

Environmental Litigation and Toxic Torts Committee Newsletter

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MESSAGE FROM THE CHAIR

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“God grant me the Serenity to accept the things I cannot Change; Courage to Change the things I can; And Wisdom to know the Difference”
Serenity Prayer, Reinhold Niebuhr (1892-1971)

These are troubling times in which we live. Newspaper headlines scream to us daily—“FORECLOSURE RATES RISE,” “UNEMPLOYMENT UP” and “LAW FIRM LAYS OFF HUNDREDS.” Our retirement funds are sinking faster than the Titanic and our mortgages exceed the decelerating values of our homes. For me, a little prayer can go a long way.

Change also is in the wind on the political and environmental fronts. A new president promising it and a new EPA administrator destined to do it. Environmental policies and priorities are changing faster than practitioners can keep up, promising much to do for those of us who litigate the inevitable disputes that such change always brings.

Most notably, of course, is climate change. What will EPA and its new administrator, Lisa Jackson, do in response to the Supreme Courts’ *Massachusetts v. EPA* decision, and the former administrator’s position

that California should get no waiver and CO₂ is not a pollutant subject to regulation? What will Congress and the new administration do? Is cap-and-trade of CO₂ really coming to a state near you? Are renewables going to be forced upon industry and the public?

Moving to compliance and enforcement, EPA promises to take a more aggressive approach; perhaps empowering those who want faster change to push the envelope further than earlier administrations. Already new lawsuits have been filed accusing various industries of violating the Clean Air Act and more are likely on the way. Make no mistake, these lawsuits are about change—they seek to use the judicial system as means for obtaining more pollution controls now.

As for the toxic tort world, efforts are already under way in Congress to roll back recent cases like *Riegel v. Medtronic*, where the Supreme Court found a product liability lawsuit filed in a state court preempted because the device had FDA approval. Legislation has been introduced which would make it harder for federal agencies to preempt state tort cases. Regardless of whether this law passes, the Obama administration is likely to oppose federal preemption of state tort law on public policy grounds.

I hope you were able to attend the 38th Annual Conference on Environmental Law in Keystone, Colorado. The program chair, Jim May, and planning committee did a superb job of lining up speakers who gave us all insight into the sorts of change we should expect.

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Geraldine E. Edens, Editor

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This is the first, but will not be the last, newsletter we publish this year. For undertaking the tall task of putting this newsletter and others together, thank committee newsletter vice chair, Geri Edens. Geri has done a great job of soliciting articles for this edition of the newsletter, and she reports that she is in the planning process for the next two editions. If you have an article or an idea for an article that you would like published, please contact her at gedens@mckennalong.com.

I am blessed to have other wonderful committee vice chairs working with me this year, including Julia Dulan (Membership), Jen Simon (Programs), David Pope (Public Service), Otis McGee (Technology), and Daniel Krainin (*The Year in Review*). The contact information for all of them is on our Web site. I encourage you to visit our Web site at www.abanet.org/environ/committees/toxictorts/.

Please let us know how we are doing and whether you have any ideas for our committee. Your involvement is what makes this committee and the Section so special.

LESSONS LEARNED FROM WIND FARM LITIGATION

**Lisa Wing Stone
Sara Zdeb**

Concerns about climate change, energy security and a long-term rise in the price of oil have focused attention on developing domestic renewable energy sources. Renewable energy currently supplies approximately 2.3 percent of our nation's energy, and wind energy supplies approximately 1.5 percent. These figures are expected to rise steadily in the upcoming years in response to the Obama administration's energy policy and state initiatives, including the recent California renewable energy law.

More specifically, President Barack Obama has proposed a Renewable Portfolio Standard (RPS) that would require 10 percent of electricity to come from renewable sources by 2012, and 25 percent by 2025. This federal standard would follow on the heels of state

mandates: twenty-six states and the District of Columbia already have enacted RPSs, setting a range of goals for renewable energy.¹

Meeting such goals will require a massive build-up in renewable energy infrastructure. These infrastructure needs will necessarily require converting large amounts of land—in small tracks and large—for use as either energy development and/or transmission. Reallocating land use from other purposes to energy resources is not without conflict and has already led to litigation, particularly around proposed wind farms.

