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## Developing Wind Power Projects in Massachusetts: Anticipating and Avoiding Litigation in the Quest to Harness the Wind

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# DEVELOPING WIND POWER PROJECTS IN MASSACHUSETTS: ANTICIPATING AND AVOIDING LITIGATION IN THE QUEST TO HARNESS THE WIND

*“The needlessly filthy and inefficient way we use energy is the single most destructive thing we do to the environment...”<sup>1</sup>*

## I. INTRODUCTION

Imagine a world where our electricity comes from sources that do not pollute the air we breathe, the water we drink, or the soil in which our food grows. Given increasing concern about global warming, and a deeper understanding of the political implications of our dependence on foreign oil, many Americans are looking for alternatives to a fossil fuel powered economy.<sup>2</sup> Fossil fuels (coal, oil, and natural gas), however, provide nearly two-thirds of our electricity in the United States.<sup>3</sup> Thus, replacing the fossil fuels that drive many of the country’s electric generation facilities will require significant investments of technological expertise and financial resources.

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<sup>1</sup> VIJAY V. VAITHEESWARAN, *POWER TO THE PEOPLE: HOW THE COMING ENERGY REVOLUTION WILL TRANSFORM AN INDUSTRY, CHANGE OUR LIVES, AND MAYBE EVEN SAVE THE PLANET 3* (Farrar, Straus and Giroux 2003).

<sup>2</sup> See generally Steven Ferrey, *Power Future*, 15 DUKE ENVTL. L. & POL’Y F. 261 (2005) (describing the various trends and impacts influencing energy policy and consumer choices); Steven Ferrey, *Sustainable Energy, Environmental Policy, and States’ Rights: Discerning the Energy Future Through the Eye of the Dormant Commerce Clause*, 12 N.Y.U. ENVTL. L.J. 507 (2004) (analyzing implications and possibilities of transition from fossil fuels to renewable energy). Conventional electricity generation in the United States releases many toxins into the environment, including approximately 39% of the carbon dioxide emissions. Ferrey, 12 N.Y.U. ENVTL. L.J. at 518.

<sup>3</sup> Avi Brisman, *The Aesthetics of Wind Energy Systems*, 13 N.Y.U. ENVTL. L.J. 1,1 (2005); see also U.S. Dep’t of Energy, <http://www.doe.gov/energysources/fossilfuels.htm> (last visited Jan. 11, 2007).

Wind power projects present one exciting alternative that will help us move towards a more sustainable energy future. Suppose that Jones represents WindCo, a wind energy company eager to build land-based wind energy projects in Massachusetts.<sup>4</sup> What legal strategies might Jones employ to help WindCo navigate the legal environment that will ultimately lead to the construction of WindCo's wind project?<sup>5</sup>

Contrary to what some may think, securing permission to build a wind project in Massachusetts is far from a sure thing.<sup>6</sup> Numerous experiences of other wind developers should inform Jones and WindCo of the various issues they are likely to face as they set out to build their project in Massachusetts.

One positive example for wind developers to look at is the experience of wind proponents in Hull, Massachusetts. In Hull, the municipal utility currently generates electricity from one 660 kW turbine located next to the town's high school and one 1.8 MW turbine located on a retired municipal landfill.<sup>7</sup> Given that 1 MW provides enough power for ap-

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<sup>4</sup> At least thirty-three proposed or built wind turbine installations exist in Massachusetts. See Massachusetts Technology Collaborative, Massachusetts Wind Installations, <http://www.masstech.org/cleanenergy/facilities/facilitiesmapstatewind.htm> (last visited Jan. 11, 2007). These projects include the Cape Wind Project in Nantucket Sound (468 MW), the Berkshire Wind Power Project in Hancock (15 MW), the Minuteman Wind Project in Savoy (12.5 MW), the Hoosac Wind Energy Project in Florida (30 MW), and the South Coast Offshore Wind Farm in Buzzards Bay (300 MW). U.S. Department of Energy, Wind and Hydropower Technologies Program, [http://www.eere.energy.gov/windandhydro/windpoweringamerica/ne\\_astate\\_template.asp?stateab=ma](http://www.eere.energy.gov/windandhydro/windpoweringamerica/ne_astate_template.asp?stateab=ma) (last visited Jan. 11, 2007). One (1) MW powers approximately 1000 homes at any given time. See Massachusetts Technology Collaborative, *Measuring Electricity*, [www.masstech.org/cleanenergy/energy/measuring.htm](http://www.masstech.org/cleanenergy/energy/measuring.htm) (last visited Jan. 11, 2007) [hereinafter *MW Calculation*].

<sup>5</sup> This note focuses on litigation issues faced by land-based wind energy projects. The issues facing off-shore projects such as Cape Wind are analyzed in greater detail by numerous other authors. See generally Jeremy Firestone, Willett Kempton, Andrew Krueger & Christen E. Loper, *Regulating Offshore Wind Power and Aquaculture: Messages from Land and Sea*, 14 CORNELL J.L. & PUB. POL'Y 71 (2004); Carolyn Kaplan, *Congress, the Courts, and the Army Corps: Siting the First Offshore Wind Farm in the United States*, 31 B.C. ENVTL. AFF. L. REV. 177 (2004); Jay Wickersham, *Sacred Landscapes and Profane Structures: How Offshore Wind Power Challenges the Environmental Impact Review Process*, 31 B.C. ENVTL. AFF. L. REV. 325 (2004). The difficulties that wind developers face at the administrative level are also beyond the scope of this note.

<sup>6</sup> See generally MASS. DIV. OF ENERGY RESOURCES, OFFICE OF CONSUMER AFFAIRS AND BUS. REGULATION, RENEWABLE ENERGY PORTFOLIO STANDARDS: ANNUAL RPS COMPLIANCE REPORT FOR 2004 (Jan. 9, 2006), available at [www.mass.gov/doer/rps/rps-2004annual-rpt.pdf](http://www.mass.gov/doer/rps/rps-2004annual-rpt.pdf). The broad categories of constraints facing wind energy projects are common to energy projects in general and include: "the challenges of site location and acceptance, financing of projects, and obtaining long term contracts for both electricity and [renewable energy credits]. In addition to those constraints, the process of developing large, new, energy facilities – planning, designing, contracting, and constructing – is inherently time consuming." *Id.* at 14.

<sup>7</sup> Hull Wind, [www.hullwind.org](http://www.hullwind.org) (last visited Jan. 12, 2007); see also J.F. Manwell, et al., *Wind Turbine Siting in an Urban Environment: The Hull, MA 660 KW Turbine* (2003),

proximately 1,000 homes, the combined capacity of the two Hull turbines is enough to power approximately 2,400 homes.<sup>8</sup> Supporters of the wind turbines in Hull attribute part of their success to the fact that the local community is both the investor and the beneficiary of the wind project.<sup>9</sup> The installation of the Hull Wind turbines has not generated any debilitating litigation because the projects enjoy widespread community support. Indeed, the community hopes to build four more turbines about two miles offshore as soon as 2008.<sup>10</sup>

Unlike the good experience in Hull, the Cape Wind project has sparked fierce debate. The conflict arises out of Cape Wind's proposal to construct 130 wind turbines in Nantucket Sound, which would generate approximately 420 MW of electricity.<sup>11</sup> The average output would provide enough electricity to power approximately three-quarters of the Cape and the Islands.<sup>12</sup> Opponents of the Cape Wind project raise seven broad categories of objections: that the permitting process has been inadequate and ill-conceived, that Nantucket Sound is a valuable resource worth preserving, that the proposed turbines create unacceptable aesthetic impacts, that the turbines adversely affect the safety of boaters, that the region does not need the electricity supplied by the proposed turbines, that the costs outweigh the benefits, and that there are numerous other risks associated with constructing the first major offshore wind project in the United States.<sup>13</sup> As a result of fierce opposition, the Cape Wind project has spawned two cases that have reached the Court of Appeals for the First Circuit.<sup>14</sup>

This note endeavors to provide attorneys with insight into the types of litigation issues they are likely to face when representing a wind project developer in Massachusetts. Part II of this note explores the reasons for the increased interest in developing wind power projects. As more and more projects are proposed in Massachusetts, litigants are more likely to ask courts to decide issues specifically related to wind energy projects. Part III,

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available at [http://www.ceere.org/rerl/publications/whitepapers/AWEA\\_Hull\\_2003.pdf](http://www.ceere.org/rerl/publications/whitepapers/AWEA_Hull_2003.pdf) [hereinafter *Hull Study*].

<sup>8</sup> *MW Calculation*, *supra* note 4.

<sup>9</sup> See *Hull Study*, *supra* note 7, at 3-5.

<sup>10</sup> *Hull tilts toward more turbines: Town wants to put 4 windmills 2 miles offshore*, THE PATRIOT LEDGER, Sept. 19, 2006, available at <http://www.windaction.org/news/5210>.

