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SUCKING THE AIR OUT OF WIND ENERGY: NUISANCE LITIGATION AND ITS EFFECT ON WIND ENERGY DEVELOPMENT

INTRODUCTION

Global climate change is a major threat facing our country and the world.¹ The consequences of climate change are likely to be significant and far reaching, including increasing droughts, sea-level rises and flooding in coastal areas, potentially adverse effects on agriculture, and negative effects to human health.² Further, there is a general consensus in the scientific community that climate change is caused by human activities,³ specifically emissions of greenhouse gases from the burning of

1. See, e.g., GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES 12 (Thomas R. Karl, Jerry M. Melillo & Thomas C. Peterson eds., Cambridge Univ. Press 2009), available at <http://globalchange.gov/publications/reports/scientific-assessments/us-impacts/download-the-report>; Elizabeth Rosenthal, *U.N. Report on Climate Details Risks of Inaction*, N.Y. TIMES, Nov. 17, 2007, at A1.

2. See GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES, *supra* note 1, at 12. “In projecting future conditions, there is always some level of uncertainty. . . . However, the science of making skillful projections at these scales has progressed considerably. . . .” *Id.* at 10. While “many crops show positive responses to elevated carbon dioxide and low levels of warming, . . . higher levels of warming often negatively affect growth and yields.” *Id.* at 71. Other adverse effects on agriculture include increased “[w]eeds, diseases, and insect pests” affecting crops and “reduce[d] livestock productivity” due to “heat, disease, and weather extremes. . . .” *Id.* Adverse effects on human health include: increased “risk of illness and death related to extreme heat and heat waves”; increased occurrence of “[s]ome diseases transmitted by food, water, and insects”; and higher levels of pollen, adversely affecting allergy sufferers. *Id.* at 89.

3. See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT, SUMMARY FOR POLICYMAKERS 5 (2008) [hereinafter IPCC REPORT] (“Most of the observed increase in global average temperatures since the mid-20th century is *very likely* due to the observed increase in anthropogenic GHG concentrations.”). Two studies demonstrate the scientific community’s consensus that climate change exists and is caused by humans. The first was a study published in the journal *Science*. The author looked at 928 papers written on the subject that appeared in peer-reviewed scientific journals over a ten-year period. She found that “[r]emarkably, none of the papers disagreed with the consensus position.” Naomi Oreskes, *The Scientific Consensus on Climate Change*, 306 SCI. 1686, 1686 (2004). In a more recent study, two University of Illinois–Chicago researchers surveyed over 10,000 earth scientists and asked them two questions:

1. When compared with pre-1800s levels, do you think that mean global temperatures have generally risen, fallen, or remained relatively constant? [and]

2. Do you think human activity is a significant contributing factor in changing mean global temperatures?

. . . .

. . . [Ninety] percent of the participa[ting scientists] answered “risen” to question 1 and 82% answered yes to question 2.

Peter T. Doran & Maggie Kendall Zimmerman, *Examining the Scientific Consensus on Climate Change*, EOS, Jan. 20, 2009, at 22, 22–23. Despite the general consensus in the scientific community, some Republican leaders in the United States believe that climate change does not exist or, if it does,

fossil fuels.⁴ Due to the potential consequences of climate change, the international community has been trying and continues to try to reduce anthropogenic greenhouse gas emissions.⁵ In the United States, members of Congress continue to seek legislation that would address climate change by creating a cap-and-trade system, capping greenhouse gas emissions at a gradually reducing level and creating a market for the sale and purchase of emission credits.⁶ The President has made reducing greenhouse gas emissions a priority as well, ordering the federal government to do so.⁷

that it does not have anthropogenic causes. See, e.g., Michael B. Farrell, *GOP's Global Warming Rumble: Sarah Palin v. Arnold Schwarzenegger*, CHRISTIAN SCI. MONITOR, Dec. 16, 2009, available at <http://www.csmonitor.com/USA/Politics/2009/1216/GOP-s-global-warming-rumble-Sarah-Palin-v.-Arnold-Schwarzenegger>. Also, it appears that a growing number of Americans doubt the existence of climate change. A poll from late 2009 found fifty-one percent, down from seventy-one percent in 2007, of American adults believe carbon dioxide will lead to global warming. Nathaniel Gronewold & Christa Marshall, *Rising Partisanship Sharply Erodes U.S. Public's Belief in Global Warming*, N.Y. TIMES, Dec. 3, 2009, <http://www.nytimes.com/cwire/2009/12/03/03climatewire-rising-partisanship-sharply-erodes-us-public-47381.html>. A wide "partisan gap" exists with "73 percent of Democrats believ[ing] that greenhouse gas emissions cause global warming, compared to 28 percent of Republicans and 49 percent of independents." *Id.* In contrast, "90 percent of Europeans view global climate change as a 'serious problem' . . ." *Id.*

4. IPCC REPORT, *supra* note 3, at 5 ("Global increases in CO₂ concentrations are due primarily to fossil fuel use . . .").

5. In 1997, thirty-seven nations signed the Kyoto Protocol, a binding agreement to reduce greenhouse gas emissions. The United States never ratified the protocol, so it was never bound to reduce its emissions. In addition, developing countries had no obligations under the agreement. See Charles J. Hanley, *Climate Talks End with Eye on Next Year*, ABCNEWS.COM, Dec. 19, 2009, <http://abcnews.go.com/print?id=9379026>; Fiona Harvey, Ed Crooks & Andrew Ward, *All Eyes Turn to the US and China*, FIN. TIMES, Dec. 18, 2009, at 3. At the end of 2009, world leaders met in Copenhagen to try to create a new agreement to succeed the Kyoto Protocol. Tom Zeller, Jr., *Fault Lines Remain After Climate Talks*, INT'L HERALD TRIB., Jan. 4, 2010, at Finance 18. In the end, only a nonbinding accord was reached, which was widely seen as inadequate to address the problem of climate change. President Obama remarked:

I think that people are justified in being disappointed about the outcome in Copenhagen. . . . It didn't move us the way we need to. . . . The science says that we've got to significantly reduce emissions over the next—over the next 40 years. There's nothing in the Copenhagen agreement that ensures that that happens.

Id.

6. In 2009, the House passed the American Clean Energy and Security (Waxman-Markey) Act of 2009, H.R. 2454, 111th Cong. (2009). For a summary of the bill, see STAFF OF H. COMM. ENERGY & COMMERCE, 111TH CONG., THE AMERICAN CLEAN ENERGY AND SECURITY ACT (H.R. 2454) (Comm. Print 2009), available at http://energycommerce.house.gov/Press_111/20090724/hr2454_housesummary.pdf. However, the Waxman-Markey bill failed to gain support in the Senate. In the spring and summer of 2010, Senator John Kerry spearheaded an effort to find compromise in the Senate on climate change legislation, in part by reducing the reach of the cap-and-trade regime, but he ultimately failed. See Perry Bacon Jr., *Kerry's Lonely Push on Climate Change*, WASH. POST, July 27, 2010, at A15. Many economists believe that a more efficient and simpler means to reduce carbon emissions is by instituting a carbon tax, but such proposals have garnered even less support in Congress. John M. Broder, *House Bill for a Carbon Tax to Cut Emissions Faces a Steep Climb*, N.Y. TIMES, Mar. 7, 2009, at A13.

7. Exec. Order No. 13,514, 74 Fed. Reg. 52,114 (Oct. 8, 2009). Under the order, each agency is

Another priority of the President is to reduce the United States' dependence on foreign sources of energy⁸ and, in the wake of the BP oil spill in the Gulf of Mexico, fossil fuels generally.⁹ He is not alone; national leaders of both parties since the 1970s have expressed a desire to end the United States' "addiction" to oil and to make the country energy independent.¹⁰ The United States imports roughly sixty percent of its oil, and this is believed to create significant problems, including "adding to the trade deficit," "national security threats," and "wild price swings" in energy.¹¹ The spilling of almost five million gallons of oil into the Gulf of Mexico and the as-of-yet untold environmental destruction from the BP oil spill illustrate that domestic fossil fuel production carries with it the potential for problems as well.¹²

Wind energy is a clean, alternative source of energy that does not create greenhouse gas pollutants and can be produced domestically.¹³ While wind energy accounts for roughly only one percent of the energy produced in the United States,¹⁴ the potential for wind energy is vast.¹⁵ "[Wind] [r]esources in the contiguous United States, specifically in the central plain states, could accommodate as much as 16 times total current demand for electricity in the United States."¹⁶ By obtaining more energy from wind, the United States could significantly reduce greenhouse gas

required to take inventory of all its greenhouse gas emissions and develop a plan to reduce them by 2020. *Id.* at 52, 117–18.

8. *See, e.g.*, President Barack Obama, Remarks by the President on Energy (June 29, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Energy/).

9. *See, e.g.*, President Barack Obama, Remarks by the President to the Nation on the BP Oil Spill (June 15, 2010) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill>).

10. DAVID SANDALOW, FREEDOM FROM OIL: HOW THE NEXT PRESIDENT CAN END THE UNITED STATES' OIL ADDICTION 1–3 (2008). Whereas general political consensus exists on the issue of energy independence, there is not political consensus on the issue of global climate change. *See* Farrell, *supra* note 3.