We conducted an informal survey of recent wind farm siting litigation, including thirty court decisions involving twenty-three different wind energy developments in fourteen different states, as well as other contested projects that were discussed in news articles. Nearly half of these decisions were issued in 2008. The contested projects ranged in size from a single residential turbine project to mass wind farms of up to 200 turbines. From this review, we can offer several observations potentially relevant to future wind development projects.

1. Court Decisions To Date Do Not Turn On Uniform Principles

Real estate's "location, location, location" truism applies with equal force to wind energy siting. Projects must be sited in areas with both sufficient prevailing wind speed to power turbines and access to the transmission grid.

Location is also important because it determines the federal, state, and local legal framework for the project. Although Congress and the Obama administration may think in terms of a national energy policy, and while electricity may travel over thousands of miles interstate before reaching its end user, the activity of power generation is intrinsically local by nature. Wind farms require far greater square-footage than comparable fossil fuel facilities. For example, Cape Wind's plan for offshore windfarm that will generate slightly more than 450 megawatts requires a footprint of 24 square miles. Massachusetts' Brayton Point Power Station, by contrast, occupies just 250 acres and produces 1,600 megawatts. Thus, while

renewable wind energy reduces air pollution and other local impacts, siting requires an especially large footprint and access to the grid—potentially raising a new set of local objections.

Opponents of wind farm proposals—whether a single turbine on a rural property or a hundred-turbine offshore wind farm—tend to raise similar objections. These fall into two categories. First are public nuisance allegations, including noise, visual obstructions, light flickering (known as "shadow flicker"), and zoning violations. *See, e.g., Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, Nos. 81332-9, 81427-9, 2008 WL 4939317 (Wash. Nov. 20, 2008) (residents objected to "shadow flicker" from the proposed Kittitas Valley Wind Power Project in Washington state); *Burch v. NedPower Mount Storm, LLC*, 647 S.E.2d 879 (W. Va. 2007) (residents filed private nuisance suit against proposed wind project in West Virginia); *Roberts v. Manitowoc County Bd. of Adjustment*, 721 N.W.2d 499 (Wis. Ct. App. 2006) (residents raised concerns about proposed Twin Creeks Wind Park's impact on their "quality of life."). Second are environmental complaints, primarily related to increased bird and bat mortality. *See, e.g., Kencrest Audubon Soc'y v. L.A. Dept. of Water & Power*, No. F050809, 2007 WL 2208806 (Cal. App. Aug. 2, 2007) (California residents challenged the environmental impact review prepared under the state's environmental quality act, claiming that the proposed Pine Tree wind farm would harm birds and bats); *Flint Hills Tallgrass Prairie Heritage Found. v. Scottish Power, PLC*, No. 05-1025-JTM, 2005 U.S. Dist. LEXIS 2772 (D. Kan. Feb. 22, 2005), *aff'd*, 147 Fed. Appx. 785 (10th Cir. 2005) (opponents of Kansas' Elk River Wind Farm argue the project will violate Migratory Bird Treaty Act). Many plaintiffs raise both land use and environmental complaints. *See, e.g., Miller v. Highland County*, 650 S.E.2d 532 (Va. 2007) (Virginia residents raised both types of objections when challenging a twenty-two-turbine project); *Mountain Cmty. for Responsible Energy v. Pub. Serv. Comm'n of W. Va.*, 665 S.E.2d 315 (2008) (residents object to Beech Ridge wind farm's impacts on property values, view, and noise, and argue it will harm birds and bats).

Because wind project opponents generally file claims

based on state or local law, their success—and the rules that courts use to evaluate their claims—varies according to location. Rather than looking to other wind farm siting opinions for guidance, courts handling these cases typically look to the zoning, land use, and environmental law of their own jurisdiction. *Compare Burch*, 647 S.E.2d 879 (court’s decision to allow private nuisance suit rested entirely on West Virginia state law grounds and an evaluation of the Public Service Commission’s decision-making process, rather than opinions from courts in other jurisdictions considering wind farm challenges), *with Ten Taxpayer Citizens Group v. Secretary Office of Env. Affairs*, No. 2007-00296, 2008 Mass. Super. LEXIS 334 (Mass. Super. Sept. 10, 2008) (court considering sufficiency of an environmental review prepared for the controversial Cape Wind offshore project did not consider decisions considering the adequacy of an environmental review for a wind farm in other states).