<sup>11</sup> Cape Wind, Project At a Glance, <http://www.capewind.org/article24.htm> (last visited Jan. 12, 2007).

<sup>12</sup> *Id.* (describing the benefits and scope of the Cape Wind project).

<sup>13</sup> See generally *Save Our Sound*, <http://www.saveoursound.org> (last visited Jan. 11, 2007).

<sup>14</sup> See *Alliance to Protect Nantucket Sound v. U.S. Dep't. of the Army*, 398 F.3d 105 (1st Cir. 2005) (upholding U.S. Army Corps' authority to issue permits allowing construction of test tower); *Ten Taxpayer Citizens Group v. Cape Wind Assocs.*, 373 F.3d 183 (1st Cir. 2004) (upholding federal regulatory jurisdiction rather than state regulatory jurisdiction).

therefore, analyzes litigation issues facing wind projects throughout Massachusetts and the United States.<sup>15</sup> Armed with this insight, attorneys representing wind project developers in Massachusetts will hopefully be successful in helping their clients build projects, thereby helping Massachusetts to become more of a player in the wind energy industry.

## II. WHY WIND?

### *A. The Scale of Growth*

Tapping the available wind resources in the United States could theoretically provide enough power to meet our country's electrical energy needs.<sup>16</sup> Partly because of this vast potential and the increasing desire to diversify energy supplies, wind is the "fastest growing electricity-generating technology in the world."<sup>17</sup> Between 1999 and 2004, global wind capacity grew by over 34,000 MW to a total of 47,317 MW at the end of 2004.<sup>18</sup> In 2004 alone, wind developers installed 7,976 MW of new electrical capacity around the world.<sup>19</sup> This installed capacity is enough to power approximately 7.9 million homes worldwide.<sup>20</sup>

In the United States, wind energy installations tripled between 1998 and 2003 when installations grew from providing 2,000 MW of domestic electricity to nearly 6,000 MW.<sup>21</sup> By the end of 2004, the United States

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<sup>15</sup> The reader curious about technological, economic, and environmental factors related to the development of wind power projects is referred to the Massachusetts Technology Collaborative (MTC) website: [www.masstech.org](http://www.masstech.org). The MTC is a quasi-public state agency that administers, among other programs, the Renewable Energy Trust (RET). The RET "seeks to maximize environmental and economic benefits for the Commonwealth's citizens by pioneering and promoting clean energy technologies and fostering the emergence of sustainable markets for electricity generated from renewable sources." [www.masstech.org/renewableenergy/index.htm](http://www.masstech.org/renewableenergy/index.htm) (last visited Jan. 11, 2007). Individual Massachusetts electricity customers fund the RET through monthly charges on electricity bills which amount to about six dollars (\$6) per year per customer. <http://www.masstech.org/renewableenergy/faq.htm> (last visited Jan. 11, 2007).

<sup>16</sup> See generally Kathy O'Dell, Nat'l Renewable Energy Lab, *Keeping up with the Rapidly Growing Wind Industry* (Dec. 2004), [http://www.nrel.gov/features/02-06\\_wind\\_industry.html](http://www.nrel.gov/features/02-06_wind_industry.html) [hereinafter *NREL Article*].

<sup>17</sup> *NREL Article*, *supra* note 16 (describing reasons for growth in the wind industry).

<sup>18</sup> AM. WIND ENERGY ASS'N, *GLOBAL WIND ENERGY MARKET REPORT 1* (2005), <http://www.awea.org/pubs/documents/globalmarket2005.pdf> (last visited Jan. 12, 2006) [hereinafter *AWEA Market Report*].

<sup>19</sup> *AWEA Market Report*, *supra* note 18, at 1 (quantifying total worldwide wind capacity).

<sup>20</sup> See *MW Calculation*, *supra* note 4. This calculation assumes that 1 MW powers approximately 1000 homes. *Id.*

<sup>21</sup> *NREL Article*, *supra* note 16 (explaining why wind is fast growing electricity

captured 6,740 MW of its total electricity needs from wind.<sup>22</sup> This total represents approximately 14.2% of worldwide wind capacity.<sup>23</sup>

Massachusetts, however, has not enjoyed a comparable growth in wind generation capacity. Of the thirty-three proposed or existing wind turbine installations in Massachusetts, twelve are at private residences, nine are at schools, and eight are specifically intended to provide electricity to the local utility grid.<sup>24</sup> While Massachusetts, as of June 2004, captured nearly 2,000 MW (or approximately 6% of total energy needs in Massachusetts) of “clean energy,” less than 1% of that clean energy was generated by wind.<sup>25</sup>

### *B. Factors Spurring Growth*

Although wind energy development in Massachusetts has not grown as dramatically as it has in other parts of the United States and the rest of the world, the factors driving industry growth are beginning to coalesce in Massachusetts. Consumer demand for renewable energy, technological advances improving turbine efficiency, and various governmental incentives make wind an increasingly affordable and viable energy source.<sup>26</sup>

The key governmental incentive for wind production in the United States is the Production Tax Credit (PTC).<sup>27</sup> First enacted in the Energy Policy Act of 1992, the PTC was most recently extended by Congress

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source).

<sup>22</sup> *AWEA Market Report*, *supra* note 18, at 6 (quantifying additional wind generating capacity).

<sup>23</sup> *AWEA Market Report*, *supra* note 18, at 3 (providing comparative percentages among various countries of electricity captured from wind).

<sup>24</sup> See Massachusetts Technology Collaborative, Massachusetts Wind Installations, [www.masstech.org/cleanenergy/facilities/facilitiesmapstatewind.htm](http://www.masstech.org/cleanenergy/facilities/facilitiesmapstatewind.htm) (last visited Jan. 12, 2007) (listing wind projects throughout the state with a connection to MTC); see also U.S. Department of Energy, Wind and Hydropower Technologies Program, [http://www.eere.energy.gov/windandhydro/windpoweringamerica/ne\\_ataste\\_template.asp?stateab=ma](http://www.eere.energy.gov/windandhydro/windpoweringamerica/ne_ataste_template.asp?stateab=ma) (last visited Jan. 11, 2007).

<sup>25</sup> Massachusetts Technology Collaborative, Sources of Electricity, [www.masstech.org/cleanenergy/massenvironment/sources.htm](http://www.masstech.org/cleanenergy/massenvironment/sources.htm) (last visited March 9, 2006). Of the 6% of “clean energy,” hydroelectric power generates 79%, biomass (e.g., burning wood and wood waste) generates 21%, and solar and wind combined generate less than 1%. *Id.* (emphasis added).

<sup>26</sup> See Database of State Incentives for Renewables and Efficiency, available at <http://www.dsireusa.org> (listing various incentives in each state, including Massachusetts, for renewable energy projects). See generally Kaplan, *supra* note 5, at 180 (describing various factors contributing to growth of American wind industry).

<sup>27</sup> See generally 26 U.S.C.A. § 45 (West 2007). The statute provides that the PTC is 1.5 cents per kilowatt hour, but this amount is adjusted annually for inflation. 26 U.S.C. § 45(b)(2).

through December 31, 2007.<sup>28</sup> The PTC provides a 1.9 cent per kilowatt-hour credit for electricity generated by a wind farm during the first 10 years of the farm's existence.<sup>29</sup>

Massachusetts wind energy project developers will also benefit from state assistance. Much of the recent state support for renewable energy projects in general has its roots in the Massachusetts Energy Deregulation Act of 1997.<sup>30</sup> The Act created the Renewable Energy Portfolio Standards (RPS), which mandate that utilities provide consumers with a certain amount of electricity from new renewable sources each year.<sup>31</sup> In 2007, for instance, at least 3% of the electricity sold to Massachusetts consumers by electric utilities must come from new renewable sources.<sup>32</sup> The fact that Massachusetts utilities must comply with the annual RPS targets creates a market for the electricity generated by wind power projects in Massachusetts because utilities are likely purchasers of any electricity generated by wind farms.

Wind project development in Massachusetts also holds exciting promise because of the existence of the Massachusetts Technology Collaborative (MTC). MTC is a quasi-public state agency focused on, among other things, the development of renewable energy projects.<sup>33</sup> Companies

<sup>28</sup> 26 U.S.C. § 45(d)(1).

<sup>29</sup> See American Wind Energy Ass'n, [http://www.awea.org/news/energy\\_bill\\_extends\\_wind\\_power\\_072905.html](http://www.awea.org/news/energy_bill_extends_wind_power_072905.html) (last visited Jan. 15, 2007); see also Kaplan, *supra* note 5, at 182 (describing importance of PTC for development of wind projects).

<sup>30</sup> Ch. 164 of the Acts of 1997, available at <http://www.mass.gov/legis/laws/seslaw97/sl970164.htm> (last visited Jan. 15, 2007). The Commonwealth also provides tax relief to wind energy systems:

[The following property shall be exempt from taxation . . .] Any solar or wind powered system or device which is being utilized as a primary or auxiliary power system for the purposes of heating or otherwise supplying the energy needs of property taxable under this chapter; provided, however, that the exemption under this clause shall be allowed only for a period of twenty years from the date of the installation of such system or device.