11. SANDALOW, *supra* note 10, at 3.

12. *See Plug in Gulf Well is Declared a Success*, N.Y. TIMES, Aug. 8, 2010, at A12; Remarks by the President to the Nation on the BP Oil Spill, *supra* note 9.

13. *Wind Power and Climate Change*, AMERICAN WIND ENERGY ASSOCIATION, http://www.awea.org/documents/factsheets/Climate_Change.pdf (last visited Jan. 10, 2011) [hereinafter AWEA].

14. U.S. ENERGY INFO. ADMIN., DEP'T OF ENERGY, ANNUAL ENERGY REVIEW 2009, at 7 tbl.1.2 (2010). Fossil fuels, alternatively, accounted for almost seventy-eight percent of energy production in the United States in 2009. *Id.*

15. *See* Xi Lu, Michael B. McElroy & Juha Kiviluoma, *Global Potential for Wind-Generated Electricity*, 106 PROC. NAT'L ACAD. SCI. 10,933 (2009), available at <http://www.pnas.org/content/106/27/10933.full.pdf>.

16. *Id.* at 10,933. This study relied on atmospheric data to analyze the potential amount of energy that could be produced by wind if a "network of . . . turbines" were placed in "non-forested, ice-free, nonurban areas" of the United States. *Id.*

emissions and slow the effects of climate change.¹⁷ In addition, increased wind energy could reduce the United States' reliance on foreign energy and fossil fuels.¹⁸ However, litigation aimed at enjoining the construction of wind energy facilities slows and increases the cost of potential wind energy development.¹⁹ Often, this litigation is based on the common-law doctrine of nuisance²⁰ and reflects a "not in my backyard" attitude.²¹ This

17. See AWEA, *supra* note 13. Despite the potential benefits for the planet of wind power, it has faced some opposition from environmental advocates. See, e.g., Christina Gillham, *Birds vs. Environmentalists?*, NEWSWEEK, Aug. 13, 2009, <http://www.newsweek.com/2009/08/12/birds-vs-environmentalists.html>.

Critics charge that wind-energy development can cause habitat fragmentation—a displacement of a species that can eventually reduce its numbers—as well as the deaths of birds and bats (a species that is especially vulnerable due to its low reproductive rates) that collide with the wind turbines' massive rotor blades. A 2007 study by the National Academy of Sciences puts the number of birds killed each year at about 20,000 to 30,000.

Id. Some conservational and bird-watching groups recognize the positive effects of wind energy on global climate change and advocate finding a balance between wind development and conservation, advocating the siting of wind farms in a way that limits the impact on wildlife. See, e.g., *Birds and Wind Farms*, AM. BIRD CONSERVANCY, <http://www.abcbirds.org/abcprograms/policy/collisions/wind-farms.html> (last visited Jan. 10, 2011); *Wind Power Overview*, NAT'L AUDUBON SOC'Y, <http://policy.audubon.org/wind-power-overview-0> (last visited Jan. 10, 2011). In addition, the U.S. Fish and Wildlife Service's Wind Turbines Guidelines Advisory Committee has drafted recommendations to the Secretary of the Interior on "how best to assess and prevent adverse impacts to wildlife and their habitats while allowing for the development of the Nation's wind energy resources." WIND TURBINE GUIDELINES ADVISORY COMM., U.S. FISH & WILDLIFE SERV., WIND TURBINE GUIDELINES ADVISORY COMMITTEE RECOMMENDATIONS, at i (2010), available at http://www.fws.gov/habitatconservation/windpower/Wind_Turbine_Guidelines_Advisory_Committee_Recommendations_Secretary.pdf.

18. President Barack Obama, Remarks by the President Challenging Americans to Lead the Global Economy in Clean Energy (Oct. 23, 2009) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-challenging-americans-lead-global-economy-clean-energy>).

19. See Lisa Wing Stone & Sarah Zdeb, *Lessons Learned from Wind Farm Litigation*, 11 ENVTL. LITIG. & TOXIC TORTS COMMITTEE NEWSL. 2, 5 (2009) ("[P]roponents and developers of wind energy projects defending . . . [against] litigation can face significant costs and project delays . . ."); see also Ernest Smith, *Wind Energy: Siting Controversies and Rights in Wind*, 1 ENVTL. & ENERGY L. & POL'Y J. 281, 283–90 (2007) (recounting the multiple rounds of litigation aimed at stopping the Cape Wind project).

20. See, e.g., *Rose v. Chaikin*, 453 A.2d 1378 (N.J. Super. Ct. Ch. Div. 1982); *Rassier v. Houim*, 488 N.W.2d 635 (N.D. 1992); *Rankin v. FPL Energy, LLC*, 266 S.W.3d 506 (Tex. App. 2008); *Burch v. NedPower Mount Storm, LLC*, 647 S.E.2d 879 (W. Va. 2007). The use of nuisance law to delay what is widely seen as environmentally beneficial is a bit ironic, given that "[t]he nuisance cause of action provides the backbone of common law environmental (pollution) litigation." Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923, 926 (1999). "Historically, nuisance law was dealing with 'pollution' problems long before Congress enacted the current array of environmental statutes." Fredric D. Bellamy, *Environmental Nuisance Claims—Conflation and Contradiction in an Area Dominated by Statutes*, in TOXIC TORT AND ENVIRONMENTAL MATTERS: ADVANCED CIVIL LITIGATION 221, 223 (1997).

21. Although people often appreciate the social utility of wind energy, they dislike the idea of a wind-generation device being placed near their home—hence the term "not in my backyard." See, e.g., Richard G. Jones, *Windmill Cuts Bills, but Neighbors Don't Want to Hear It*, N.Y. TIMES, July 11, 2007, at B1.

Note addresses the issue of nuisance claims against wind energy development and proposes a way to reduce litigation and thus speed the development of wind energy, fulfilling the twin goals of reducing greenhouse gas emissions and dependence on foreign oil.²²

This Note contains five parts. Parts I–III introduce the legal issues involved in nuisance litigation against wind farms. Part I provides an overview of the common-law doctrine of nuisance.²³ Part II briefly discusses some of the relevant statutory law affecting wind farms and their placement.²⁴ Part III examines the relevant case law, looking at the primary cases of nuisance litigation against single wind generators²⁵ and wind farms.²⁶ Part IV begins by analyzing the case law discussed in Part III and describes which types of nuisance suits are most likely to prevail.²⁷ Part IV finishes with a discussion of the effects of nuisance suits, including their effect on the development of wind energy, regardless of the outcome.²⁸ After a discussion of right-to-farm statutes,²⁹ which serve as an imperfect model to my proposal, Part V proposes how immunity from nuisance litigation for wind farm developers could be formulated at the state level by creating right-to-wind statutes.³⁰

I. COMMON LAW

A. *Private Nuisance*

Nuisance law is a common-law doctrine, having its roots in the assize of nuisance, which originated in England nearly 900 years ago.³¹ As opposed to the doctrine of trespass, which occurred when a defendant actually entered the plaintiff's land, the assize of nuisance was for the defendant "who interfered with plaintiff's use and enjoyment of his property by acts done elsewhere than on plaintiff's land . . ."³² The modern doctrine of private nuisance appears to trace its origin to the assize

22. See *supra* text accompanying notes 7 and 8.

23. See *infra* Part I.

24. See *infra* Part II.

25. See *infra* Part III.A.

26. See *infra* Part III.B.

27. See *infra* Part IV.A.

28. See *infra* Part IV.B.

29. See *infra* Part V.A.

30. See *infra* Part V.B.

31. 9 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 64.01(1) (Michael Allen Wolf ed., 2009). For a historical account of the development of the assize of nuisance, see Janet Loengard, *The Assize of Nuisance: Origins of an Action at Common Law*, 37 CAMBRIDGE L.J. 144 (1978).

32. POWELL, *supra* note 31.

of nuisance, as the *Restatement (Second) of Torts* defines a private nuisance as “a nontrespassory invasion of another’s interest in the private use and enjoyment of land.”³³

Not all interference,³⁴ however, rises to the level of a private nuisance. For a successful action, “the interference must be substantial and the harm significant.”³⁵ “[A]s Dean Prosser . . . noted, ‘[t]he law does not concern itself with trifles, or seek to remedy all the petty annoyances and disturbances of everyday life in a civilized community’”³⁶ The standard used to measure the interference is whether a normal person or normal property in the neighborhood would consider the harm significant.³⁷

B. Public Nuisance

Public nuisance has historical roots in a crime called a purpresture, which was an “encroachment[] on the king’s right” and involved an action such as an “obstruction of roads, non-repair of bridges, [or an] interference with light”³⁸ Today, a “public nuisance is an unreasonable interference with a right common to the general public.”³⁹ Of the two types of nuisance, litigants against wind farms generally pursue private nuisance, so public nuisance need not be discussed further.⁴⁰

33. RESTATEMENT (SECOND) OF TORTS § 821D (1979).

34. Although the *Restatement* uses the term “invasion,” *id.*, “interference” is commonly used as well. See POWELL, *supra* note 31, § 64.02(1).

35. *Id.* § 64.02(2) (footnote omitted).

36. *Id.* (quoting PROSSER AND KEETON ON TORTS § 88 (5th ed. 1984)).