Even cases filed in federal court, alleging violations of federal law, have created disparate precedents because of deference to local law issues. Also, on-shore wind farm projects implicate different federal law than off-shore projects. Hence, in Texas, where residents challenged a coastal, on-shore wind farm under the Coastal Zone Management Act (CZMA), the court’s dismissal of their claim turned on an interpretation of the CZMA. *Coastal Habitat Alliance v. Patterson*, No. 1:07CV00985LY, slip op. (W.D. Tex. Sept. 30, 2008) (memorandum opinion and order granting motion to dismiss). In Massachusetts, by contrast, challenges to federal permits for the off-shore Cape Wind project spawned an array of unique jurisdictional issues stemming from the project’s location in both state and federal waters and implicating the Magnuson-Stevens and Outer-Continental Shelf Lands Acts. *See, e.g., Ten Taxpayer Citizens Group v. Cape Wind Assocs., LLC*, 278 F. Supp. 2d 98 (D. Mass. 2003), *aff’d*, 373 F.3d 183 (1st Cir. 2004).

If wind farm siting litigation continues on its current path of balkanization, the courts are unlikely to offer wind farm developers uniform guidance. Consideration of local zoning laws, as well as the community’s receptiveness to renewable energy development, will

continue to be a key strategic step in siting future projects.

2. Current Cases Demonstrate Conflict Between Federal/State Renewable Energy Goals and Local Land Use Laws

Wind farm litigation to date reveals deep conflicts between state and national-level energy policies on the one hand and local land use policies on the other. Over the past decade, many states have been taking aggressive steps to promote renewable energy sources including the RPSs discussed above, as well as a vast array of tax and other incentives for investments in renewable energy.²

These federal and state level policies, however, can conflict with local land use laws. In Washington, for example, Kittitas County enacted a zoning ordinance requiring county approval of wind farm siting. Rather than expressly zoning for wind farms, the ordinance required applicants to apply for a rezone and an amendment to the county’s comprehensive zoning plan. *Residents Opposed to Kittitas Turbines*, 2008 WL 4931397 at *3. In Italy, New York, the town board enacted a moratorium prohibiting wind farm construction unless an applicant qualified for an “alleviation of extraordinary hardship” exception. *See Ecogen v. Town of Italy*, 438 F. Supp. 2d 149 (W.D.N.Y. 2006).

In some cases, the conflict has been resolved by action at the local level deferring to federal or state law. In Highland County, Virginia, the board of supervisors amended a zoning ordinance to allow conditional use permits for wind turbines exceeding the ordinance’s maximum height restriction. *Miller*, 650 S.E.2d at 533-34. In other cases, states have stepped in. The State of Washington addressed the state-local conflict by enacting the 2001 Energy Facilities Site Locations Act. The law created a council to administer the siting of alternative energy projects, R.C.W. §§ 80.50.30 – 80.50.40, and whose recommendations the governor can certify. R.C.W. § 80.50.100. The law preempts energy facility decisions by local government entities, allowing the governor to approve alternative energy projects even when they conflict with local zoning

requirements. *Id.* at § 80.50.110. In *Residents Opposed to Kittitas Turbines*, the Washington Supreme Court upheld the governor’s decision to preempt Kittitas County’s local requirements and site a 100-megawatt project. 2008 WL 4931397 at *23.

These conflicts will likely become more pronounced as the federal government becomes more aggressively involved in promoting renewable energy. In its “20% Wind Energy by 2030” report, the U.S. Department of Energy concluded that inconsistent regulatory requirements are a major barrier to the development of wind energy. An increase in the intensity of wind energy development will only exacerbate these programs. *See* U.S. Department of Energy, “20% Wind Energy by 2030,” May 2008, § 5.5. Any successful federal energy policy supporting the growth of alternative energy will need to consider ways to reduce these conflicts or many projects will stay mired in litigation.

3. Cases Are Complicated by Standing and Other Party Issues

Recent litigation also reflects confusion as to available causes of action and standing in siting cases. More than one wind farm siting case has been tripped up by fundamental problems with standing. In *Coastal Habitat Alliance*, for example, the court dismissed the plaintiffs’ CZMA suit on standing grounds. It held, among other things, that because the CZMA does not afford a private right of action, the plaintiffs had not asserted an injury to any legally cognizable interest. *Coastal Habitat Alliance*, No. 1:07CV00985LY, slip op. at 20. The court also stressed that, to the extent the plaintiffs’ asserted injury was harm from construction of the wind farm, the relief they sought—further environmental review—would not redress that injury, because it would not necessarily prevent construction of the project. *Id.* at 20-21.