MASS. GEN. LAWS ch. 59, § 5 (45) (2007) (emphasis added). Both Governor Deval Patrick and the Speaker of the Massachusetts House of Representatives, Sal DiMasi, have recently unveiled new energy policy proposals that strive to further encourage and support renewable energy project development. *Speaker Unveils Energy Program*, BOSTON HERALD, March 21, 2007, available at <http://business.bostonherald.com/businessNews/view.bg?articleid=189768>. It remains to be seen which of the various renewable energy proposals will ultimately become law.

<sup>31</sup> MASS. GEN. LAWS ch. 25A, § 11F (2007) (empowering creation of renewable energy portfolio standards).

<sup>32</sup> 225 MASS. CODE REGS. 14.07 (2007) (implementing regulations for the renewable energy portfolio standards).

<sup>33</sup> See generally Massachusetts Technology Collaborative, <http://www.masstech.org> (last visited Jan. 11, 2007).

such as WindCo will find a willing adviser in MTC's Renewable Energy Trust (RET).<sup>34</sup>

One key MTC project that is spurring the growth of wind development in Massachusetts is the Community Wind Collaborative ("Collaborative").<sup>35</sup> The Collaborative was designed to develop wind projects in Massachusetts by encouraging municipalities to collaborate with MTC to build wind projects in the municipality.<sup>36</sup> MTC developed a wind map for all of New England.<sup>37</sup> Of the localities with sufficient wind resources, over forty said they were interested in working with MTC.<sup>38</sup> One theory behind the Collaborative is that if more people have a "Hull" experience, then resistance to wind developments will decrease; as resistance abates, so, too, does the likelihood of litigation.<sup>39</sup>

### III. INTO THE FRAY OF LITIGATION<sup>40</sup>

As more wind developers seek to capitalize on the factors spurring growth in wind energy projects in Massachusetts, Massachusetts courts will likely be asked to decide more cases specifically involving wind energy projects. This note, therefore, seeks to help practitioners avoid litigation by understanding various cases decided by courts in both Massachusetts and around the country related to (or analogous to) wind energy projects. The lessons learned from the various cases, as well as

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<sup>34</sup> See generally MTC Renewable Energy Trust, <http://www.masstech.org/renewableenergy/index.htm> (last visited Jan. 11, 2007).

<sup>35</sup> See generally Massachusetts Technology Collaborative, *Community Wind Collaborative Overview*, [http://masstech.org/RenewableEnergy/Community\\_Wind/index.htm](http://masstech.org/RenewableEnergy/Community_Wind/index.htm) (last visited Oct. 9, 2006) [hereinafter *Community Wind*].

<sup>36</sup> *Community Wind*, *supra* note 35; see also Mark Bolinger, *A Survey of State Support for Community Wind Power Development*, Lawrence Berkeley National Laboratory, Case Studies of State Support for Renewable Energy (copy on file with author).

<sup>37</sup> Wind Energy Resource Modeling and Maps for New England, [www.masstech.org/RenewableEnergy/Community\\_Wind/wind\\_maps.htm](http://www.masstech.org/RenewableEnergy/Community_Wind/wind_maps.htm) (last visited Jan. 13, 2007) (featuring MTC maps).

<sup>38</sup> *Community Wind*, *supra* note 35.

<sup>39</sup> See Mark Bolinger et al., *A Comparative Analysis of Community Wind Power Development Options in Oregon*, 15 (July 2004), available at [www.energytrust.org/RR/wind/OR\\_Community\\_Wind\\_Report.pdf](http://www.energytrust.org/RR/wind/OR_Community_Wind_Report.pdf). In fact, the collaborative "was conceived out of the sharp contrast between the highly publicized debate over the proposed [Cape Wind] project, and the nearly unanimous community support for [the Hull turbine]." *Id.*

<sup>40</sup> This section will explore some of the specific legal challenges asserted by opponents, though often opponents are really saying: "Not in my backyard." The common acronym for this phenomenon is NIMBY. See Barry G. Rabe, *North American Federalism and Climate Change Policy: American State and Canadian Provincial Policy Development*, 14 WIDENER L.J. 121, 143-44 (2004) (noting irony that "the so-called NIMBY syndrome may . . . impair development of wind energy in the very places where demand for renewable electricity is greatest").



practical insight from regulators and practitioners, lead to the following pieces of advice.

*A. Avoid litigation by working with the regulators.*

Building a wind project requires interaction with a maze of local, state and federal agencies.<sup>41</sup> On the federal level, wind projects may require permits through the Environmental Protection Agency (EPA), the Fish and Wildlife Service (FWS), and the Federal Aviation Administration (FAA).<sup>42</sup> On the state level, wind projects may require review under the Massachusetts Environmental Policy Act (MEPA), or require permits from the Department of Environmental Protection (DEP) or the Massachusetts Natural Heritage Program (MNHP).<sup>43</sup> On the local level, wind projects generally must comply with local regulations such as the local zoning code.<sup>44</sup> Key statutes include MEPA,<sup>45</sup> the Massachusetts zoning law,<sup>46</sup> and

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<sup>41</sup> See generally *Renewable Energy and Distributed Generation Guidebook: A Developer's Guide to Regulations, Policies and Programs that Affect Renewable Energy and Distributed Generation Facilities in Massachusetts*, A Publication of the Massachusetts Division of Energy Resources (April 2001), available at [www.mass.gov/doer/pub\\_info/guidebook.pdf](http://www.mass.gov/doer/pub_info/guidebook.pdf) (outlining the process for building renewable energy projects in Massachusetts).

<sup>42</sup> *Id.* at 66-70 (describing the full range of potentially necessary federal permits). The City of Boston has proposed wind turbines on Long Island in Boston Harbor, but the height of the proposed turbines conflicts with FAA regulations that limit the height of objects that may be built in close proximity to Logan Airport. See 14 C.F.R. § 77.

<sup>43</sup> *Id.* at 43-64 (describing the full range of potentially necessary state permits).

<sup>44</sup> *Id.* at 70-71 (describing the full range of potentially necessary local permits). Numerous cities and towns in Massachusetts, including Plymouth, Wareham, Truro, and Fairhaven, have implemented or are actively considering implementing a local zoning ordinance specifically related to wind energy projects. Robert Knox, *Turbines generate less resistance - Planners embrace wind energy, but procedure is a challenge*, THE BOSTON GLOBE, Aug. 13, 2006, available at <http://www.windaction.org/news/4419>. The Town of Windsor created a wind farm bylaw that requires that "the height of any wind turbine as measured from average grade shall be less than two hundred (200) feet and have a minimum blade clearance from the ground immediately below each wind turbine of twenty (20) feet." Robert W. Ritchie, *Municipal Powers*, in ENVIRONMENTAL AND LAND USE LAW CONFERENCE BOOK (MCLE 2006). In addition to numerous cities and towns, the Cape Cod Commission has also developed a model bylaw for land-based wind energy conversion facilities. The model bylaw is available at the Cape Cod Commission's website, <http://www.capecodcommission.org/windenergy/ModelWindBylaw.pdf>. The benefit of a local bylaw that specifically addresses wind projects is that wind project developers and opponents understand more clearly the rules of engagement. See *id.* at 4-5. The murkier the rules of engagement are at the local regulatory level, the more likely projects are to be rejected or tied up in debilitating litigation. See *Ten Taxpayer Citizens Group v. Cape Wind Assocs.*, 373 F.3d 183, 188 (1st Cir. 2004) (sorting out the appropriate regulatory authority for permitting the Cape Wind project).

<sup>45</sup> MASS. GEN. LAWS ch. 30, §§ 61-62 (2007). Review under MEPA is triggered when any entity seeks a permit for a project having the potential to create significant damage to the environment. MASS. GEN. LAWS ch. 30, § 61.

the various regulations related to the Energy Facilities Siting Board.<sup>47</sup>

The obvious litigation implication of these various federal, state, and local requirements is that a failure to comply with required permit procedures may lead to enforcement actions by the responsible regulatory agency.<sup>48</sup> What is more complex, and causes the most strain to a project's budget, however, is the opportunity for citizen groups to challenge the issuance of each individual permit.<sup>49</sup> A key tool for citizen groups to challenge projects with environmental implications – such as wind energy projects – is the citizen suit statute.<sup>50</sup> This statute enables a group of at least ten plaintiffs to file suit in superior court in the county in which the alleged environmental damage is occurring in order to enjoin the environmental damage from continuing.<sup>51</sup> Ten-citizen groups have challenged the Cape

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<sup>46</sup> MASS. GEN. LAWS ch. 40A (2007).

