

How To Defend Against Nuisance Lawsuits

Obtaining necessary regulatory approvals for a wind project does not mean that opponents won't stand in the way of development.

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Wind development takes years of work. Locations must be evaluated and sites eventually selected. In addition, experts must prepare reports examining every aspect of the wind farm and its impact on the surrounding area, including sound impact studies, compliance analyses and wildlife assessments.

Even when some community members voice opposition, zoning boards may approve projects and issue permits, after which developers can negotiate leases with landowners and eventually build the project. But this may not stop opponents from filing lawsuits seeking an injunction to shut down the project and demanding millions of dollars in damages, claiming that the wind farm is a nuisance.

Those who file lawsuits against wind farms claim that the sound created by the turbines and the “shadowing” or “flicker” from the rotating blades interfere with their use and enjoyment of their property, disrupt their sleep and even make them ill. Opponents also contend that wind projects lower property values.

Wind opponents have targeted large-scale wind projects in the U.S. and Canada with such lawsuits, including in Taylor County, Texas (lawsuit filed in 2005), Cooke County, Texas (2006), Blair County, Pa. (2008),

Lee and DeKalb counties, Ill. (2009), Huron County, Mich. (2010) and Chatham-Kent municipality, Ontario (2011).

To defeat these claims, wind farm developers need to be prepared and understand how wind opponents are using nuisance law to advance their agenda.

Nuisance law 101

The legal concept of “nuisance” originated in England over 900 years ago. Most people are familiar with trespass law, which protects a property owner against unwanted physical invasions of their land. Nuisance law, however, is a little more complicated. Nuisance law protects owners against interference with the use and enjoyment of their property by acts occurring somewhere other than on their own property. In other words, landowners can file a nuisance lawsuit against a wind energy company even if that company never set foot on their property.

Landowners typically file what are called private nuisance and public nuisance lawsuits. In a private nuisance claim, landowners claim the turbines interfere with their right to use and enjoy their property. To prevail on such a claim, plaintiffs must prove that the alleged interference has caused them “significant” harm and

that the alleged interference is intentional and unreasonable. “Intentional” does not mean that the wind farm owner purposefully set out to interfere with the plaintiffs’ use and enjoyment of their property. It only means that the wind farm owner intended to run the wind turbines. The “reasonableness” of the interference is subject to a risk-utility analysis. The interference is unreasonable if the severity of its harm outweighs the utility of the conduct causing it.

To prevail with a public nuisance claim, plaintiffs must prove that the alleged interference is a “significant” disruption in regard to the public’s health, safety, peace, comfort or convenience.

Landowners in a nuisance lawsuit seek two forms of relief: equitable relief in the form of a preliminary and permanent injunction seeking to either shut down or modify the wind farm; and/or monetary relief. A preliminary injunction is typically requested at the outset of the case. Plaintiffs must show, among other things, that they are likely to prevail on the merits of their case, will suffer irreparable injury absent an injunction and cannot be adequately compensated by money damages. This legal mechanism poses a real threat to the ongoing operations of the wind farm during the litigation.

While the scope of an injunction depends on the facts of the case, it is possible that a court could order the wind farm to operate at less than full capacity, during limited hours or, worse, not at all. Thus, it is critical that the wind farm owner be prepared to defend against such action immediately and aggressively, which requires an effective response to the scientific, technical and health-related claims. If the court denies a preliminary injunction, that same court is not likely to grant a permanent injunction later at trial.

Landowners may claim that they are entitled to money to compensate them for their alleged loss of the use and enjoyment of their property, adverse health effects and a decrease in property values. Depending on the number of litigious landowners, the alleged collective claim could reach six or seven figures.

Landowners primarily complain about two intrusions: noise and shadowing or flicker. Landowners may first claim that operating turbines generate infrasound, low-frequency noise and audible noise that exceed acceptable thresholds. Infrasound has a frequency range of less than 20 Hz below the audible range for human hearing, and studies have shown that wind turbines do not produce perceptible infrasound.

Opponents will most likely rely on their own subjective impressions. Second, landowners may claim that the rotating blades of the turbines cause shadowing or reflect light that creates a strobe or flicker effect on their property.

In an effort to establish that these intrusions have caused them “significant” harm and constitute an “unreasonable” interference, landowners may claim they are unable to use and enjoy their property, including the normal, everyday activities.