37. RESTATEMENT (SECOND) OF TORTS § 821F (1979). Thus, “hypersensitive persons or property” will not have a claim unless a normal person or property in the community would consider the harm significant. *Id.* § 821F cmt. d.

38. POWELL, *supra* note 31, § 64.01(1) (quoting E. GARRETT & H. GARRETT, LAW OF NUISANCES 1–2 (3d ed. 1908)).

39. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

40. See *Rose v. Chaikin*, 453 A.2d 1378 (N.J. Super. Ct. Ch. Div. 1982); *Rassier v. Houim*, 488 N.W.2d 635 (N.D. 1992); *Burch v. NedPower Mount Storm, LLC*, 647 S.E.2d 879 (W. Va. 2007) (discussed *infra* Parts III.A.1; III.A.2; and III.B.1 respectively). *But see Rankin v. FPL Energy, LLC*, 266 S.W.3d 506, 508 (Tex. App. 2008) (plaintiff made a public nuisance claim, but it was dismissed at the trial level; discussed *infra* Part III.B.2). The pursuit of private nuisance claims in these cases is consistent with the nature of the harm—these plaintiffs all allege harm to them personally or their property. They likely do not allege a public nuisance because doing so would require them to show an interference with a right held by the public. See *supra* text accompanying note 39.

C. *Balancing Test*

Courts generally utilize a balancing test when evaluating a case alleging a nuisance.⁴¹ Although the articulation of the test varies somewhat by state,⁴² it generally involves weighing the seriousness of the harm caused to a neighbor against the social utility of the activity causing the harm.⁴³ Where the harm caused outweighs the social utility, a nuisance occurs.⁴⁴ To determine the seriousness of the harm, several factors are considered, including:

- (a) [t]he extent of the harm involved;
- (b) the character of the harm involved;
- (c) the social value that the law attaches to the type of use or enjoyment invaded;
- (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
- (e) the burden on the person harmed of avoiding the harm.⁴⁵

To determine the social utility or value of the activity alleged to cause the harm, additional factors are considered: “(a) the social value that the law attaches to the primary purpose of the conduct; (b) the suitability of the conduct to the character of the locality; and (c) the impracticability of preventing or avoiding the invasion.”⁴⁶

D. *Defense of “Coming to the Nuisance”*

If a plaintiff successfully shows that the harm caused by the activity outweighs the social utility of the activity, he or she will have established

41. See, e.g., *Burch*, 647 S.E.2d at 887.

42. Compare *Rose*, 453 A.2d at 1381 (“The utility of the defendant’s conduct must be weighed against the *quantum* of harm to the plaintiff.” (quoting *Sans v. Ramsey Golf & Country Club*, 149 A.2d 599, 605 (N.J. 1959))), with *Burch*, 647 S.E.2d at 887 (“An interference with the private use and enjoyment of another’s land is unreasonable when the gravity of the harm outweighs the social value of the activity alleged to cause the harm.” (quoting *Hendricks v. Stalnaker*, 380 S.E.2d 198, 198 (W. Va. 1989))).

43. See, e.g., RESTATEMENT (SECOND) OF TORTS § 826 (1979).

44. *Id.*

45. RESTATEMENT (SECOND) OF TORTS § 827 (1979).

46. RESTATEMENT (SECOND) OF TORTS § 828 (1979). As to be expected, different courts give different weight to the various factors. See discussion *infra* note 139 and accompanying text.

a nuisance.⁴⁷ The defendant, however, can raise one of several defenses.⁴⁸ Of importance to this Note is the defense of “coming to the nuisance.”⁴⁹ The basic argument is that the defendant was conducting the activity alleged to cause a nuisance before the plaintiff acquired the nearby property—hence, the plaintiff “came to the nuisance.”⁵⁰ If the defendant can successfully prove the “coming to the nuisance” defense, it does not usually serve as a complete bar to recovery for the plaintiff, but becomes a factor weighed in favor of the defendant when the court makes its decision.⁵¹ For farmers, the “coming to the nuisance” defense has been codified in the form of right-to-farm laws in all fifty states.⁵² However, the right-to-farm legislation is stronger than the “coming to the nuisance” defense because it usually provides immunity from nuisance actions.⁵³

E. Remedies

Plaintiffs in nuisance actions generally pursue injunctions or damages as a remedy.⁵⁴ “The usual basis for equitable intervention—the inadequacy of the remedy at law—is normally present in a private nuisance action.”⁵⁵ Monetary damages can be awarded at the “election of the plaintiff” or by the decision of the court to deny equitable relief.⁵⁶ In cases against wind generators and farms, injunction is the typical remedy sought.⁵⁷ Further, wind farms often face anticipatory nuisance claims, which a plaintiff

47. See RESTATEMENT (SECOND) OF TORTS § 826 (1979).

48. POWELL, *supra* note 31, § 64.05.

49. *Id.* § 64.05(2). Others include acquiescence, estoppel, statute of limitations, a prescriptive right to continue the activity, and compliance with local zoning regulations. Not all of these serve as complete bars to recovery, but as factors to be weighed in the balancing test. *Id.* § 64.05.

50. *Id.* § 64.05(2).

51. *Id.*

52. See Harrison M. Pittman, Annotation, *Validity, Construction, and Application of Right-to-Farm Acts*, 8 A.L.R.6TH 465, 480 (2005); see also *infra* text accompanying notes 170–73 (further discussing right-to-farm statutes).

53. Pittman, *supra* note 52, at 465.

54. POWELL, *supra* note 31, § 64.07(1).

55. *Id.* § 64.07(2)(a). At the same time, a court may deny relief based on “such traditional equitable principles as laches.” *Id.* § 64.07(2)(b) (footnote omitted).

56. *Id.* § 64.07(3). Determining damages can be complicated, but “[w]hen the harm is permanent, damages are measured by the decrease in the fair market value of the property attributable to the private nuisance.” *Id.* (footnote omitted).

57. See *infra* text accompanying notes 72, 102, 123.

“[S]ubstantial interferences with a person’s use and enjoyment of property by things such as noise and unsightliness can best be abated by courts applying equitable principles. This is due to the fact that constant loud noise and unsightliness that interferes with the use and enjoyment of property simply are not susceptible to computation.”

Burch v. NedPower Mount Storm, LLC, 647 S.E.2d 879, 894 (W. Va. 2007).

brings before the nuisance has even commenced and before the plaintiff has experienced any harm.⁵⁸

II. STATUTORY LAW

Although the statutory law affecting wind farms is largely beyond the scope of this Note, there are a few key points worth mentioning. First, there are few states that provide mandatory guidance on the siting of wind farms outside of urban areas.⁵⁹ However, several states are beginning to provide nonmandatory guidance on the siting of wind farms in their jurisdictions.⁶⁰ Occasionally, local governments create ordinances that affect the siting of wind farms.⁶¹ Such ordinances may require the issuance of a permit before developers of wind farms may begin construction.⁶²

III. CASE LAW

Relatively few cases have addressed the issue of nuisance law with regard to wind energy. The following four cases are the only published cases that exist on the subject.⁶³ As wind energy continues to expand in the

58. POWELL, *supra* note 31, § 64.07(2)(d). See *Burch*, 647 S.E.2d at 889 (allowing an anticipatory claim to proceed); see also *Muscarello v. Ogle Cnty. Bd. of Comm'rs*, 610 F.3d 416, 424 (7th Cir. 2010) (dismissing as unripe an anticipatory nuisance claim).

59. See *Smith*, *supra* note 19, at 299. "Except in urban areas, where zoning and building regulations may impose restrictions on wind turbines, the siting and location of utility-grade wind plants are left almost entirely to the discretion of wind companies and individual landowners." *Id.* at 282.

60. For a discussion on ways that states are creating wind farm siting guidelines, an analysis of said guidelines, and a proposed comprehensive guideline, see Robert S. Guzek, Note, *Addressing the Impacts of Large Wind Turbine Projects to Encourage Utilization of Wind Energy Resources*, 27 TEMP. J. SCI. TECH. & ENVTL. L. 123, 133–38 (2008).

61. As of December 2008, at least twenty-five local governments in Illinois, Kansas, Michigan, Minnesota, New York, Pennsylvania, South Dakota, and Utah had enacted ordinances for the siting of wind farms. F. OTERI, NAT'L RENEWABLE ENERGY LAB., AN OVERVIEW OF EXISTING WIND ENERGY ORDINANCES (2008), available at http://www.windpoweringamerica.gov/pdfs/policy/2008/ordinances_overview.pdf; see, e.g., MANITOWOC COUNTY, WIS., CODE § 24.06(2) (2007). In addition, several states have drafted model ordinances, which can be adopted by local governments in their states. For a link to the model ordinances, as well as local ordinances, see U.S. Dep't of Energy, *Wind Energy Ordinances*, WIND POWERING AMERICA, <http://www.windpoweringamerica.gov/siting/ordinances.asp> (last visited Oct. 15, 2010).