<sup>47</sup> MASS. GEN. LAWS ch. 164, §§ 69G – 69S (2007); Massachusetts Energy Facilities Siting Board (EFSB), [http://www.mass.gov/dte/siting\\_board.htm](http://www.mass.gov/dte/siting_board.htm) (last visited Jan. 11, 2007). The purpose of the EFSB is to provide required power to the Commonwealth with a minimum impact on the environment at the lowest cost. *Id.*

<sup>48</sup> See generally F. Scott Risley, *The Receipt, Negotiation and Resolution of Environmental Enforcement Actions*, 54 A.F. L. REV. 89 (2004) (analyzing the management of federal environmental enforcement actions).

<sup>49</sup> The Hoosac Wind Power Project presents an example of the difficulties that wind developers face, both with citizen opposition and regulatory uncertainty. In 2003, the wind project secured special permits from the two towns with jurisdiction over the project. *Hoosac Wind Power News*, enXco, Inc. 2005, Vol. 1, Num. 5 (on file with the author). In addition to local zoning permits, the project must also comply with regulations from the Natural Heritage and Endangered Species Program (NHESP) of the Massachusetts Division of Fisheries & Wildlife, the Federal Aviation Administration (FAA), and the Department of Environmental Protection (DEP). *Id.* NHESP recently granted the necessary permits with the condition that the Hoosac Wind Project install safeguards to protect communities of large-leaved goldenrod plants. *Id.* The FAA currently requires that structures over 200 feet tall be lighted, but these regulations may change based on a forthcoming study by pilots near a wind facility in Oklahoma. *Id.* The DEP also granted the project permission to proceed provided that the project minimize the impacts on the local wetlands resources. *Id.* This permit was appealed by a local citizen group. *Id.* As a result of the DEP appeal, the special permits issued by the towns of Florida and Monroe lapsed, thereby further delaying the project and subjecting the project to further review at the local level. *Id.*

<sup>50</sup> MASS. GEN. LAWS ch. 214, § 7A (2007) (ten citizens suit provision).

<sup>51</sup> *Id.* Mass. Gen. Laws ch. 214, § 7A provides in pertinent part:

The superior court for the county in which damage to the environment is occurring or is about to occur may, upon a civil action in which equitable or declaratory relief is sought in which not less than ten persons domiciled within the commonwealth are joined as plaintiffs . . . determine whether such damage is occurring or is about to occur and may, before the final determination of the action, restrain the person causing or about to cause such damage; provided, however, that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment.

*Id.*

Wind Project and the Hoosac Wind Project.<sup>52</sup> It is important to note that nothing in the statute prevents one citizen group from challenging the DEP wetlands permit while another challenges the MNHP permit, and yet another challenges the local zoning board proceedings.<sup>53</sup> Currently, the primary way for a wind project developer to attempt to confront all opposition at once is to request a meeting with key regulators, provide ample notice to the community, and then plan a budget that assumes the worst in terms of litigation expenses.<sup>54</sup>

### 1. Working with the local zoning authorities

A common way for local zoning authorities to regulate wind energy projects is through the special (or conditional) use permit procedure.<sup>55</sup> The key elements of a special permit zoning ordinance that will determine whether a community is friendly or hostile to wind energy projects include tower height restrictions, setback requirements,<sup>56</sup> noise restrictions,<sup>57</sup>

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<sup>52</sup> See *Ten Taxpayer Citizens Group v. Cape Wind Assocs.*, 373 F.3d 183 (1st Cir. 2004) (ten citizen group filed suit, seeking injunction to stop construction of test tower as part of Cape Wind project); *In re Hoosac Wind Project*, 12 DEPR 94 (2005) (ten citizen group filed an administrative appeal, challenging issuance of wetland permit for Hoosac Wind Project).

<sup>53</sup> See MASS. GEN. LAWS ch. 214, § 7A (2007) (describing parameters of ten citizen suit provision). Ten citizen groups may also attempt to intervene in adjudicatory proceedings before administrative bodies. MASS. GEN. LAWS ch. 30A, § 10A (2007).

<sup>54</sup> See Jay Wickersham, *Permitting Energy Development Projects*, in ENVIRONMENTAL AND LAND USE LAW CONFERENCE BOOK (MCLE 2006).

<sup>55</sup> Jim Green and Mick Sagrillo, *Zoning for Distributed Wind Power – Breaking Down Barriers*, Conference Paper, NREL/CP-500-38167, August 2005 – Prepared for Wind-Power 2005, Denver, CO, May 15-18, available at <http://www.nrel.gov/docs/fy05osti/38167.pdf> [Green/Sagrillo 2005]. Fewer communities allow for turbines as permitted (as-of-right) uses. *Id.* In Massachusetts, the Division of Energy Resources and the Executive Office of Environmental Affairs collaborated to craft a model bylaw to allow wind projects by special permit. The model bylaw is available at <http://www.mass.gov/Eoca/docs/doer/renew/model-allow-wind-by-permit.pdf> (last visited March 28, 2007).

<sup>56</sup> In Wisconsin, Florida Power and Light (FPL) proposed a 28 MW wind project in Addison, Wisconsin. Statement of Michael Vickerman, Executive Director - RENEW Wisconsin, Jan. 31, 2001, available at [http://www.renewwisconsin.org/windfarm/addi\\_cancel.html](http://www.renewwisconsin.org/windfarm/addi_cancel.html). Due in part to intense opposition to the project, the town planning commission passed a bylaw requiring a 1,000 foot setback from a wind turbine to any residence, structure, public right-of-way, or the project boundary. *Id.* The provision severely limited the number of turbines that could be built on the site and was a primary factor in FPL's decision to withdraw the project proposal. *Id.* Less restrictive setback requirements require setbacks of 1.5 times the tower height or 1.25 times the tower height. John Cavanagh, *Golden Planners Tighten Wind Generator Law - Residents Still Want Stricter Setbacks, Noise Levels*, HERALD-JOURNAL (Golden, Mich.), June 29, 2006, available at <http://www.windaction.org/news/3698>; *Wind Turbine Law up for Hart Twp. Public Hearing Monday*, OCEANA'S HERALD JOURNAL (Mich.), Apr. 6, 2006, available at <http://www.windaction.org/news/2407>.

minimum lot size requirements,<sup>58</sup> and limits on the particular zoning districts in which wind turbines may be sited.<sup>59</sup>

An example of how an ordinance can specifically impact a proposed wind energy project can be found in Savoy, Massachusetts. Minuteman Wind, a Massachusetts wind developer, is proposing a 12.5 MW wind farm in and around Savoy, Massachusetts.<sup>60</sup> While the developer prepares the special permit application, the community is considering a bylaw that would limit the height of wind turbines to 350 feet.<sup>61</sup> Given that the developer is proposing five 420-foot turbines, this proposed ordinance, if passed, could present trouble for the developer unless a deal can otherwise be worked out.<sup>62</sup>

When a wind project developer secures a special (or conditional) use permit from the local zoning authority, the developer stands on fairly strong footing if an opponent challenges the permit in court. The footing is even stronger in situations where the local zoning authority grants the conditional use permit consistent with a local wind energy system ordinance.<sup>63</sup>

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<sup>57</sup> In Michigan, a proposed ordinance would limit sound levels from the turbine to 55 decibels at the property line. Cavanagh, *supra* note 56. According to industry advocates, a wind turbine operating 750 – 1,000 feet away from a decibel meter generates between 35-45 decibels, comparable to a “quiet bedroom” that generates 35 decibels. American Wind Energy Association, *FACTS ABOUT WIND ENERGY AND NOISE*, available at [http://www.awea.org/pubs/factsheets/WE\\_Noise.pdf](http://www.awea.org/pubs/factsheets/WE_Noise.pdf) (last visited on Feb. 11, 2007).

<sup>58</sup> Officials in Yarmouth, Massachusetts have proposed to tighten their existing wind ordinance by restricting commercial scale turbines to lots 10 acres or larger. Patrick Cassidy, *Yarmouth to Revisit Wind Power Bylaw*, CAPE COD TIMES (Mass.), Sept. 18, 2006, available at <http://www.windaction.org/news/5182>. The bylaw would not restrict small, residential scale turbines. See Craig Salters, *Zoning Bylaw for Wind Turbines Generating Interest*, YARMOUTHPORT REGISTER (Mass.), Sept. 8, 2006, available at <http://www.windaction.org/news/4943> (describing the debate in another Cape Cod community).

<sup>59</sup> Officials in Hart Township, Michigan proposed an ordinance that would allow wind turbines in agricultural-residential zones as special uses. *Wind turbine law up for Hart Twp. public hearing Monday*, OCEANA’S HERALD JOURNAL (Mich.), Apr. 6, 2006, available at <http://www.windaction.org/news/2407>. A Kansas community adopted wind regulations that allow commercial wind farms in agriculturally-zoned areas through the local special use permit process. The regulations prevent wind turbines in certain areas, including areas that have large, intact areas of vegetation or areas visible from scenic byways or vistas. Kevin M. Smith, *Watchdog Group, Drafter Say Regulations Are Good*, DAILY UNION (Kan.), Jan. 6, 2006, available at <http://www.windaction.org/news/1216>.

