R. (Third Section) 1 (2004), the tribunal considered a claim by a couple in Sweden who complained that a group of turbines near their home began to emit noise which interfered with the use and enjoyment of their homes. Therein, the court relied upon the World Health Organization (WHO) Guidelines for Community Noise and Fact Sheet No. 258. *Id.* at 9. Under the WHO guidelines, noise levels of 85 decibels or more were deemed potentially dangerous. *Id.* WHO guideline values indicate annoyance levels occur between 50 and 55 decibels. In other words, according to the WHO guidelines, noises below levels of 50 to 55 decibels are such that most of the adult population will avoid becoming moderately or seriously annoyed with the noise emanated. *Id.* In that particular action, the tribunal found the complainants had not provided sufficient information to show that the turbines at issue were of such a level as to constitute a nuisance under WHO guidelines. *Id.*

In *Rose v. Chaikin*, 453 A.2d 1378, 187 N.J. Super. 210 (N.J. Super. Ch., 1982), the court *en banc* made a factual finding that based upon the evidence presented regarding noise of a single wind turbine at issue, "the net result is a noise [from the wind turbine] which is both difficult to ignore and almost impossible to escape". The court described the sounds emanating from the wind turbine as unnatural to the area and more or less constant. The evidence presented to the court indicated the wind turbine sound levels varied near the home of the Plaintiff at a range between 56 to 61 decimals. Here, it cannot be understated the importance a local ordinance enacted by the City of Brigantine, New Jersey played in the case. *Id.* The City of Brigantine had in place a local ordinance that required noise levels to be below 50 decibels. Based upon the evidence presented to the court, the court found that the noise constituted an actionable private nuisance as a result of (1) injury to the health and comfort of ordinary people in the vicinity and (2) unreasonableness of that injury under all the circumstances. *Id.* As a result, the court maintained an injunction against the Defendant who sought to install the single turbine for production of electricity.

As technology involving wind turbines has developed, turbines have become much larger and able to produce substantially more electricity than previous generations of wind turbines. At the same time, the noise levels emanating from the wind turbines have reduced. As seen from the review of the few cases listed herein, perhaps more than any other issue, whether noise levels from a wind turbine or wind farm constitute a nuisance will depend entirely upon the actual levels of

noise produced as well as the surrounding environment.

3. Wildlife

The next realm that gives rise to claims of nuisance against wind farms involve the impact they have upon wildlife. Perhaps of all allegations of private or public nuisance made against a wind farm project, negative impact upon wildlife can be the strongest positions for Plaintiffs to stand. The focus of impact upon wildlife, at least in the United States, involving wind turbines are usually upon avian species – specifically birds and bats. Simply put, the allegations are that the enormous spinning blades of a turbine kill the birds and bats flying by and around them.

There are two primary sources of protection avian species receive under federal law and upon which opponents of wind farm projects have relied to date. First, The Migratory Bird Treaty Act of 1918 (MBTA) prevents "taking" a protected species of birds.[2] Likewise, under the Endangered Species Act (ESA), no one is allowed to "take" a protected species. The word take is defined very broadly and is not limited simply to those who might attempt to hunt protected species. Indeed, in the seminal case of *Animal Welfare Institute v. Beech Ridge Energy, LLC*, 675 F. Supp. 2d 540 (D. Md., 2009), a wind farm project in West Virginia was not allowed to continue because the court held it was a "virtual certainty" that the wind project at issue would imminently harm, wound or kill Indiana Bats in violation of ESA.[3] Opposing a claim against a federal statute is very fact specific. The practitioner will need to familiarize themselves with not only the federal statute, but also the permitting processes under the statutes that allow activities resulting in a "taking" of protected species.

Violations of federal statute are not the only springboard for a claim of public nuisance against wildlife. Opponents of wind farms have alleged wildlife is a public resource that should not be decimated. In *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008), the California Appellate Court held birds and other wildlife are a public trust resource.[4] Ultimately, in that case the request for an injunction to prohibit the wind farm project was dismissed due to regulatory issues involved evidencing the fact that courts are very receptive to the principle that wildlife should be protected. With these types of claims, virtually any person can assert a wind farm project has some negative impact upon wildlife in some form or fashion. Whether or not such an allegation will hold true, again is dependent upon the facts of the case.

In contrast to land based wind farms, off-shore wind farms have reportedly resulted in positive effects on wildlife in and around the sea.[5] As off-shore wind farms are installed in United States waters, these issues will undoubtedly develop further.

In addition to these three primary areas of nuisance litigation, those neighboring a wind farm project may also make nuisance claims involving issues such as ice thrown from turning blades during the winter or make complaints of dust blowing from roadways across the wind farm – particularly during construction activities, or that the removal of trees on a property has decimated the value of

[2]The Law of Clean Energy, Efficiency and Renewables, supra, note 6, 380.
[3]Id. at 379.
[4]Id. at 380.
[5]The Netherlands: First Offshore Wind Farm Has Positive Impact on Marine Life, https://www.offshorewind.biz/search/offshore+positive+impact&marine+life, last visited November 20, 2012, October 31, 2012.

the realty. When defending these claims, in addition to the defenses discussed above regarding the existence of the actual harm alleged, it must also be determined whether there is a contractual relationship between the claimant and the wind company. Wind farms cover thousands of acres. There are often hundreds of landowners that sign leases with the companies. The leases are comprehensive – to say the least. The leases entered by landowners without exception have broad release language that could be effective in defending a nuisance claim. Again, that is a determination to be made on a case by case basis.

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