62. See, e.g., MANITOWOC COUNTY, WIS., CODE § 24.07(3) (2007).

63. A fifth case, *Muscarello v. Ogle County Board of Commissioners*, 610 F.3d 416 (7th Cir. 2010), includes a nuisance claim against a wind farm development; however, I do not discuss it in detail as it never reached the merits of the nuisance claim. *Id.* at 418. In that case, a homeowner sued over the issuance of a zoning permit for a proposed wind farm. *Id.* at 419. The court dismissed her nuisance claim as not ripe because no wind turbines had been constructed yet, so no invasion could have occurred. *Id.* at 424. News reports show other instances of lawsuits against wind farms where the plaintiff made a nuisance claim. See, e.g., Kathy Mellott, *Judge Backs Gamesa in Noise Lawsuit*,

coming years,⁶⁴ it is likely that more cases will emerge, providing a richer body of law on this subject.

A. *Cases Involving a Single Wind Generator in a Residential Setting*⁶⁵

1. *Rose v. Chaikin*⁶⁶

In *Rose v. Chaikin*, the plaintiff and defendant were neighbors in a “contiguous residential neighborhood in Brigantine, New Jersey.”⁶⁷ “[I]n an effort to save on electric bills,” the defendant “erected a 60’-high tower” with a wind generator on top, “ten feet from the property line of one of [the] plaintiffs.”⁶⁸ When operational,⁶⁹ the wind generator produced noise in the range of fifty-six to sixty-one decibels, making noise described as similar to a “large motor upon which there is superimposed the action of blades cutting through the air.”⁷⁰ The noise made by the wind generator caused the plaintiff to suffer physical symptoms and interfered with daily activities.⁷¹ Thus, the plaintiff brought a nuisance action seeking to enjoin the operation of the wind generator.⁷²

TRIB.-DEMOCRAT (Johnstown, Pa.), Dec. 9, 2008, available at 2008 WLNR 23613300; Stuart R. Wahlin, *Lawsuit Ensures Wind Farm Won’t Be a Breeze*, ROCK RIVER TIMES (Rockford, Ill.), Feb. 3, 2010, available at <http://rockrivertimes.com/2010/02/03/lawsuit-ensures-wind-farm-won%E2%80%99t-be-a-breeze/>.

64. In 2009, new wind installations increased America’s wind energy generating capacity by 10,000 megawatts, or “enough to serve over 2.4 million homes[.]” MARKET UPDATE: RECORD 2009 LEADS TO SLOW START IN 2010, AMERICAN WIND ENERGY ASSOCIATION 1 (2010), available at http://www.awea.org/documents/factsheets/Market_Update_Factsheet.pdf. Although the rate of growth of wind energy development is expected to decrease in coming years, wind energy is expected to continue to grow. *Id.*

65. The division in my discussion between cases involving a single wind generator in a residential setting and cases involving an actual or proposed wind farm, see Part III.B, was first used by Ernest Smith. See Smith, *supra* note 19, at 292–93.

66. *Rose v. Chaikin*, 453 A.2d 1378 (N.J. Super. Ct. Ch. Div. 1982).

67. *Id.* at 1380. Brigantine, New Jersey, is a small beach town north of Atlantic City. See BRIGANTINE BEACH TOURISM COMMISSION, <http://www.brigantinebeachnj.com/tourism.html> (last visited Jan. 10, 2011).

68. *Rose*, 453 A.2d at 1380.

69. “Although a reduction in the wind speed to below eight m.p.h. will automatically shut down the unit, the prevailing winds at this site are generally above that.” *Id.*

70. *Id.* For comparison, a whisper is equivalent to thirty decibels, a normal conversation measures around fifty to sixty-five decibels, and a hair dryer measures around seventy decibels. *Interactive Sound Ruler*, NAT’L INST. ON DEAFNESS & OTHER COMM. DISORDERS, <http://www.nidcd.nih.gov/health/education/decibel/decibel.asp> (last updated June 7, 2010).

71. “Those symptoms included nervousness, dizziness, loss of sleep and fatigue.” *Rose*, 453 A.2d at 1380.

72. The plaintiff also brought an action to enjoin the defendant based on the defendant’s violation of the local zoning ordinance, which set the maximum decibels permitted at fifty. *Id.* This claim was successful, but ultimately unnecessary given the outcome of the nuisance action. *Id.* at

The court utilized a balancing test to determine whether the defendant's wind generator constituted a private nuisance.⁷³ New Jersey case law required two elements to enjoin a noise because it constituted a private nuisance: "(1) injury to the health and comfort of ordinary people in the vicinity, and (2) unreasonableness of that injury under all the circumstances."⁷⁴ The court started by analyzing the harm to the plaintiff, specifically the noise created by the wind generator.⁷⁵ It found that the wind generator produced noise that was "offensive because of its character, volume and duration," and that the plaintiff had shown sufficient harm for a successful nuisance claim.⁷⁶ The court considered the character of the neighborhood a significant factor—the wind generator was especially bothersome given the tranquility of the neighborhood.⁷⁷

The court next considered the social utility of the wind generator. The defendant argued that alternative power from the wind generator contributed to a broader national policy of reducing energy consumption.⁷⁸ While the court lauded the intention of alternative energy, ultimately it concluded that the relative harm to the plaintiff outweighed the social utility.⁷⁹ Thus, the court found a private nuisance existed and an injunction warranted because "the social utility of [the] windmill is outweighed by the quantum of harm that it creates."⁸⁰

1384; *see infra* text accompanying note 80. The plaintiff joined as defendants the manufacturer of the wind generator, its installer, and the city, but they did not participate in the trial. *Rose*, 453 A.2d at 1380 n.1.

73. The balancing test had the same basic outline as discussed in Part I.C of this Note. "The utility of the defendant's conduct must be weighed against the *quantum* of harm to the plaintiff." *Rose*, 453 A.2d at 1281 (quoting *Sans v. Ramsey Golf & Country Club*, 149 A.2d 599, 605 (N.J. 1959)).

74. *Rose*, 453 A.2d at 1381 (citing *Malhame v. Demarest*, 392 A.2d 652, 658 (N.J. Super. Ct. Law Div. 1978)).

75. The defendant argued "noise, standing alone, cannot constitute a private nuisance . . .," but the court quickly rejected this argument. *Rose*, 453 A.2d at 1381.

76. *Id.* at 1382.

77. *Id.* The court further argued that plaintiffs had selected this location because of its proximity to the beach and the related natural sounds, so the "noise of [the wind generator], which would be unwelcome in most neighborhoods, [was] particularly alien [t]here." *Id.*

78. Specifically, the defendant pointed to two federal pieces of legislation, the Wind Energy Systems Act of 1980, 42 U.S.C. §§ 9201–13 (2006), and the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 (2006). *Rose*, 453 A.2d at 1382.

79. "[T]he fact that a device represents a scientific advance and has social utility does not mean that it is permissible at any cost." *Id.* at 1382.

80. *Id.* at 1383. The court noted that this holding should not be read to mean that all wind generators are a nuisance, only that the facts of this case "clearly and convincingly establish[ed]" one. *Id.*

2. *Rassier v. Houim*⁸¹

The defendant in *Rassier v. Houim* “erected a tower and installed a wind generator on his residential lot in . . . Mandan[,] [North Dakota] in 1986.”⁸² Two years later, the plaintiff bought the neighboring lot and moved a mobile home onto it, placing her house approximately forty feet from the defendant’s tower with the wind generator.⁸³ At that range, an environmental scientist and an engineer measured the noise emanating from the wind generator at roughly fifty to sixty-nine decibels.⁸⁴ The plaintiff alleged the noise made use of her yard impractical.⁸⁵ She also alleged that the wind generator was a safety hazard, as large chunks of ice could fall off the blades.⁸⁶ In 1990, approximately two years after moving onto the property, the plaintiff brought an action claiming the defendant’s wind generator constituted a private nuisance.⁸⁷ The district judge rejected the plaintiff’s claims, and she appealed.⁸⁸

The court first outlined nuisance law, which, in North Dakota, is statutory, as opposed to common, law.⁸⁹ The nuisance action in North Dakota tracks a negligence action in that a plaintiff must show a duty and breach.⁹⁰ “The duty which gives rise to a nuisance claim is the absolute duty not to act in a way which unreasonably interferes with other persons’ use and enjoyment of their property.”⁹¹ To determine whether someone

81. *Rassier v. Houim*, 488 N.W.2d 635 (N.D. 1992).

82. *Id.* at 636. Mandan is located in central North Dakota, across the Missouri River from Bismarck, North Dakota. Its population is just over 18,000, but it is part of the Bismarck metropolitan area, which has a population over 100,000. See CITY OF MANDAN, <http://www.cityofmandan.com/> (last visited Jan. 10, 2011).

83. *Rassier*, 488 N.W.2d at 636, 638.

84. *Id.* at 638. Mandan had no noise ordinance proscribing noise above a certain level. The court noted that the standard elsewhere in North Dakota is a maximum of fifty-five decibels in residential areas, so the defendant’s wind generator would have violated such an ordinance. *Id.* For a better understanding of the windmill’s fifty to sixty-nine decibel production, see *supra* note 70.

85. *Rassier*, 488 N.W.2d at 638. Expert testimony at trial also maintained that “noise at the measured levels could be irritating, stressful, and interfere with sleep.” *Id.*

86. Plaintiff testified that she had once found such a chunk of ice in her yard. *Id.*

87. *Id.* at 636. The plaintiff also claimed the defendant had violated restrictive covenants placed on the property by the developer. The trial court judge found these covenants had been abandoned and were no longer enforceable. *Id.* at 639.

88. *Id.* at 636.