<sup>60</sup> Patrick G. Rheaume, *Turbine project exempt?*, BERKSHIRE EAGLE (Mass.), July 7, 2006, available at <http://www.windaction.org/news/3802>.

<sup>61</sup> *Id.*

<sup>62</sup> Rheaume, *supra* note 60.

<sup>63</sup> In many cases, securing permission to build a wind energy project is as much a political process as it is a legal process. Wind developers who work with the community and secure support from the neighbors are more likely to succeed than those developers who fail to work with residents. George Petrisek, *Virginia Company Looking to Build Wind Farm in Potter Co.*, THE BRADFORD ERA (Va.), Oct. 16, 2006, available at <http://www.windaction.org/news/5778>. The Potter County project apparently complies with

In Wisconsin, Navitas Energy, Inc. (“Navitas”) secured a conditional use permit from the Manitowoc County Board of Adjustment (“the Board”) to build a 49-turbine wind energy project.<sup>64</sup> In *Roberts*, the court reviewed a decision of the Board to grant the permit based on the Board’s interpretation of the local “Large Wind Energy System Ordinance.”<sup>65</sup> “Large Wind” projects are those involving turbines with a nameplate capacity of 100kW or greater than 170 feet tall, or both.<sup>66</sup> The ordinance, *inter alia*, required Navitas and the Board to provide notice to certain interested parties and hold public hearings.<sup>67</sup> In addition, the ordinance gives the Board discretion to grant the permit application, subject to reasonable conditions imposed by the Board, as long as the project meets the requirements of the ordinance, and granting the permit “will not unreasonably interfere with the orderly land use and development plans of the county.”<sup>68</sup>

In affirming the Board’s decision to grant the permit, the court’s analysis demonstrates why wind developers should look for communities with ordinances that allow wind projects through conditional use permits. While local boards retain discretion in deciding whether to grant a conditional use permit, if a wind developer benefits from the properly employed discretion of a local board’s decision, a court “will not substitute [its] discretion for that of the Board.”<sup>69</sup> Moreover, decisions of local boards are presumed correct and the opponent has the burden to prove otherwise.<sup>70</sup> In attempting to prove that the board’s decision is incorrect, an opponent would have to show that the board acted beyond its jurisdiction, that the board proceeded under an incorrect theory of law, acted arbitrarily or unreasonably, or made a decision based on evidence that could not have reasonably led the board to its decision.<sup>71</sup> In *Roberts*, the court concluded that

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local regulations, so it is a matter of getting local residents on board so that local officials can feel comfortable approving the project. *See id.*

<sup>64</sup> *Roberts v. Manitowoc County Bd. of Adjustment*, 721 N.W.2d 499, 502 (Wis. Ct. App. 2006); *see also Shippee v. Zoning Bd. of Appeals of Old Lyme*, 466 A.2d 328 (Conn. Super. Ct. App. Session 1983) (affirming local ZBA’s granting of special permit for wind project consistent with local ordinance).

<sup>65</sup> *Roberts*, 721 N.W.2d at 501 (citing Manitowoc County, Wis. Code § 24.09(2) (2005)). The Court further noted that Code § 24 was recently updated, effective May 1, 2006. The updated version of the ordinance was not relevant to this case because the relevant events occurred before May 1, 2006. *Id.* The current ordinance requires that, *inter alia*, (1) turbine noise may not be more than 5 decibels higher than ambient noise levels, (2) turbines may only be located in certain agricultural zoning districts, and may not be located in certain conservancy or natural area districts, and (3) that turbines be set back at least 1.1 times the total height of the turbine from the turbine-owner’s property line. *Id.*

<sup>66</sup> *Roberts*, 721 N.W.2d at 501.

<sup>67</sup> *Id.*

<sup>68</sup> *Roberts*, 721 N.W.2d at 501.

<sup>69</sup> *Id.* at 502-03.

<sup>70</sup> *Roberts*, 721 N.W.2d at 503.

<sup>71</sup> *Id.*

the conditional use permit granted to Navitas by the Board was made consistent with the local ordinance and supported by substantial evidence.<sup>72</sup> Even though, according to opponents, there is substantial evidence dispelling the “purported virtues of wind power,” the court “will uphold the Board’s decision where . . . it is supported by substantial evidence, even if there is also substantial evidence to support the opposite conclusion.”<sup>73</sup>

Not all communities, however, have local ordinances that specifically address wind energy projects. In communities without a wind project ordinance, wind project proponents face a tougher hurdle in getting their projects approved. In such communities, even if a wind project proponent works with the regulators, follows the existing permitting rules, and receives a favorable ruling from the local zoning authorities, the proponent may still face trouble if the opponent can show that the local authority that issued the permit exceeded its statutory authority.<sup>74</sup>

The experience of a municipal utility and private developer in Princeton, Massachusetts highlights these difficulties. In *Bomba v. Princeton*,<sup>75</sup> two neighbors challenged the local zoning board of appeal’s (ZBA) decision that allowed the local municipal utility and a private wind developer to construct two test towers for the purpose of assessing whether the spot was an effective location for wind turbines.<sup>76</sup> The local ZBA decided that the test towers were exempt from the local zoning bylaw that restricted the heights of structures, primarily because the test towers were considered “public buildings,” and that the ZBA’s decision was entitled to deference.<sup>77</sup> The land court judge was not persuaded by the ZBA’s arguments that wind turbines qualified for the “public buildings” exception in the local bylaw.<sup>78</sup> Consequently, the judge held that the ZBA’s decision was made on “legally untenable” ground and found for the project’s opponents.<sup>79</sup>

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<sup>72</sup> *Roberts*, 721 N.W.2d at 508.

<sup>73</sup> *Id.* at 507.

<sup>74</sup> See *Bomba v. Zoning Bd. of Appeals of Princeton*, No. 293552, 2005 WL 2106162 (Mass. Land Ct. Sept. 1, 2005) (finding that local zoning board of appeals exceeded authority because decision based on “legally untenable” ground). See also *In re Halnon*, 811 A.2d 161, 166 (Vt. 2002) (implying that if a project can get approval from local siting boards based on sound reasoning, the project is well-positioned for any subsequent litigation because the local siting board’s decision merits deference).

<sup>75</sup> 2005 WL 2106162.

<sup>76</sup> *Id.* at \*1.

<sup>77</sup> *Id.* at \*2 (noting that wind turbines do not fit neatly into any existing town zoning law).

<sup>78</sup> *Id.* at \*6. Section VI.2(A) of the local bylaw states that the height restriction “does not apply to a . . . public building,” but the bylaw does not explicitly define “public” or “building.” *Id.* at \*5.

<sup>79</sup> *Id.* at \*8 (explaining that ZBA’s analogy of a wind turbine to a public building was incorrect).

## 2. Bypassing the local zoning authorities

Currently, one way for a wind energy developer to bypass hostile local zoning authorities altogether in Massachusetts is to petition the state's department of public utilities for a public service corporation exception.<sup>80</sup> If the department considers the particular wind project a public service corporation, then the department has the authority to force the local zoning board to permit the project.<sup>81</sup> Gaining zoning board approval, however, is only one piece of the puzzle for a wind project.<sup>82</sup> The department does not have the authority to force other state permitting agencies, such as the DEP, to issue any permits within the DEP's jurisdiction.<sup>83</sup>

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<sup>80</sup> See MASS. GEN. LAWS ch. 40A, § 3 (2007) (setting forth the Dover Amendment). The Dover Amendment describes "subjects which zoning may not regulate." *Id.* The amendment provides exemptions for "public service corporation[s]" and for solar power systems, but not for wind systems per se. *Id.* In determining whether a wind energy corporation qualifies as a "public service corporation," courts will consider:

whether the corporation is organized pursuant to an appropriate franchise from the State to provide for a necessity or convenience to the general public which would not be furnished through the ordinary channels of private business; whether the corporation is subject to the requisite degree of governmental control and regulation, and the nature of the public benefit to be derived from the service provided.

*Save the Bay, Inc. v. Dep't of Public Utils.*, 322 N.E.2d 742, 753 (Mass. 1975) (holding that liquefied natural gas company qualified as "public service corporation").

<sup>81</sup> MASS. GEN. LAWS ch. 40A, § 3 (outlining various exceptions to the Massachusetts zoning law). Section 3 says:

lands or structures used, or to be used *by a public service corporation* may be *exempted* in particular respects *from the operation of a zoning ordinance* or by-law if, upon petition of the corporation, the department of telecommunications and energy shall, after notice given . . . and public hearing in the town or city, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public . . .

*Id.* (emphasis added).