In other cases, plaintiffs failed to sue the proper defendant. In *Miller*, the court dismissed one plaintiff’s claim because she sued Highland County, Virginia, rather than the county’s board of supervisors. *Miller*, 650 S.E.2d at 535-37. A similar outcome resulted when advocates, concerned about bird mortality, sued the operators of California’s Altamont Pass wind farm

under the state’s public trust doctrine. *Ctr. for Biological Diversity v. FPL Group, Inc.*, 166 Cal. App. 4th 1349 (2008). While the court held that the public trust doctrine protects wildlife and that members of the public have standing to enforce it, it concluded that plaintiffs seeking to enforce the doctrine must sue the government. *Id.* at 1367-69. Because the Center for Biological Diversity had sued the wind farm operators and not the state officials who permitted the project, the court affirmed the suit’s dismissal. *Id.*

4. Most Wind Farm Siting Litigation Is Unsuccessful

On balance, few litigants have been successful in opposing wind energy development. Nonetheless, proponents and developers of wind energy projects defending such litigation can face significant costs and project delays, which could themselves derail the project.³ The sponsors of proposed wind farms across the country—in California, Texas, Kansas, and Wisconsin to name a few—have prevailed against a variety of federal, state, and local challenges opponents filed against their projects. *See Kencrest Audubon Soc’y*, 2007 WL 2208806; *Coastal Habitat Alliance*, No. 1:07CV00985LY, slip op. at 20; *Flint Hills Tallgrass Prairie Heritage Found.*, 2005 U.S. Dist. LEXIS 2772; *Roberts v. Manitowoc County Bd. of Adjustment*, 721 N.W.2d 499.

As noted, no common theme emerges from the few suits where opponents have been successful. In *Ecogen*, the court effectively blocked a proposed wind farm from proceeding when it upheld the town of Italy’s moratorium against wind farm siting. *Ecogen*, 438 F. Supp. 2d 149. The Court of Appeals for the D.C. Circuit also sided against a proposed wind farm when it vacated the Federal Aviation Administration’s approval of a wind farm near the Las Vegas airport. *Clark County, Nev., v. F.A.A.*, 522 F.3d 437 (D.C. Cir. 2008). While the court, in evaluating the Grant County, West Virginia wind farm, did not rule on the project’s ultimate disposition, it opened the door to further litigation by allowing opponents to pursue a private nuisance suit. *Burch*, 647 S.E.2d 879. The absence of similarity among these decisions is itself a lesson to be gleaned. Every case must be evaluated for its own individual merits, including an assessment of the

local land use laws and regulations, a review of whether or not all regulatory and permitting requirements have been abided, and consideration of whether the local community—most importantly the project’s immediate neighbors—are supporters or detractors.

Proponents of wind projects can best avoid the types of objections raised in these cases by selecting the right parcel of land and vetting the project in advance with affected parties. Having a robust communication plan in place that reaches out to supporters and detractors early in the project and keeps them informed regularly of the project’s progress may be the most effective and efficient tool for staving off litigation.

One example of properties that may be especially suitable is brownfields sites, historically contaminated lands. See www.epa.gov/oswer/ocpa/maps_incentives.htm for information on locations and incentives for renewable energy generation on contaminated lands and mining sites throughout the United States. These sites offer many benefits for renewable energy development. First and foremost, they are available large tracts of land which may have limited other uses due to historic contamination. This offers the energy developer the ability to secure a site from a single (or a few) landowner, thereby lowering transaction costs. In addition, since these sites were previously developed, they often already have critical infrastructure such as roads, connections the water and sewer systems, and electric grid connections, also lowering development costs.

5. Conclusion

Siting renewable energy projects will likely be the source of much controversy for the foreseeable future, especially as projects grow in number and scale. At some point, we may reach the tipping point where renewable energy projects become so numerous that they achieve widespread community acceptance. But all signs indicate that before we reach the tipping point, we will continue down the path of intensely local and individualized litigation.