89. The common law is still applicable, though, so long as it does not conflict with the statutory law. *Id.* In practice, North Dakota still applies a balancing test. See *infra* text accompanying note 92.

90. See *Rassier*, 488 N.W.2d at 636–37.

91. *Id.* at 637. Specifically, the nuisance statute proscribes failing to perform a duty when the failure “[a]nnoys, injures, or endangers the comfort, repose, health, or safety of others.” *Id.* at 636 (quoting N.D. CENT. CODE § 42-01-01 (1992)).

has failed to perform this duty, the court weighs factors that are found at common law.⁹² The court placed particular importance when weighing factors on the common-law doctrine of coming to the nuisance, finding it weighed heavily in the defendant's favor.⁹³ Based on a weighing of the coming to the nuisance factor and the other evidence presented,⁹⁴ the court concluded that the trial court was not "clearly erroneous"⁹⁵ in its factual finding that a nuisance did not exist and upheld the lower court.⁹⁶

B. Cases Involving an Actual or Proposed Wind Farm

1. Burch v. NedPower Mount Storm, LLC⁹⁷

The defendant⁹⁸ in *Burch v. NedPower Mount Storm, LLC* sought to develop a wind farm in Grant County, West Virginia, along a fourteen-mile-long strip of the Allegheny Front.⁹⁹ The proposal called for 200 wind turbines, each 210–415 feet in height with blades 115 feet in length.¹⁰⁰ Three years prior to the lower court's decision, the defendant obtained "a certificate of convenience and necessity," a siting "certificate required for the operation of wholesale electric generating facilities" in West Virginia, from the Public Service Commission (PSC).¹⁰¹ The plaintiffs,

92. *Rassier*, 488 N.W.2d at 637.

93. *Id.* at 638; see discussion *supra* Part I.D.

94. The court specifically mentioned that it took the plaintiff two years to bring suit, that no other neighbor complained of the sound, and that there were safety features that mitigated the potential problem of ice throws. *Rassier*, 488 N.W.2d at 638.

95. Clearly erroneous is the standard of review on factual issues. *Id.* at 638 (citing N.D. R. Civ. P. 52(a) (1992)).

96. *Rassier*, 488 N.W.2d at 638–39. The trial court used the coming to the nuisance factor as its stated reason for denying the claim. *Id.* at 638. It is worth noting that two of five justices on the North Dakota Supreme Court dissented from this opinion. Justice Meschke, writing for himself and another justice, concurred in part and dissented in part. He agreed with the majority's discussion of the law, but disagreed with its weighing of factors. *Id.* at 639 (Meschke, J., concurring in part and dissenting in part). Specifically, he thought the trial court and the majority weighed too heavily the coming to the nuisance factor. *Id.* He would have focused more on the "character of the locality." *Id.* at 640. He believed that the coming to the nuisance factor "should not be applied to an inappropriate activity that interferes with the use of property planned, zoned, and dedicated to residential purposes." *Id.* He would have remanded the decision for a weighing of factors that took greater account of the residential nature of the neighborhood where the plaintiff and defendant lived. *Id.* at 641.

97. *Burch v. NedPower Mount Storm, LLC*, 647 S.E.2d 879 (W. Va. 2007).

98. *NedPower Mount Storm, LLC*, was the defendant company that planned to construct the wind farm. Also, a defendant was Shell WindEnergy, Inc., which contracted to purchase the farm after its construction. *Id.* at 884–85.

99. *Id.*

100. *Id.* at 885.

101. *Id.* at 884 & n.1. The PSC has "the authority and duty to enforce and regulate the practices, services and rates of public utilities" in the state. *Id.* at 887 (quoting W. VA. CODE § 24-1-1(a) (1986)).

“homeowners who live[d] . . . about one-half mile to two miles from the projected wind turbines,” brought a private nuisance claim against the defendant seeking to enjoin construction of the wind farm.¹⁰² The lower court dismissed the plaintiffs’ claim, and they appealed.¹⁰³

The first issue the court addressed was whether the granting of the PSC certificate immunized the defendants from nuisance liability.¹⁰⁴ The defendant argued that allowing a nuisance action against an electricity generation facility would “conflict[] with the role of the PSC in granting siting certificates to these facilities.”¹⁰⁵ The court disagreed.¹⁰⁶ While the PSC took account of several factors before granting a siting certificate,¹⁰⁷ it did not consider the interests of the neighboring homeowners and the effect that the placement of an electric generating facility would have on their “use and enjoyment of their propert[y].”¹⁰⁸ Since the PSC did not consider the homeowners’ interest, the court found that nuisance law was still “necessary to preserve the traditional rights of these landowners.”¹⁰⁹

The court next considered whether the plaintiffs alleged sufficient facts that, if proven, would prove a nuisance claim and entitle the plaintiffs to a prospective injunction.¹¹⁰ With respect to the potential noise from the wind

Before granting the certificate, the PSC held a hearing with public notice and comment. *Id.* at 884 n.2. “[T]he PSC concluded as a matter of law that the facility will be ‘an economically beneficial, environmentally responsible wind power facility’ that will help to address the need for ‘additional generating capacity’ and will help ‘diversify . . . the regional energy supply.’” *Id.* at 884 n.2.

102. *Id.* at 885.

Specifically, the [plaintiffs] asserted that they [would] be negatively impacted by noise from the wind turbines; the turbines [would] create a “flicker” or “strobe” effect when the sun is near the horizon; the turbines [would] pose a significant danger from broken blades, ice throws, and collapsing towers; and the wind power facility [would] cause a reduction in the [plaintiffs’] property values.

Id.

103. *Id.* at 884.

104. *Id.* at 886–91.

105. *Id.* at 889. It was also argued that “the circuit court lack[ed] jurisdiction to enjoin the construction . . . of [the wind] facilities under [the] law of nuisance” because the “Legislature granted the PSC the power to decide the siting of electric generating facilities.” *Id.* at 886. The court rejected this argument because it could find no evidence in the authorizing statute that the legislature meant to “disregard or abrogate the common law doctrine of nuisance.” *Id.* at 889.

106. *Id.* The dissent reached an entirely different conclusion, finding that NedPower, by the PSC’s certificate, was a public utility. *Id.* at 898 (Benjamin, J., dissenting). As a public utility, NedPower had the power of eminent domain and could not be subjected to an injunction based on private nuisance. *Id.* at 899.

107. The PSC considered the “‘interests of current and future utility service customers, the general interests of the state’s economy and the interests of the utilities subject to its jurisdiction.’” *Id.* at 889 (majority opinion) (quoting W. VA. CODE § 24-1-1(b) (1986)).

108. *Id.* at 889.

109. *Id.*

110. The circuit court found that even if the alleged injuries developed, they would “not support a

farm, the court concluded based on case law that noise, by itself, would be sufficient to establish a nuisance.¹¹¹ With respect to the claim that the windmill would create a “‘flicker’ or ‘strobe’ effect,” the court found that aesthetics alone usually provided insufficient grounds for a nuisance claim, but when paired with other interferences, an injunction could be granted.¹¹² The court similarly found that an alleged diminution in property values, without more, would not qualify as a nuisance.¹¹³ However, if coupled with “interferences to the use and enjoyment of . . . property,” the diminution in property value could be sufficient for an injunction.¹¹⁴ Having found the plaintiffs “alleged sufficient facts . . . to avoid a dismissal,” the court reversed and remanded the case for a hearing on the plaintiffs’ claims.¹¹⁵ The court noted, however, that to obtain a prospective injunction, “it must be shown that the danger of injury from [the prospective nuisance] is impending and imminent, and the effect certain.”¹¹⁶

prospective injunction because the injuries are speculative and contingent.” *Id.* at 891.

111. *Id.* “[E]very person . . . has the right not to be disturbed in his house; he has the right to rest and quiet and not to be materially disturbed in his rest and enjoyment of home by loud noises.” *Id.* (quoting *Snyder v. Cabell*, 1 S.E. 241, 251 (W. Va. 1886)).

112. *Id.* at 891–92. The court pointed to an earlier case where it held that a salvage yard was a nuisance because, in addition to “‘unsightliness,’” the yard was noisy, “‘hazard[ous] from the presence of flammable materials,’” infested with “‘rodents and insects,’” and negatively affecting the property value of its residential neighbors. *Id.* at 892 (quoting *Mahoney v. Walter*, 205 S.E.2d 692, 693 (W. Va. 1974)).

113. *Burch*, 647 S.E.2d at 892. Interestingly, an extensive study of almost 7,500 home sales in nine states conducted by the Lawrence Berkeley National Laboratory found no evidence that proximity to wind facilities adversely affected home values. BEN HOEN ET AL., ERNEST ORLANDO LAWRENCE BERKELEY NAT’L LAB., U.S. DEP’T OF ENERGY, THE IMPACT OF WIND POWER PROJECTS ON RESIDENTIAL PROPERTY VALUES IN THE UNITED STATES: A MULTI-SITE HEDONIC ANALYSIS 75 (2009); Press Release, Lawrence Berkeley Nat’l Lab., Berkeley Lab Study Finds No Widespread Impact of Windpower Projects on Surrounding Residential Property Values in the U.S. (Dec. 2, 2009), available at <http://newscenter.lbl.gov/press-releases/2009/12/02/wind-power-property-values/> (“Neither the view of wind energy facilities nor the distance of the home to those facilities was found to have any consistent, measurable, and significant effect on the selling prices of nearby homes.” (quoting Ben Hoen)).