<sup>82</sup> See *supra* notes 41-47 and accompanying text (outlining portions of regulatory framework).

<sup>83</sup> See *supra* notes 80-81 and accompanying text (describing force of public service corporation determination).

*B. Avoid litigation by working with the community.*

1. Aesthetic Concerns

Another lesson learned from the litigation experience of others is to try to make reasonable accommodation for the aesthetic concerns of the community.<sup>84</sup> The obstinate wind developer risks the ire of the permitting agency, the reviewing court, and the neighbors.<sup>85</sup> *In re Halnon*<sup>86</sup> highlights the importance of being a good neighbor. Halnon wanted to build a wind turbine on a sixty-two acre parcel of land he owned in East Middlebury, Vermont.<sup>87</sup> He sought approval from the proper authority, but was denied.<sup>88</sup> Neighbors' aesthetic concerns were the primary source of objections to the proposed project.<sup>89</sup>

In *In re Halnon*, the permitting authority had determined, and the reviewing court agreed, that Halnon did not provide any "compelling reason why he could not use an alternative site" for the construction of his wind turbine.<sup>90</sup> Halnon could have moved the wind turbine to a different location on his property, but he refused to do so.<sup>91</sup> Consequently, the court

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<sup>84</sup> See generally Brisman, *supra* note 3 (describing the weight of aesthetic concerns in the overall calculus of environmental impacts of wind energy projects).

<sup>85</sup> See *In re Halnon*, 811 A.2d 161, 165 (Vt. 2002) (scolding wind proponent for not mitigating aesthetic impacts of proposed turbine).

<sup>86</sup> 811 A.2d 161 (Vt. 2002) (upholding local board's denial of wind turbine permit because applicant failed to attempt to mitigate aesthetic concerns of neighbors).

<sup>87</sup> *In re Halnon*, 811 A.2d at 162.

<sup>88</sup> *Id.* In Vermont, a wind project proponent must secure a "certificate of public good" from the Vermont Public Service Board. *Id.* As part of the process, a project proponent such as Halnon must send notice to neighboring landowners informing them of his application to construct a wind turbine. *Id.*

<sup>89</sup> *In re Halnon*, 811 A.2d at 162. Vermont courts use the *Quechee* test when evaluating whether a project will have an impermissible aesthetic impact on the surrounding community. *Id.* at 162-63 (citing *In re McShinsky*, 572 A.2d 916, 919 (Vt. 1990)). The two-pronged analysis involves determining: (1) whether the project will have an "adverse [aesthetic] impact" because the project "would not be in harmony with its surroundings" and (2) if so, whether the adverse impact is "undue." *In re Halnon*, 811 A.2d at 163 (citing *In re McShinsky*, 572 A.2d at 919). More specifically, an impact is "undue" if:

- (1) the project violate[s] a clear, written community standard intended to preserve the aesthetics . . . of the area, (2) the project offend[s] the sensibilities of the average person, [or] (3) the applicants failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings[.]

*In re McShinsky*, 572 A.2d at 920.

<sup>90</sup> *In re Halnon*, 811 A.2d at 163 (noting that the hearing officer had determined that suitable alternative sites existed).

<sup>91</sup> *In re Halnon*, 811 A.2d at 165. The court noted that the fact that the proposed wind



held that “it was not an abuse of discretion for the [permitting authority] to dismiss Halnon’s application when Halnon failed to provide evidence that he had taken significant steps to minimize the negative effects that the project would have on [the neighbor’s view].”<sup>92</sup>

## 2. Wind turbines as a private nuisance

Wind turbine opponents have also attempted to stop projects by arguing that individual wind turbines constitute a private nuisance.<sup>93</sup> In Massachusetts, the general rule for determining whether a particular action amounts to a private nuisance is whether one actor’s action creates an unreasonable interference with the use and enjoyment of the neighbor’s land.<sup>94</sup> While Massachusetts courts have not yet interpreted in a published opinion whether wind turbines amount to nuisances, cases from other jurisdictions are instructive.<sup>95</sup>

In New Jersey, a court has held that the noise caused by wind turbines can create a nuisance. In *Rose v. Chaikin*,<sup>96</sup> a neighbor filed suit to enjoin the operation of a wind turbine that had been built by another neighbor.<sup>97</sup> The wind proponent built the turbine in order to provide power for his home in Brigantine, New Jersey.<sup>98</sup> The complaining neighbor’s primary complaint was that the noise from the wind turbine constituted a private nuisance.<sup>99</sup> In assessing whether the turbine in fact constituted a private nuisance, the court explained: “[t]he utility of the defendant’s con-

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tower was only 450 feet from his neighbor was different than another situation in which the board allowed a wind turbine that was 1300 feet from the neighbor. *Id.* at 166.

<sup>92</sup> *In re Halnon*, 811 A.2d at 165.

<sup>93</sup> See *infra* notes 96-111 and accompanying text. Today’s turbines are quieter than the turbines at issue in the following cases. In fact, “from a distance of several hundred feet, wind turbines [today] can be compared to the sound level of a refrigerator.” Renewable Energy Research Laboratory, UMass – Amherst, *Wind Power: Impacts & Issues*, available at [http://www.ceere.org/rerl/publications/published/communityWindFactSheets/RERL\\_Fact\\_Sheet\\_3\\_Impacts&Issues.pdf](http://www.ceere.org/rerl/publications/published/communityWindFactSheets/RERL_Fact_Sheet_3_Impacts&Issues.pdf) (last visited Jan. 11, 2007). The cases below mention decibel levels of over 60. More modern turbines generate levels of approximately 50 decibels. *Id.*

<sup>94</sup> *Asiala v. City of Fitchburg*, 505 N.E.2d 575, 577 (Mass. App. Ct. 1987) (finding nuisance when city’s inadequate maintenance of retaining wall caused significant damage to property owner’s building). “A private nuisance is actionable when a property owner creates, permits, or maintains a condition or activity on his property that causes a substantial and unreasonable interference with the use and enjoyment of the property of another.” *Id.*

<sup>95</sup> See *infra* notes 96-111 and accompanying text.

<sup>96</sup> 453 A.2d 1378 (N.J. Super. Ct. Ch. Div. 1982).

<sup>97</sup> *Rose*, 453 A.2d at 1380 (analyzing whether noise emanating from private wind turbine constituted a nuisance).

<sup>98</sup> *Id.* (noting that turbine built with permission from building permit).

<sup>99</sup> *Id.* (noting that the 61 decibels generated by the turbine exceeded the 50 decibel limit set out by the controlling bylaw).

duct must be weighed against the quantum of harm to the plaintiff.”<sup>100</sup> Moreover, “[t]he question is not simply whether a person is annoyed or disturbed, but whether the annoyance or disturbance arises from an unreasonable use of the neighbor’s land.”<sup>101</sup> Unreasonableness, the court continued, “is judged . . . according to the simple tastes and unaffected notions generally prevailing among plain people.”<sup>102</sup>

More specifically, in order to determine whether noise amounts to a private nuisance, two elements must be present. First, there must exist an “injury to the health and comfort of ordinary people in the vicinity.”<sup>103</sup> Second, that injury must be “[unreasonable] . . . under all the circumstances.”<sup>104</sup> In holding that the wind turbine amounted to a nuisance because of the noise, the court acknowledged that while scientific and social progress may sometimes require a reduction in personal comfort, “the fact that a device represents a scientific advance and has social utility does not mean that it is permissible at any cost.”<sup>105</sup>

Unlike the *Rose* court in New Jersey, which found that a turbine constitutes a nuisance when it creates noise at 61 decibels, a North Dakota court found that turbines are not a nuisance despite the noise.<sup>106</sup> In *Rassier v. Houim*,<sup>107</sup> *Rassier* sought to abate a private nuisance created by a wind turbine installed by *Houim* in a residential area.<sup>108</sup> As measured by scientists, the wind turbine generated noise levels between 50 and 69 decibels.<sup>109</sup> In holding that *Houim*’s wind turbine did not constitute a private nuisance, the court reasoned that *Rassier* had not provided enough evidence to prove that the turbine was a nuisance.<sup>110</sup> In fact, the court noted,

<sup>100</sup> *Rose*, 453 A.2d at 1381 (applying nuisance law analysis to wind turbines).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Rose*, 453 A.2d at 1381 (explaining that noise can be such an injury).

<sup>104</sup> *Id.*

<sup>105</sup> *Rose*, 453 A.2d at 1382. The court found that the wind turbine had created noise levels of between 56-61 decibels. *Id.* at 1380. Today, according to wind industry advocates, a wind turbine operating 750-1,000 feet away from a decibel meter generates between 35-45 decibels, comparable to a “quiet bedroom” that generates 35 decibels. AMERICAN WIND ENERGY ASS’N, FACTS ABOUT WIND ENERGY AND NOISE, available at [http://www.awea.org/pubs/factsheets/WE\\_Noise.pdf](http://www.awea.org/pubs/factsheets/WE_Noise.pdf) (last visited Feb. 11, 2007).