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Endnotes

1. See Union of Concerned Scientists, Renewable Electricity Standards Toolkit, http://go.ucsusa.org/cgi-bin/RES/state_standards_search.pl?template=main (last visited Jan. 7, 2008) (summarizing state RPSs).
2. See Database of State Incentives for Renewables and Efficiency, <http://www.dsireusa.org/> (last visited Jan. 9, 2008).
3. In extreme cases, opposition litigation can cause significant costs and delays. For example, Cape Wind has faced a constant stream of lawsuits since 2002 and continuing today. Opponents sued when the company proposed constructing a temporary “test tower” to collect data in order to determine whether Nantucket Sound’s Horseshoe Shoals would be a feasible location. The suits were unsuccessful and Cape Wind eventually constructed the tower. *Ten Taxpayer Citizens Group v. Cape Wind Assocs., LLC*, 278 F.Supp.2d 98 (D. Mass. 2003), *aff’d*, 373 F.3d 183 (1st Cir. 2004); *Ten Taxpayer Citizens Group v. Cape Wind Assocs., LLC*, 278 F.Supp.2d 98 (D. Mass. 2003), *aff’d*, 373 F.3d 183 (1st Cir. 2004). In *Alliance to Protect Nantucket Sound, Inc., v. Energy Facilities Siting Bd.*, 858 N.E.2d 294 (Mass. 2006), opponents unsuccessfully challenged the state siting board’s decision to approve undersea transmission lines. In two other unsuccessful suits, opponents challenged a certificate Environment Secretary Ian Bowles issued approving the project’s environmental review. *Ten Taxpayer Citizens Group v. Secretary Office of Env. Affairs*, 2008 Mass. Super. LEXIS 334 (Mass. Super. Sept. 10, 2008); *Town of Barnstable v. Cape Wind Assocs., LLC*, No. BACV2007-00506-A (Mass. Super. June 17, 2008). Despite facing a variety of legal challenges, even the very controversial (some say “notorious”) Cape Wind project is overcoming the opposition’s efforts.

CLEAN COAL UPDATE—RECENT TRENDS IN CRITICISM AND LIABILITY

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Introduction

Dirty and contributive to climate change, coal is nonetheless a cheap and abundant energy source. Most energy experts therefore predict that coal will continue to play a substantial role in U.S. energy production for at least two more decades (Energy Info. Admin., *Annual Outlook 2008*, at 84 (2008)) and an even larger one in developing countries. *See, e.g.*, Rennings, Klaus, A Lead Market Approach Towards The Emergence And Diffusion Of Coal-Fired Power Plant Technology at 1 (Aug. 2008), ZEW - Ctr. For European Econ. Research, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1261853. Thus, in order to combat the negative environmental effects of coal-powered energy, the coal industry has for years been vaunting the prospect of “clean coal technology,” a collection of processes that can reduce greenhouse gas emissions from coal-fired power plants.

Criticism and Support for Clean Coal

Some environmental groups, however, have dismissed the concept of “clean coal” as an oxymoron. *See, e.g.*, Greenpeace Int’l, False Hope: Why Carbon Capture And Storage Won’t Save The Climate (May 2008). Likewise, in early December 2008, the newly founded “Reality Coalition”—a partnership among the National Resources Defense Council, Sierra Club, and several other environmental organizations—funded an advertising spot deriding the idea that coal could possibly be “clean.” Coal Warriors: Enviros Take Aim at Clean Coal “Myth,” <http://blogs.wsj.com/environmentalcapital/2008> (Dec. 5, 2008, 13:08 EST). And after the coal ash spill in Tennessee in late December, several environmentalists treated the event as more proof that “clean coal” just does not exist. Shaila Dewan, *Coal Ash Spill Revives Issue of its Hazards*, N.Y. TIMES, Dec. 25, 2008, at A1.

Nevertheless, some opponents to coal-powered energy concede that clean coal technology is necessary—they argue that even if the United States becomes entirely sustainable on alternative fuels and power within the next few decades, other countries (such as India and China, where coal is plentiful and considerable new construction of coal-fired power plants is expected) likely will not. Thus, these scholars argue that some component of clean coal technology must come into play to address world-wide emissions. *See, e.g.*, Dr. James E. Hansen, *Tell Barack Obama the Truth—The Whole Truth*, <http://www.columbia.edu/~jeh1/> (Nov. 21, 2008) (advocating for increased research and development for carbon capture and sequestration).