114. *Burch*, 647 S.E.2d at 892. Alternatively, the plaintiff could seek monetary damages for the loss of value to his or her property. *Id.*

115. *Id.* at 895. The court argued it cannot predict the outcome of the claim, but indicated that the siting certificate will be “persuasive evidence of the reasonableness and social utility” of placing a wind farm on the site. *Id.* According to local news reports, the plaintiffs ultimately failed to stop construction of the NedPower wind farm, though as of February 15, 2009, the “suit [was] still kicking, after bouncing to the state Supreme Court and back.” Jim Balow, *Recession Takes Sales Out of Wind; Wind Turbines Multiply Across Ridgetops, but May Slow Down*, CHARLESTON GAZETTE (W. Va.), Feb. 15, 2009, at P1E.

116. *Burch*, 647 S.E.2d at 893 (quoting *Pope v. Bridgewater Gas Co.*, 43 S.E. 87, 87 (W. Va. 1903)). The court distinguished this case, where a nuisance could be found based on the facts of the case, with a nuisance per se—something that is a nuisance at all times. *Id.* at 892–93. An unlawful business like a brothel is the “classic example” of a nuisance per se. *Id.* at 893 n.9. A business that is

2. Rankin v. FPL Energy, LLC¹¹⁷

In *Rankin v. FPL Energy, LLC*, the defendants¹¹⁸ had constructed and were operating the Horse Hollow wind farm, the largest wind farm in the world.¹¹⁹ Horse Hollow is located in Taylor County, Texas¹²⁰ and contains 421 wind turbines that are 400 feet tall and occupy an area of 47,000 acres.¹²¹ The plaintiffs,¹²² neighbors of the wind farm, brought an action alleging nuisance and seeking injunctive relief.¹²³ The defendants filed for a motion for partial summary judgment, which was granted, and the plaintiffs' final nuisance claim lost at trial by jury.¹²⁴ The plaintiffs appealed the summary judgment.¹²⁵

The primary issue addressed on appeal was whether the district court judge properly dismissed the plaintiffs' claims with regard to the wind farm's aesthetic impact.¹²⁶ After analyzing the case law of Texas, the court found no Texas court had ever found a nuisance based only on aesthetic impact, and "successful nuisance actions typically involve an invasion of a plaintiff's property by light, sound, odor, or foreign substance."¹²⁷ While

lawful cannot be a nuisance per se. *Id.* at 892. Since the PSC approved the wind farm's construction, it was lawful and therefore not a nuisance per se. *Id.* at 893.

117. *Rankin v. FPL Energy, LLC*, 266 S.W.3d 506 (Tex. App. 2008). For a more thorough discussion on the effect of *Rankin* on Texas nuisance law, see Kristina Culley, Note, *Has Texas Nuisance Law Been Blown Away by the Demand for Wind Power?*, 61 BAYLOR L. REV. 943, 950-67 (2009).

118. There were multiple defendants: FPL Energy, LLC, and its apparent subsidiaries. *Rankin*, 266 S.W.3d at 508. The plaintiffs also originally sued the owners of the property that housed the wind farm but dismissed them prior to trial. *Id.* at 508 n.2.

119. Press Release, Lynn Tillotson & Pinker LLP, Lynn Tillotson & Pinker LLP Announces Defense Verdict In Lawsuit Against Largest Wind Farm in the World (Apr. 4, 2008), available at <http://www.openpr.com/news/13928/Lynn-Tillotson-Pinker-LLP-Announces-Defense-Verdict-In-Lawsuit-against-Largest-Wind-Farm-in-the-World.html>.

120. *Rankin*, 266 S.W.3d at 508. Taylor County is located in the north central plains of Texas—the center of the state geographically. See TAYLOR COUNTY, <http://www.taylorcountytexas.org/> (last visited Jan. 10, 2011). Horse Hollow is located roughly twenty miles southwest of Abilene, Texas, the largest city in Taylor County. See *id.*; Press Release, Lynn Tillotson & Pinker LLP, *supra* note 119.

121. See *Rankin*, 266 S.W.3d at 511; Press Release, Lynn Tillotson & Pinker LLP, *supra* note 119.

122. Plaintiffs consisted of seventeen individuals and a corporation. *Rankin*, 266 S.W.3d at 508 n.1.

123. The plaintiffs alleged public, as well as private, nuisance claims, but no public nuisance claim went to trial. *Id.* at 508.

124. *Id.*

125. Plaintiffs also appealed the exclusion of witnesses and expert testimony. The defendant raised a cross issue involving the taxing of costs to the plaintiffs. *Id.*

126. *Id.* The trial judge also instructed the jury that it could not consider the aesthetic impact of the wind farm in determining the nuisance. *Id.*

127. *Id.* at 509. The court noted that

the plaintiffs conceded that an aesthetic claim standing alone would not constitute a nuisance, they argued that the aesthetic impact should be considered when combined with other factors.¹²⁸ The court rejected this argument as a “distinction without a difference.”¹²⁹ The plaintiffs also argued that their “emotional response to the loss of their view . . . interferes with the use and enjoyment of their property.”¹³⁰ Again, the court rejected this argument, finding that an emotional response could only support a nuisance claim where the nuisance was a nuisance per se.¹³¹ The defendants’ actions were not a nuisance per se because the operation of the wind farm was lawful.¹³² Thus, the court, in upholding the lower court’s summary judgment, found that a nuisance action could not be based on aesthetic impact or the emotional response flowing therefrom.¹³³

IV. ANALYSIS

A. *Making Sense of the Case Law*

Based on the cases discussed in the previous part,¹³⁴ this portion of the Note addresses what conditions will likely lead to a successful nuisance action against a wind generator or wind farm. Specifically, it first considers whether residential or rural actions are likely to be more successful, and then discusses which type of interferences are most likely to lead to successful nuisance actions.

[t]he injury or annoyance which warrants relief against an alleged nuisance must be of a real and substantial character . . . ; for if the injury or inconvenience [is] merely theoretical . . . or trivial . . . , there is no nuisance in a legal sense. Thus the law will not declare a thing a nuisance because it is . . . unpleasant to the eye . . . , for the law does not cater to men’s tastes or consult their convenience

Id. at 510 (quoting from *Shamburger v. Scheurrer*, 198 S.W. 1069, 1071–72 (Tex. Civ. App. 1917)) (internal quotation marks omitted).

128. The other factors advanced by the plaintiffs were: “the turbines’ blinking lights, the shadow flicker affect they create early in the morning and late at night, and their operational noises” *Rankin*, 266 S.W.3d at 510.

129. *Id.* at 512. “Aesthetical impact either is or is not a substantial interference with the use and enjoyment of land. If a jury can consider aesthetics as a condition, then it can find nuisance because of aesthetics.” *Id.* at 512–13. The court’s logic here is questionable, because it is not clear why aesthetics could not be a factor in a nuisance, even if it alone would not support one. The West Virginia Supreme Court takes the opposite view of the *Rankin* court. *See infra* text accompanying notes 114–15.

130. *Rankin*, 266 S.W.3d at 511.

131. The case law, which addressed nuisance in fact, did not support a nuisance claim based on “fear, apprehension, or other emotional reaction resulting from the lawful operation of industry.” *Id.* at 512. *See supra* note 116 for an explanation of nuisance per se.

132. *Rankin*, 266 S.W.3d at 511.

133. *Id.* at 513.

134. *See supra* Part III.

Wind generators in residential areas are more likely to have successful nuisance claims against them than wind generators or wind farms in less developed areas.¹³⁵ This is due to the close proximity of neighbors and the fact that “[t]he location, character and habits of the particular community are to be taken into account in determining what is offensive or annoying to a normal individual living in it.”¹³⁶ Of course, this proposition is not always true, as the *Rassier* case indicates.¹³⁷ However, the unique circumstance surrounding *Rassier* may explain why it came out differently than *Rose*, which found that a wind generator in a residential area was a nuisance.¹³⁸ The primary reason for the discrepancy between the two cases was that the court in *Rassier* placed significant emphasis on the fact that the plaintiff was coming to the nuisance, and this weighed heavily in the defendant’s favor.¹³⁹ Had the plaintiff not come to the nuisance, her claim likely would have prevailed because it presented a similar fact pattern to the *Rose* case, albeit in a different jurisdiction.¹⁴⁰

Of all the possible “nontrespassory invasion[s]”¹⁴¹ that a plaintiff may allege, the case law suggests that a noise invasion is likely to be the most successful in a nuisance suit against a wind generator or wind farm.¹⁴² Noise was the predominant factor in *Rose* that led to a successful finding of nuisance.¹⁴³ The court in *Burch*, while not deciding on the merits of the

135. Compare *Rose v. Chaikin*, 453 A.2d 1378 (N.J. Super. Ct. Ch. Div. 1982) (finding a wind generator in a residential setting constitutes a nuisance), with *Rankin*, 266 S.W.3d 506 (upholding the partial summary judgment for defendants in a nuisance action against a wind farm in a rural area).