<sup>106</sup> See *Rassier v. Houim*, 488 N.W.2d 635 (N.D. 1992) (holding noise from wind turbine did not amount to nuisance because opponent failed to prove that it was actually a nuisance).

<sup>107</sup> 488 N.W.2d 635 (N.D. 1992).

<sup>108</sup> *Id.* at 636.

<sup>109</sup> *Id.* at 638. “Those North Dakota communities which have enacted noise ordinances prohibit noise exceeding 55 decibels in residential areas,” but the town in which *Rassier* and *Houim* lived (*Mandan*) had not enacted such an ordinance. *Id.*

<sup>110</sup> *Id.* at 638-39. In *Rassier*, the dissent quotes from *Rose v. Chaikin* to support the proposition that “[e]xcessive noise is a classic breach of duty, and it is a private nuisance to a neighbor in a residential area.” *Rassier*, 488 N.W.2d at 640 (Meschke, J., dissenting).

Houim had offered to show Rassier how to turn off the turbine whenever the noise bothered Rassier, but Rassier never availed herself of Houim's offer.<sup>111</sup>

### 3. Playing hardball with the neighbors

A particularly aggressive wind project developer may consider filing suit directly against citizens who speak out or challenge particular development projects.<sup>112</sup> If these types of suits are not carefully crafted, however, they risk being labeled as "strategic litigation against public participation" (SLAPP).<sup>113</sup> SLAPP suits are "generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so."<sup>114</sup>

While attempting to intimidate opponents may be tempting, this approach is limited by the Massachusetts anti-SLAPP statute. The anti-SLAPP statute is designed, in part, to "remedy . . . lawsuits directed at individual citizens of modest means for speaking publicly against development projects."<sup>115</sup> More specifically, the anti-SLAPP statute protects the "petitioning activity" of citizens who oppose development projects.<sup>116</sup> In other words, a frustrated wind developer may not sue a pesky opponent merely for that opponent asserting his or her right to petition the government to appeal any permits.<sup>117</sup> If a wind developer were to sue a particularly troublesome opponent, and that opponent successfully invoked the protection of the anti-SLAPP statute, the court would dismiss the charges as expeditiously as possible, and may award the opponent attorney's fees.<sup>118</sup>

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<sup>111</sup> *Rassier*, 488 N.W.2d at 638 (noting further that Houim's wind turbine existed prior to Rassier moving to the neighborhood).

<sup>112</sup> See *Plante v. Wylie*, 824 N.E.2d 461 (Mass. App. Ct. 2005) (dismissing charges brought by stymied developer against opponent's lawyer).

<sup>113</sup> MASS. GEN. LAWS ch. 231, §59H (2007) (Massachusetts anti-SLAPP statute).

<sup>114</sup> *Plante*, 824 N.E.2d at 465 (quoting *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 940 (1998)).

<sup>115</sup> *Plante*, 824 N.E.2d at 465 (quoting *Kobrin v. Gastfriend*, 821 N.E.2d 60, 66 (2005)).

<sup>116</sup> See *Plante*, 824 N.E.2d at 465 (asserting that conservation trust may invoke protections of anti-SLAPP statute when it is sued based on petitioning activity).

<sup>117</sup> See generally *Plante v. Wylie*, 824 N.E.2d 461 (Mass. App. Ct. 2005); MASS. GEN. LAWS ch. 231, § 59H.

<sup>118</sup> MASS. GEN. LAWS ch. 231, § 59H ("If the court grants [the] special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees . . ."). Moreover, "[t]he statute is designed to deter lawsuits filed to intimidate citizens from legitimately petitioning the government for redress of grievances and to provide a mechanism for the prompt dismissal of such lawsuits before the petitioning party has been forced to incur significant costs of defense." *Plante*, 824 N.E.2d at 466 (citing *Duracraft*, 691 N.E.2d 935).

While no reported Massachusetts cases specifically analyze anti-SLAPP issues in the context of wind projects, one recent land use case proves instructive.<sup>119</sup> In *Plante v. Wylie*,<sup>120</sup> a disgruntled developer sued an adversarial attorney for what the developer alleged were violations of the Massachusetts Civil Rights Act, the federal RICO statute, and the Massachusetts Consumer Protection Act.<sup>121</sup> More specifically, the developer sued the attorney, who represented a conservation trust that opposed the developer's plans, for initiating settlement agreements with various parties affected by the conflict between the developer and the conservation trust.<sup>122</sup> The conflict arose because the conservation trust asserted an ownership interest over the land that the developer claimed to own and intended to further develop.<sup>123</sup>

In order to determine whether the anti-SLAPP statute protects the actions of a project opponent, a court must determine whether the project opponent was sued for activity that the court considers "petitioning activity."<sup>124</sup> In *Plante*, the court dismissed the claims against the attorney and awarded the attorney reasonable costs and attorney's fees because the court found that the attorney's actions in trying to craft a settlement amounted to protected petitioning activity.<sup>125</sup>

While certain petitioning activities by project opponents are protected by the anti-SLAPP statute, other behaviors of project opponents are not. For example, a wind energy developer *may* sue disgruntled opponents for actions such as harassment or trespassing without risking a successful anti-SLAPP suit.<sup>126</sup> In *Garabedian v. Westland*,<sup>127</sup> the court held that the anti-SLAPP statute protected opponents seeking to block land filling and grading when they worked to enlist neighborhood opposition, but it did not protect opponents when they harassed truck drivers and videotaped the

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<sup>119</sup> See *Plante v. Wylie*, 824 N.E.2d 461 (Mass. App. Ct. 2005) (dismissing charges brought by stymied developer against opponent's lawyer).

<sup>120</sup> 824 N.E.2d 461 (Mass. App. Ct. 2005).

<sup>121</sup> *Id.* at 463.

<sup>122</sup> *Id.* (analyzing whether settlement negotiations amounted to protected "petitioning activity").

<sup>123</sup> *Id.* (describing the various ownership interests in the parcel at issue asserted by the parties).

<sup>124</sup> See *Plante*, 824 N.E.2d at 467 (noting that statute defines specific categories of petitioning activities).

<sup>125</sup> *Plante*, 824 N.E.2d at 469 (demonstrating that potentially having to pay attorney's fees is major risk of inartfully suing project opponents).

<sup>126</sup> See *Garabedian v. Westland*, 796 N.E.2d 439 (Mass. App. Ct. 2003) (describing activities protected by anti-SLAPP statute when challenging land filling and grading activity); *Ayasli v. Armstrong*, 780 N.E.2d 926 (Mass. App. Ct. 2002) (describing activities protected by anti-SLAPP statute when challenging home renovation project).

<sup>127</sup> 796 N.E.2d 439 (Mass. App. Ct. 2003).

truck drivers' work.<sup>128</sup> Likewise, in *Ayasli v. Armstrong*,<sup>129</sup> the neighbors' voicing disapproval of a home renovation before various town boards was protected, while harassment, trespassing, and threats were not.<sup>130</sup>

*C. Avoid litigation by respecting the wildlife impacted by the project.*

In addition to working with the neighbors, it is also critical to pay attention to any potential impacts that the wind project may have on wildlife. Indeed, "[t]he potential for wind energy to provide a clean, economical, and renewable supply of electricity must be weighed against the potential for wind energy development to impact bird mortality, degrade ecosystems, and harm endangered species and endangered species habitats."<sup>131</sup>

The Migratory Bird Treaty Act (MBTA) is one federal law that has important implications for wind farms.<sup>132</sup> The MBTA is a federal statute that has potentially strict consequences for actions that "take" birds covered by the treaty.<sup>133</sup> In the context of wind farms, proponents must be concerned with whether any bird deaths resulting from collisions with wind turbines will lead to strict liability for turbine owners and whether bird deaths resulting from collisions with turbines amount to a "take" as contemplated by the statute.<sup>134</sup>

One large wind farm in particular highlights the interplay between wind farms and the MBTA. Many opponents of wind projects point to the wind farm in Altamont Pass, California as an example of unacceptable levels of bird kills resulting from migratory birds that collide with wind turbines.<sup>135</sup> The notion of wind turbines as "condor cuisinarts," however,

<sup>128</sup> *Garabedian*, 796 N.E.2d at 444 (denying anti-SLAPP motion in neighborhood battle related to airplane hangar).

<sup>129</sup> 780 N.E.2d 926 (Mass. App. Ct. 2002).

<sup>130</sup> *Ayasli*, 780 N.E.2d at 933-34 (analyzing anti-SLAPP issues related to neighborhood battle related to home renovation).

<sup>131</sup> Victoria Sutton & Nicole Tomich, *Harnessing Wind is Not (By Nature) Environmentally Friendly*, 22 PACE ENVTL. L. REV. 91, 94 (2005) (arguing for more comprehensive consideration of adverse environmental impacts of wind energy systems).