Carbon Capture and Sequestration— U.S. Efforts

One clean coal process that has garnered much attention in the United States is carbon capture and sequestration (CCS)—a process where the carbon dioxide (CO₂) that would normally be emitted from a power plant is captured, condensed to a supercritical state, and then transmitted by pipeline or truck to a sequestration site below the ground. These sites are generally depleted oil or natural gas reservoirs or other geologic formations with certain geochemical or physical properties that will keep the CO₂ trapped.

The Department of Energy (DOE) has formed several partnerships to research the capture and permanent sequestration of CO₂ in the United States. Dep’t of Energy, Carbon Sequestration Regional Partnerships, <http://fossil.energy.gov/programs/sequestration/partnerships/index.html>. In August 2008, DOE reported that it had begun injecting CO₂ into a large coalbed in New Mexico’s San Juan Basin as part of a combination sequestration/methane recovery demonstration. Dep’t of Energy Fossil Energy Techline, DOE Starts CO₂ Sequestration in New Mexico Coalbed (Aug. 4, 2008), http://fossil.energy.gov/news/techlines/2008/08031-San_Juan_Basin_CO2_Injection.html. DOE plans to inject 35,000 tons of CO₂ at the site over a six-month period, in hopes that the project will help “develop ways to maximize permanent storage of the injected CO₂.” *Id.*

The U.S. Environmental Protection Agency (EPA) has also proposed a regulation to protect underground sources of drinking water (USDWs) if CO₂ is injected into geologic formations beneath U.S. soils. Federal Requirements under the Underground Injection Control (UIC) Program for Carbon Dioxide (CO₂) Geologic Sequestration (GS) Wells, 73 Fed. Reg. 43,492 (proposed July 25, 2008) (to be codified at 40 C.F.R. pts. 144 and 146). The rule, promulgated pursuant to the Safe Drinking Water Act (SDWA), would create a new class of injection wells: those created solely for the purpose of injection of a CO₂ stream for geologic sequestration. EPA repeatedly notes that the proposed rule will not *require* geologic sequestration but is meant simply to protect USDWs if such sequestration takes place.

CCS—Long-term Liability

Environmental attorneys have noted several potential problems with the proposed SDWA rule, one of which revolves around long-term liability. While owners or operators are expected to monitor the injection wells for 50 years after cessation of injection, will they face liability for releases or migration of the stored CO₂ after the monitoring period? Are they expected to insure themselves against such indefinite liability? In its preamble, EPA notes that it does not have authority under the SDWA to transfer liability from one entity to another. In addition, the proposed rule does not address property rights and does not give a clear picture of the magnitude of potential liability, which some have criticized as a probable disincentive to financiers or operators/owners considering investment in a CCS project.

While EPA did not address long-term liability in the proposed SDWA rule, several third-party organizations have proposed solutions to handle long-term CCS liability. The World Resources Institute outlined a liability proposal, which includes a federal indemnity component, in an issue brief in December 2007. Elizabeth J. Wilson, Mark A. De Figueiredo, Chiara Trabucchi, And Kate Larsen, World Resources Institute, *Liability And Financial Responsibility Frameworks For Carbon Capture And Sequestration* (Dec. 2007), <http://pdf.wri.org/liability-andfinancial-responsibility.pdf>.

In the United States, the Interstate Oil and Gas Compact Commission (IOGCC) has taken the position that states are best positioned to address long-term liability associated with CCS. In September 2007, IOGCC's Task Force on Carbon Capture and Geologic Storage suggested treating closed CCS projects the same way states often handle abandoned oil and gas wells: by transferring post-closure liability to a state trust fund (to be funded by imposed injection fees). The Task Force recommended that the trust fund could assume such liability 10 years after closure of a CCS project. IOGCC Task Force on Carbon Capture and Geologic Storage, *Storage of Carbon Dioxide in Geological Structures: A Legal and Regulatory Guide for States* (Sept. 27, 2007), http://www.eei.org/meetings/nonav_2007-10-18-km/CCS_IOGCClegalRegulGuideExecSumm.pdf.

Along those lines, recently passed CCS legislation transfers liability to the government after a certain time period. Last November, Australia passed the Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008 (the "Act"). The Act, which applies to the capture and storage of CO₂ emissions under coastal waters, provides for the transfer of long-term liability from the operator to the Commonwealth within 20 years after completion of a CO₂ storage project.