136. RESTATEMENT (SECOND) OF TORTS § 821F cmt. e (2000).

137. See *supra* notes 81–96 and accompanying text. The *Burch* case also may seem to contradict the notion that a nuisance suit against a rural wind farm is less likely to be successful. See *supra* text accompanying notes 97–116. However, it does not, because while the court reversed and remanded the lower court’s dismissal of the claim, it did so without addressing the validity of the plaintiff’s claims. See *supra* note 115 and accompanying text.

138. See *supra* text accompanying note 80.

139. See *supra* text accompanying note 93. Notably, the dissent would have placed less weight on the coming to the nuisance factor and weighed more heavily the residential character of the neighborhood. See *supra* note 96. In addition, unlike *Rose* and most residential communities, there were no restrictive local ordinances. See *supra* notes 72, 84. Also, the restrictive covenants, which would have prohibited the construction of the wind generator in *Rassier*, had been abandoned and were no longer enforceable. See *supra* note 84.

140. The level of noise produced by both wind generators was nearly identical, around the fifty-five to sixty decibel range, although the plaintiff in *Rose* alleged more concrete physical harms as a result. See *supra* notes 70–71, 84–85 and accompanying text.

141. RESTATEMENT (SECOND) OF TORTS § 821D (1979).

142. See, e.g., *Rose v. Chaikin*, 453 A.2d 1378 (N.J. Super. Ct. Ch. Div. 1982) (finding a wind generator a nuisance because the noise it produced disturbed the plaintiff and was out of place with character of the neighborhood); cf. *Burch v. NedPower Mount Storm, LLC*, 647 S.E.2d 879, 891 (W. Va. 2007) (“[N]oise alone may create a nuisance, depending on time, locality and degree.” (quoting *Ritz v. Woman’s Club of Charleston*, 173 S.E. 564, 564 (W. Va. 1934))).

143. See *supra* text accompanying notes 75–77.

case,¹⁴⁴ indicated that noise would be a significant factor in finding a nuisance as well.¹⁴⁵ Although *Rassier* did not result in a successful nuisance claim based on noise, this can be attributed to the successful “coming to the nuisance” defense advanced by the defendant and recognized by the court.¹⁴⁶ The success of these types of nuisance claims against wind generators and wind farms may become less successful as technology continues to improve, reducing the sound they produce.¹⁴⁷

Other invasions may result in successful nuisance claims against wind generators and farms, especially when there is a collection of invasions and the court looks at the situation as a whole.¹⁴⁸ The *Burch* case gives a good indication that courts may be open to nuisance claims that consider factors such as: the light-strobe effect created by wind generators when the sun is low in the horizon;¹⁴⁹ reduced property values resulting from nearby wind farms;¹⁵⁰ and low-level noise from far-off wind farms.¹⁵¹ Since the *Burch* court did not find a nuisance, but rather reversed a summary judgment motion,¹⁵² the outcome of these types of claims, or a case which considered each claim as part as a larger collection of invasions, is uncertain.

Finally, some invasions seem very unlikely to result in successful nuisance actions against wind generators or wind farms. The court in *Rankin* resoundingly rejected the idea that claims could be based in whole, or in part, on aesthetic grounds.¹⁵³ The court also rejected the idea that the

144. See *supra* note 115.

145. See *supra* note 111 and accompanying text. The ultimate success of the claim based on noise seems questionable given that the closest defendant was a half-mile away from the nearest wind turbine. See *supra* text accompanying note 102. The sound of a wind turbine from 1000–2000 feet, less than the approximately 2,600 feet of the nearest defendant, is only around forty to fifty decibels, which is equivalent to the sound of a refrigerator running. *Interactive Sound Ruler*, *supra* note 70; see also W. DAVID COLBY ET AL., WIND TURBINE SOUND AND HEALTH EFFECTS: AN EXPERT PANEL REVIEW 3-3 (2009), available at http://www.awea.org/documents/AWEA_CanWEA_SoundWhitePaper_12-11-09.pdf.

146. See *supra* note 96 and accompanying text.

147. There have been “major advances in technology over the last 20 years. Today’s windmills—often called wind turbines—are quieter and more reliable, and they generate more power at a lower cost.” Scott Kirsner, *Wind Power’s New Current*, N.Y. TIMES, Aug. 28, 2003, at G1.

148. See *supra* text accompanying notes 112–13. But see *Rankin v. FPL Energy, LLC*, 266 S.W.3d 506, 512–13 (suggesting that unless an invasion would be a nuisance on its own, it cannot be considered as a factor in determining a nuisance).

149. See *supra* text accompanying note 112.

150. See *supra* text accompanying note 113.

151. See *supra* note 145 and accompanying text.

152. See *supra* note 115 and accompanying text.

153. See *supra* text accompanying notes 127–29. It is important to distinguish aesthetic grounds from those related to light, like the strobe effect mentioned in *Burch*. See *supra* text accompanying

emotional response to aesthetic grounds could support a nuisance claim.¹⁵⁴ Despite the clear repudiation in *Rankin*, “over the past few decades, courts, in dictum, and commentators have challenged the traditional reluctance to find a nuisance based solely on aesthetic grounds.”¹⁵⁵ Thus, it is possible that aesthetic challenges may still be raised in other jurisdictions.

B. Nuisance Claims Against Wind Developers Both Slow and Increase the Cost of Wind Development

Even if a plaintiff’s lawsuit based in nuisance law against a wind generator or wind farm ultimately fails, the litigation slows down and increases the cost of wind energy development.¹⁵⁶ Litigation is a notoriously slow process.¹⁵⁷ The Cape Wind project off the Nantucket Sound exemplifies the delaying effect that litigation can have on a potential wind development.¹⁵⁸ Multiple rounds of litigation against the developers, all of which have failed,¹⁵⁹ have prevented the construction of the offshore wind farm since the first round of litigation in 2003.¹⁶⁰ While the Cape Wind project has not been the subject of a nuisance suit, the

note 112. As opposed to aesthetics, light historically has been a ground for a nuisance claim. *See supra* text accompanying note 127.

154. The court found emotional response only supported a claim where there is a nuisance per se. *See supra* text accompanying note 131. Although the wind farm in *Rankin* was clearly legal, *Rankin*, 226 S.W.3d at 511, it is conceivable that there could be an illegal wind generator, such as one in violation of zoning laws, and then emotional response to its aesthetics may support a nuisance claim. *See id.* at 511–12. Although, if it were violating zoning laws, other recourse would be available. *See, e.g., supra* note 72.

155. POWELL, *supra* note 31, § 64.04(4) (footnotes omitted).

156. *See* Stone & Zdeb, *supra* note 19, at 5.

157. *See, e.g.,* Elaine Smith, *Danger—Inequality of Resources Present: Can the Environmental Mediation Process Provide an Effective Answer?*, 1996 J. DISP. RESOL. 379, 383 (“[T]he median duration of environmental litigation from filing to disposition was ten months, extending to 23 months if the case went to trial.”).

158. For a thorough discussion of the early rounds of litigation facing the Cape Wind project, see Smith, *supra* note 19, at 284–90.

159. The issues litigated included whether the Massachusetts Department of Environmental Protection and Massachusetts Department of Environmental Management needed to issue permits for construction and whether the U.S. Army Corps of Engineers properly issued a permit to construct a wind-monitoring tower. *See id.* at 286–88. In the face of this litigation, “Cape Wind has . . . prevailed in every hearing before a federal agency and won every case in the federal courts . . .” *Id.* at 289.

160. *See id.* at 284; *see also* Jim Efstathiou Jr., *Salazar Signs Cape Wind Lease, First for U.S. Waters*, BLOOMBERG BUSINESSWEEK, Oct. 6, 2010, <http://www.businessweek.com/news/2010-10-06/salazar-signs-cape-wind-lease-first-for-u-s-waters.html>. In October 2010, the Secretary of the Interior, Ken Salazar, signed a twenty-eight-year lease with the developer of the Cape Wind Project, a step toward its construction; however, opponents of the development still have five pending lawsuits against the project. *Id.*

ability of its opponents to delay its development is illustrative of the effect litigation can have on wind development.

In addition to being a slow process, litigation is expensive.¹⁶¹ It is estimated that Fortune 500 companies spend \$210 billion on litigation, “equivalent to one-third of . . . after-tax profit[s].”¹⁶² The money wind energy developers spend in litigation inevitably increases the cost of the overall project and decreases the cost efficiency of wind generation.¹⁶³ As noted, wind energy has the potential to significantly reduce greenhouse gas emissions and our dependence on foreign oil,¹⁶⁴ so anything which serves to needlessly delay or increase wind energy’s costs, as nuisance litigation can, is a social harm and generally should be avoided.

V. PROPOSAL

This part moves forward from the general premise that nuisance litigation against wind farms and wind generators is often a social harm and advances a proposal to minimize that harm.¹⁶⁵ Another commentator has suggested that courts should address this issue by generally following the *Rankin* court’s reasoning, liberally dismissing suits at the pleading stage, and considering monetary damages in lieu of equitable remedies.¹⁶⁶

161. See, e.g., Stone & Zdeb, *supra* note 19, at 5.

162. John B. Henry, *Fortune 500: The Total Cost of Litigation Estimated at One-Third Profits*, METRO. CORP. COUNS., Feb. 2008, at 28, available at <http://www.metrocorp.counsel.com/pdf/2008/February/28.pdf>.