Next, they may claim that these alleged intrusions cause some combination of ailments, including disturbed sleep, headaches, tinnitus, ear pressure, dizziness, vertigo, nausea, visual blurring, rapid heartbeat, irritability,

and loss of memory or concentration. These ailments are, coincidentally, the symptoms of so-called “wind turbine syndrome,” a condition coined by American pediatrician Dr. Nina Pierpont in her self-published book. Plaintiffs’ lawyers will most likely find a professional “expert” witness who will testify that the wind turbines are the cause of these ailments.

Finally, landowners may claim that their property values have been destroyed. Once again, lawyers may find an “expert” witness to support this claim. Typically, this witness will be a real estate appraiser who will opine that the presence and proximity of the turbines have driven down property values – the theory being that a buyer will pay less for a home closer to the turbines or, at least, pay the same for a similar home located farther away from the turbines.

Defending against nuisance lawsuits

Common sense would dictate that a wind farm in compliance with the local ordinance cannot possibly be a legal nuisance. However, such compliance, while an important component of the defense, does not alone defeat a nuisance lawsuit. In most states, compliance with the ordinance is only admissible as evidence of reasonableness. The jury will still be permitted to consider whether the overall operation of the wind farm is an unreasonable intrusion. Noncompliance with an ordinance, however, is usually fatal to the wind farm’s defense.

In addition to establishing compliance with the local ordinance, a wind farm owner has many other defenses. The first line of defense attacks the intrusion itself. Flicker complaints are susceptible to attack because this alleged intrusion is seasonal, present only on sunny days and limited in duration (early morning or early evening hours, times in which landowners may not be awake or at home).

For this reason, these cases are typically about sound. For sound-related complaints, the wind farm owner should retain an acoustics expert to assess the sound power level output

of the turbines and sound levels outside of each plaintiff’s home. This data may be available from a post-operation compliance study. The expert should explain to the jury that the wind farm is in full compliance with the applicable wind facility ordinance and well within acceptable hearing thresholds and recognized noise community guidelines.

The wind farm owner should also retain experts to rebut the plaintiffs’ damage theories and supporting experts. A well-credentialed medical doctor who has studied the issue of whether wind turbines cause adverse health effects must be retained.

This expert will have an abundance of favorable peer-reviewed literature from which to reference, such as the acclaimed “Wind Turbine Sound and Health Effects – An Expert Panel Review,” Colby, et al (December 2009). The defense panel should include medical doctors, audiologists and acoustical professionals from the U.S., Canada, Denmark and the U.K. who have concluded there is no scientific evidence directly linking wind turbine audible or sub-audible sounds to any adverse health effects.

In addition, the defense should retain an appropriate local medical doctor to analyze each plaintiff’s medical records and, if necessary, examine each plaintiff. The physician may find that a plaintiff’s purported ailments pre-date the wind farm and are completely unrelated to the operation of the turbines.

To refute allegations that the wind farm has adversely affected property values, the wind farm owner should also retain a property expert or economist. This expert may reference several studies on the topic, including “Wind Energy Facilities and Residential Properties: The Effect of Proximity and View on Sales Prices,” Ben Hoen, et al, Journal of Real Estate Research (November 2011), which is a peer-reviewed, published study that says wind facilities have no statistically significant effect on home sales prices.

Finally, the defense should chal-

lenge the notion that the alleged intrusions are unreasonable. As a renewable source of energy that costs less than new coal plants, limits dependence on foreign oil, and may create opportunities to develop local manufacturing facilities and other employment opportunities, wind energy provides significant benefits with minimal inconvenience to its communities. By offering evidence regarding the economic and social values inherent to wind energy, the defense can undercut landowners' ability to show that the utility of the

wind farm is outweighed by the alleged interference.

Thus far, the industry has either defeated or has favorably resolved the major nuisance lawsuits brought by landowners. The industry must remain vigilant, however, because one verdict in favor of landowners could give rise to copycat cases. Being prepared for the nuisance of these post-launch lawsuits and mounting a strong defense is the best strategy for the company, the industry and surrounding communities.

For more information, be sure to

attend "Community Toolbox: Overcome Wind Energy Opposition at the Community Level" on Tuesday, June 5, at 3:30 p.m. during the American Wind Energy Association's WIND-POWER 2012 Conference & Exhibition, June 3-6 in Atlanta. **SWP**

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