In the United States, state legislatures have passed statutes with similar liability transfers. Last year, Oklahoma's legislature passed Senate Bill 1765 (effective Jan. 1, 2009), which follows the IOGCC model—the bill sets up a Carbon Dioxide Storage Facility Trust Fund (to be funded by fees per ton of CO₂ injected) and provides that the state will assume ownership of sequestered CO₂ 10 years after cessation of storage operations.

Likewise, Texas and Illinois both passed liability-transfer bills in anticipation of the proposed FutureGen project (both bills passed before FutureGen underwent its massive restructuring in 2008). Texas enacted laws providing that the Texas Railroad Commission would take title to all CO₂ captured by the FutureGen project and relieving the CO₂ owner of injection and storage liability on the date ownership transfers to the state (with an exemption for personal injury from construction). TEX. NAT. RES. CODE §§ 119.002,

119.004. Similarly, in July 2007, the Illinois legislature passed Senate Bill 1704, which provides that the state assumes ownership of CO₂ once it is injected as part of the FutureGen project.

Conclusion

Few will likely see 2008 as a banner year for the coal industry. It faced a prominent coal ash spill, a targeted anti-clean coal advertising effort, monumental changes to FutureGen, a proposed rule that failed to address long-term liability of CCS projects, and the appointment of new Secretary of Energy Steven Chu, who has called coal his “worst nightmare.” Steven Chu: ‘Coal is My Worst Nightmare,’ <http://blogs.wsj.com/environmentalcapital/2008> (Dec. 11, 2008, 15:18 EST). Nonetheless, CCS projects and legislation have proceeded—both domestically and abroad—and notably, some recent laws have addressed questions of long-term liability by transferring liability to a government body. Such movement shows that while many continue to debate the merits of clean coal technology, it is becoming increasingly ingrained in legal (and governmental) frameworks around the world.

CASE SUMMARY: CENTER FOR BIOLOGICAL DIVERSITY, INC. V. FPL GROUP, INC., AND THE CONTOURS OF THE PUBLIC TRUST DOCTRINE

Tyrell F. Jordan

On Sept. 18, 2008, the Alameda County Superior Court of California affirmed the entry of judgment on the pleadings and the dismissal of a Complaint filed by the Center for Biological Diversity, Inc., and Peter Galvin (collectively “the Environmentalists”) against numerous defendants who owned and operated wind turbine electric generators in the Altamont Pass Wind Resource Area (located in the California counties of Alameda and Contra Costa). The Environmentalists alleged that the wind turbine operators were responsible for killing and injuring raptors and other birds in violation of the public trust doctrine. In addition to their public trust doctrine claim, the Environmentalists asserted claims under California’s Unfair Competition Law (UCL) alleging that the wind turbine operators’ conduct amounted to a violation of numerous federal and state wildlife conservation laws. The UCL claims were summarily dismissed by the trial court based on the Environmentalists’ lack of standing to assert those claims. The Environmentalists did not appeal the dismissal of their UCL claims. In addition to dismissing the UCL claims, the trial court dismissed the Environmentalists’ public trust doctrine claim, holding that private parties are not entitled to bring an action for violation of the public trust doctrine which action derives from the destruction of wildlife. The Environmentalists appealed.

Alternative Energy Sources and Parallel Administrative Proceedings

The wind turbine operators had received permits to operate private wind energy generation facilities in the approximately 40,000-acre Alameda County portion of the Altamont Pass Wind Resource Area (Altamont Pass). Altamont Pass was created by the State Energy Resources Conservation and Development agency in response to federal legislation promoting the development of alternative energy sources. The Environmentalists alleged that as many as 5,000 wind



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turbine generators were operating in Altamont Pass and accused the wind turbine operators of operating obsolete and inefficient generators that should be replaced by newer, state of the art generators that would produce greater amounts of electricity and kill fewer birds.

While the Environmentalists' lawsuit was pending, administrative proceedings in Alameda County were ongoing to determine whether the existing 20-year conditional use permits in place to operate the Altamont Pass wind turbines should be extended. The Environmentalists and other environmental groups appeared at various hearings and objected to extension of the permits. The proceedings resulted in a resolution from the Alameda County Board of Supervisors which granted conditional use permits subject to nine new avian-mortality-mitigating conditions on wind turbine use.