<sup>132</sup> Migratory Bird Treaty Act, 16 U.S.C.A §§ 703-712 (West 2005).

<sup>133</sup> 16 U.S.C. § 703(a) (2005). The MBTA provides in pertinent part: "it shall be unlawful at any time, by any means or in any manner, to . . . take . . . [or] attempt to take . . . any migratory bird . . ." Birds covered by the treaty include hawks, eagles, Canadian geese, ducks, and pigeons. 50 C.F.R. § 10.13 (2004).

<sup>134</sup> See 50 C.F.R. § 10.12 (2004) (defining "take" broadly to mean "[to or attempt to] pursue, hunt, shoot, wound, kill, trap, capture, or collect" protected birds); *United States v. Moon Lake Elec. Ass'n*, 45 F. Supp. 2d 1070, 1073 (D. Colo. 1999) (noting that the majority of circuit courts of appeal hold that 16 U.S.C. § 707(a) of the MBTA is a strict liability crime).

<sup>135</sup> *Brisman*, *supra* note 3, at 70 (describing study which revealed that Altamont Pass wind farm had killed thirty-three protected birds over a three-year period).

while a catchy phrase for opponents, is not totally fair.<sup>136</sup> In fact, modern day technological advances have significantly cut down on the number of bird kills caused by current wind turbines.<sup>137</sup> In general, the U.S. Fish and Wildlife Service (FWS) estimates that at least 97 million birds die from striking building windows each year while approximately 33,000 birds die from collisions with wind turbine rotors.<sup>138</sup> Indeed, at least one study estimates that the common domestic cat is responsible for millions of bird deaths each year.<sup>139</sup>

One litigated issue related to the MBTA is whether private citizens may bring suit against wind developers under the statute or whether enforcement responsibility lies solely with FWS.<sup>140</sup> In *Flint Hills Tallgrass Prairie Heritage Foundation v. Scottish Power, PLC*,<sup>141</sup> a private citizen group challenged a proposed wind farm by arguing that the wind farm would cause “permanent and irreparable damage” to the surrounding ecosystem, including the various migratory birds that lived in the area.<sup>142</sup> In holding that the MBTA does not provide a private right of action for private parties, the court noted that the MBTA is “largely viewed as a criminal statute.”<sup>143</sup>

While the MBTA does not provide a private right of action for citizens suing private parties, it clearly allows the federal government to bring enforcement actions against dilatory parties.<sup>144</sup> In *United States v. Moon*

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<sup>136</sup> Brisman, *supra* note 3, at 73 (lamenting the persistent stigma of turbines as bird-killers as a barrier to wind farm development).

<sup>137</sup> Power Scorecard, *Electricity from: Wind*, available at [http://www.powerscorecard.org/tech\\_detail.cfm?resource\\_id=11](http://www.powerscorecard.org/tech_detail.cfm?resource_id=11) (last visited Mar. 14, 2006).

<sup>138</sup> U.S. Fish & Wildlife Service, *Migratory Bird Mortality: Many Human-Caused Threats Afflict our Bird Populations* (Jan. 2002), available at <http://www.fws.gov/birds/mortality-fact-sheet.pdf>.

<sup>139</sup> *Id.* Moreover, the Altamont Pass wind farm was constructed in the middle of a major migratory bird flight path, a location that wind developers today recognize as inappropriate. See Brisman, *supra* note 3, at 71 (commenting that the Altamont Pass turbines were sited in the “middle of prime raptor habitat” and that bird studies done at other turbine location across the country measured “only one or two bird deaths per turbine per year”).

<sup>140</sup> 50 C.F.R. § 10.1 (2005) (vesting the U.S. Fish and Wildlife Service with enforcement authority under the MBTA and other statutes such as the Endangered Species Act). See *Flint Hills Tallgrass Prairie Heritage Found. v. Scottish Power*, No. 05-1025-JTM, 2005 WL 427503 (D. Kan. Feb. 22, 2005) (analyzing whether private right of action exists under the MBTA).

<sup>141</sup> 2005 WL 427503 (D. Kan. Feb. 22, 2005).

<sup>142</sup> *Id.* at \*1.

<sup>143</sup> *Id.* at \*2 n.1 (acknowledging the limited possibility of establishing a private right of action against the *government*, but even then, only under the Administrative Procedure Act and not under the MBTA itself, and under no circumstances against a private party) (emphasis added).

<sup>144</sup> 50 C.F.R. § 10.1 (2005) (vesting the U.S. Fish and Wildlife Service with enforcement authority under the MBTA and other statutes such as the Endangered Species Act).

*Lake Elec. Ass'n*,<sup>145</sup> FWS charged Moon Lake, a rural electrical cooperative, with six violations of the MBTA because of the deaths of Golden Eagles, Ferruginous Hawks, and a Great Horned Owl.<sup>146</sup> In bringing the charges, the government pointed out that Moon Lake failed to put “inexpensive” protective devices that would have prevented the bird deaths on the cooperative’s 2,450 power poles.<sup>147</sup> While Moon Lake argued that liability under the MBTA required intentionally harmful conduct, the court held that intent “is irrelevant to . . . prosecution under s. 707(a).”<sup>148</sup>

In support of its assertion that intent is irrelevant to prosecution, the court further explained:

By prohibiting the act of “killing” in addition to the acts of hunting, capturing, shooting, and trapping, the MBTA’s language and regulations suggest that Congress intended to prohibit conduct beyond that normally exhibited by hunters and poachers. Indeed, the MBTA does not seem overly concerned with how captivity, injury, or death occurs.<sup>149</sup>

The consequences of this ruling for Moon Lake were three years of probation, \$100,000 in fines and restitution, a requirement to retrofit the utility poles to prevent future bird deaths, and an agreement to develop an Avian Protection Plan.<sup>150</sup>

Given that the federal government can bring enforcement actions against parties even if the bird kills are unintentional, as in *Moon Lake*, the question becomes how wind developers can comply with the MBTA without incurring prohibitive costs.<sup>151</sup> At the moment, there are no final regulations that explain to wind developers how FWS will enforce statutes such

<sup>145</sup> 45 F. Supp. 2d 1070 (D. Colo. 1999).

<sup>146</sup> *Id.* at 1071 (rejecting Moon Lake’s arguments on motion for summary judgment that MBTA enforcement jurisdiction does not include unintentional conduct).

<sup>147</sup> *Id.* (outlining the government’s specific charges against the rural electricity collaborative).

<sup>148</sup> *Id.* at 1074.

<sup>149</sup> *Id.* (rendering intent irrelevant theoretically opens up wind developers to enforcement actions if even one bird is killed by a turbine). Fines are the most likely consequence of conviction under the MBTA, although imprisonment is also a possibility. 16 U.S.C. § 707 (2005) (outlining penalties for violations).

<sup>150</sup> U.S. Dep’t of Agriculture, *Migratory Bird Treaty Act Enforcement*, <http://www.usda.gov/rus/electric/engineering/2000/mbta.htm> (last visited Mar. 21, 2006).

<sup>151</sup> See U.S. Fish & Wildlife Service, *Implementation of Service Voluntary Interim Guidelines to Avoid and Minimize Wildlife Impacts from Wind Turbines*, letter from Director Steve Williams (April 2004) (copy on file with author); U.S. Fish & Wildlife Service, *Service Interim Guidance on Avoiding and Minimizing Wildlife Impacts from Wind Turbines* (May 2003) (copy on file with author).

as the MBTA in the context of wind farms.<sup>152</sup> Interim guidelines indicate that FWS may ultimately insist that wind developers undertake three years of bird studies at a proposed location before FWS will determine whether to grant the wind developer a permit for their turbines.<sup>153</sup> The uncertainty in how aggressive FWS will ultimately decide to be in seeking enforcement actions against wind developers is one of the key areas of regulatory uncertainty for wind project developers.<sup>154</sup>

#### IV. CONCLUSION

While harnessing the power of the wind in Massachusetts is becoming a more economically and politically feasible proposition, there remain numerous legal issues that wind developers must navigate. This note has attempted to highlight the litigation battles of others so that Jones and WindCo can prepare for their own. As with any industry, minimizing the risk of litigation is a key element of thriving in the marketplace. Wind energy proponents can probably never stop litigation altogether, especially because of the relative ease with which project opponents can challenge project permits every step of the way. Nevertheless, by heeding lessons learned by others, WindCo will hopefully be successful developing their projects, and Massachusetts will be better for it.

*Mike Koehler*

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<sup>152</sup> See *supra* note 151.

<sup>153</sup> See *supra* note 151.

<sup>154</sup> As a result of the regulatory uncertainty, wind developers must decide whether to risk the chance of an enforcement action taken against them if FWS officials discover dead birds near their wind farm site. See *United States v. Moon Lake Elec. Ass'n*, 45 F. Supp. 2d 1070 (D. Colo. 1999).