The Public Trust Doctrine

The public trust doctrine

has been characterized as “resoundingly vague, obscure in origin and uncertain of purpose.” . . . It has been described as “a transcendent legal principle. While its articulations can be found in European civil law, English common law and its reflection noted in United States statutory and constitutional law, its roots are in natural law.” . . . “The approach with the greatest historical support holds that certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than serfs. . . . It is thought to protect those rights, it is necessary to be especially wary lest any particular individual or group acquire the power to control them. . . . An allied principle holds that certain interests are so particularly the gifts of nature’s bounty that they ought to be reserved for the whole of the populace.”

Center For Biological Diversity, Inc., v. FPL Group, Inc., No. A116362, — Cal.Rptr.3d —, 2008 WL 4255789, *4, fn.12 (Cal. App. 1 Dist. Sept. 18, 2008) (internal citations and footnotes omitted).

The wind turbine operators argued that the Environmentalists' public trust doctrine claim should be dismissed because the public trust doctrine applies only to claims meant to protect tidelands and navigable waters, and not wildlife. Disagreeing, the court noted that, “[w]hile the public trust doctrine has evolved primarily around the rights of the public with respect to tidelands and navigable waters, the doctrine is not so limited. ‘[T]he public trust doctrine is not just a set of rules about tidelands, a restraint on alienation by the government or an historical inquiry into the circumstances of long-forgotten grants.’ . . . ‘Whatever the doctrine may have meant in Roman law, in medieval continental Europe, or in English law, the courts in this country have treated the public trust largely as a public property right of access to certain public trust natural resources for various public purposes.’” *Id.* at *4 (citations omitted). Consequently, the court held, “[t]o the contrary, it has long been recognized that wildlife are protected by the public trust doctrine.” *Id.* at *5. Moreover, the court recognized a right in private citizens to enforce the public trust to protect wildlife. “While the trial court and defendants may be correct that the public trust over wildlife thus far has been enforced only in actions brought by public entities, there is no reason in principle why members of the public should be denied standing to maintain an appropriate action.” *Id.* at *7.

Nevertheless, the court held that a claim alleging violation of the public trust is properly brought only as against the responsible public agency.

We thus reject the conclusion of the trial court that private parties may not invoke the public trust doctrine “beyond the traditional public trust interest in navigable and tidal waters and tidelands.” That is not to say, however, that plaintiffs are entitled to maintain this action in the manner they have framed it. The defect in the present complaint is not that it seeks to enforce the public trust, but that it is brought against the wrong parties. Plaintiffs have brought this action against the windmill operators whose actions they allege are destroying natural resources protected by the public trust. Plaintiffs have not proceeded against the County of Alameda, which has authorized the use of the wind turbine generators, or against any agency such as the California Department of Fish and Game that

has been given the statutory responsibility of protecting the affected natural resources. When the trial court indicated its intention to grant judgment on the pleadings and dismiss the action, no request was made for leave to amend to state a claim against any such party.

Id. at *8.

The court analogized this case to enforcement of a traditional trust and concluded that the action must be brought against the appropriate representative of the state who stands in the shoes of the “trustee” of the “public trust.” Additionally, the court theorized that even if it recognized a right to proceed against the wind turbine operators directly for a violation of the public trust, it would be appropriate for the court to abstain from deciding the issues presented by the Environmentalists in deference to the regulation being provided by public agencies.

Intervention by the courts, other than by exercising oversight over the administrative process and ensuring that proper standards are applied, not only would threaten duplication of effort and inconsistency of results, but would require the courts to perform an ongoing regulatory role as technology evolves and conditions change. All of these factors call for abstention. “It is well established that a court of equity will abstain from employing the remedies available under the unfair competition law in appropriate cases. As the Court of Appeal held in a case involving the health care finance industry: ‘[B]ecause the remedies available under the [unfair competition law], namely injunctions and restitution, are equitable in nature, courts have the discretion to abstain from employing them. Where [an unfair competition law] action would drag a court of equity into an area of complex economic [or similar] policy, equitable abstention is appropriate. In such cases, it is primarily a legislative and not a judicial function to determine the best economic policy.’”

Id. at *11.

Conclusion

Although recognizing that an action for violation of the public trust doctrine is enforceable by private citizens seeking to preserve and protect wildlife, the Alameda County Superior Court of California declined to extend application of the doctrine to actions against a non-governmental party who has not been entrusted with oversight of the particular public trust right at issue. In so doing, the court affirmed the trial court’s entry of judgment on the pleadings and dismissal of the Environmentalists’ complaint against the wind turbine generator operators.

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