163. The developer of wind energy presumably pays litigation expenses by passing on the cost to the consumer, increasing the cost of the product—energy produced by wind. Cf. Gwyn Goodson Timms, Note, *Statutorily Awarding Attorneys’ Fees in Environmental Nuisance Suits: Jump Starting the Public Watchdog*, 65 S. CAL. L. REV. 1733, 1758 (1992) (“[D]efendants in pollution [nuisance] suits are huge corporations that can write off litigation costs or pass them on to the shareholders and consumers as a cost of doing business.”).

164. See *supra* text accompanying note 13.

165. Clearly, as cases like *Rose v. Chaikin*, 453 A.2d 1378 (N.J. Super. Ct. Ch. Div. 1982), demonstrate, nuisance claims are sometimes meritorious and deserving of judicial intervention. See *supra* Part III.A.1.

166. See Stephen Harland Butler, *Headwinds to a Clean Energy Future: Nuisance Suits Against Wind Energy Projects in the United States*, 97 CALIF. L. REV. 1337, 1364, 1373–74 (2009). Butler breaks down his recommendations for how courts should evaluate these cases based on the type of claim alleged. With regard to noise, he takes a rather aggressive stance, arguing that “[r]ather than forc[ing] every wind developer facing a wind suit to go to trial over noise concerns, future courts should consider a standard for noise claims that allows the dismissal of claims that clearly lack merit.” *Id.* at 1366. However, he argues “[a] jury should have the chance to make the final determination if there appears to be a chance that the wind development would be close enough to a residential area to cause substantial amounts of noise.” *Id.* at 1367. With regard to aesthetic claims, he believes courts should reject the logic followed in *Burch v. NedPower Mount Storm*, and reject claims based either entirely or partially on aesthetic concerns. *Id.* at 1369. In addition, Butler argues that as an alternative to enjoining construction of the socially desirable wind farms, “courts should consider whether

Such a solution is inadequate because by the time the court hears the case, wind development has already been slowed and its costs increased.¹⁶⁷ My proposal goes further and immunizes wind developers from the costs and delays of nuisance litigation, while preserving the protections such litigation affords neighboring property owners.¹⁶⁸ Before explaining the proposal, this Note discusses right-to-farm legislation as an example of nuisance immunity.¹⁶⁹

A. *Right-to-Farm Legislation as a Model?*

Currently, all fifty states have right-to-farm statutes,¹⁷⁰ which serve as an imperfect model to a possible solution to nuisance-based litigation against wind farms.

A typical Right-to-Farm Act provides that an agricultural operation or activity shall not be considered a nuisance if the nuisance derives from changed conditions in the area surrounding the operation and if the operation was established first and operated for a defined period of time . . . before the change in conditions occurred. In this sense, the Acts are merely a codification of the common law's coming to the nuisance doctrine.¹⁷¹

Most of these statutes were passed in the 1970s and 1980s as a result of urban sprawl and a desire to protect agricultural producers from new neighbors who objected to living so close to agricultural production.¹⁷²

monetary damages or other compensation to the plaintiff neighboring landowners might best ameliorate the plaintiffs' alleged harm while also preserving the social utility of a wind project." *Id.* at 1374.

167. *See supra* Part IV.B. In her concluding remarks on the subject, another commentator agrees that nuisance litigation is an inappropriate solution to the conflict between wind developers and neighbors. Culley, *supra* note 117, at 972. However, Culley's sympathies seem to be with the dissatisfied neighbors rather than with the advancement of wind development. *See id.* at 943. She suggests that "the wind energy industry should work more collaboratively with the local communities and the government on zoning, permitting and proper siting of the turbines." *Id.* at 972.

168. *See infra* Part V.B.

169. *See infra* Part V.A.

170. *See* Pittman, *supra* note 52, at 480.

171. *Id.* at 481.

172. *Id.* at 480. The following findings and purpose of the Florida Right to Farm Act describe the sentiment of Florida's legislature in enacting the statute:

The Legislature finds that agricultural production is a major contributor to the economy of the state; that agricultural lands constitute unique and irreplaceable resources of statewide importance; that the continuation of agricultural activities preserves the landscape and environmental resources of the state, contributes to the increase of tourism, and furthers the economic self-sufficiency of the people of the state; and that the encouragement, development, improvement, and preservation of agriculture will result in a general benefit to

Most wind producers would not benefit from an immunity analogous to the one created by right-to-farm statutes. Since right-to-farm statutes are based on the common-law doctrine of coming to the nuisance,¹⁷³ only preexisting wind generators or wind farms would benefit from an analogous statute.¹⁷⁴ Thus, defendants like those in *Rassier* would be protected from future neighbors objecting to their wind generators.¹⁷⁵ However, such a statute would do nothing to address the increased costs and delays that nuisance litigation causes new developers of wind energy.¹⁷⁶

B. Proposal

States should adopt “right-to-wind” statutes. These statutes would combine a typical license statute with immunity from nuisance suits.¹⁷⁷ A Manitowoc County, Wisconsin, ordinance provides a good model for how the permit portion of the right-to-wind statute should be constructed.¹⁷⁸ To

the health and welfare of the people of the state. The Legislature further finds that agricultural activities conducted on farm land in urbanizing areas are potentially subject to lawsuits based on the theory of nuisance and that these suits encourage and even force the premature removal of the farm land from agricultural use. It is the purpose of this act to protect reasonable agricultural activities conducted on farm land from nuisance suits.

Florida Right to Farm Act, FLA. STAT. ANN. § 823.14(2) (West 2006).

173. See *supra* Part I.D.

174. The right-to-farm statutes usually require the farm to exist and be operational for at least a year before the statutory protection will apply. Pittman, *supra* note 52. Presumably, some similar minimum would be required for wind protection.

175. See *supra* Part III.A.2.

176. See *supra* text accompanying notes 157, 161.

177. The 1981 Model State Administrative Procedure Act defines a “license” as “a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law.” MODEL STATE ADMIN. PROCEDURE ACT § 1-102(4) (1981).

178. See Large Wind Energy System Ordinance, MANITOWOC COUNTY, WIS., CODE § 24 (2007). The ordinance has been the subject of some criticism due to the restrictiveness of its requirements. For instance, the ordinance requires a minimum set back of “1.1 times the total height of the . . . wind system . . . from any public road or power line,” as well as “at least 1,000 feet from the property line of a nonparticipating [neighboring] property.” *Id.* § 24.06(2). In the words of a Wisconsin wind advocate, “if every jurisdiction adopted Manitowoc County’s setback standards, there would not be a single commercial wind project operating in Wisconsin right now.” *Manitowoc County Says No to Wind Project*, HERALD TIMES REP. (Manitowoc, Wis.), Jan. 23, 2009, at 5A. However, the Board of Adjustment, which approves applications for new wind development, has allowed “variances” to these setback requirements in the past and faced litigation from citizens upset with the less restrictive setbacks. See *Roberts v. Manitowoc Cnty. Bd. of Adjustment*, 721 N.W.2d 499, 504–05 (Wis. Ct. App. 2006) (upholding the Board’s approval of the application, and its right to issue the “variances”). In addition, the maximum noise level restriction seems excessively burdensome. The ordinance states that “[t]he noise generated by the operation of a large wind energy system may not exceed the ambient noise level by more than 5 dB(A) as measured at any point on property adjacent to the parcel on which” the wind generator is located. MANITOWOC COUNTY, WIS., CODE § 24.06(14)(a). Five decibels is very insignificant, less than the sound of normal breathing, which is 10 decibels. *Interactive Sound*

obtain the permit, wind developers would have to meet a number of requirements meant to ensure that the wind farm or generator would not become a nuisance to nearby property owners. These requirements would include minimum setbacks from neighboring parcels and structures, minimum safety requirements and precautions, and maximum noise levels.¹⁷⁹ Once compliance with the requirements is met, an appropriate state agency would conduct a public hearing, after proper notice and within a short amount of time.¹⁸⁰ Such an administrative hearing would allow any neighbor who has objections to the proposed wind farm or wind generator to raise those objections and present evidence as to why the statutory minimum guidelines would be insufficient in that situation.¹⁸¹ After the hearing, the agency would determine whether the applicant had met the minimum statutory requirements and whether the proposed wind farm would unreasonably interfere with the use and enjoyment of any neighbors' property.¹⁸² If the applicant met the statutory requirements and did not unreasonably interfere, the license would be granted, and the wind

Ruler, *supra* note 70. Such an insignificant difference as measured from the property line, not even a structure or inside a structure, seems unnecessarily burdensome.

179. MANITOWOC COUNTY, WIS., CODE § 24.06. The Manitowoc County Code suggests other potential requirements, including: maximum height; minimum clearance between the ground and the blades; fenced-off access ladders; underground electric lines; "nonreflective, neutral color"; and compliance with all federal laws including FAA lighting requirements. *Id.* The specific requirements of any right-to-wind statute would require extensive study and policy judgments by legislators to strike the appropriate balance between protecting neighbors from unwelcome interference with their use and enjoyment of their property and creating realistic and not overly burdensome standards for developers of wind energy. Indeed, the drafting of the Manitowoc County ordinance took an advisory committee a year. Kristopher Wenn, *Board Passes Wind Energy Rules*, HERALD TIMES REP. (Manitowoc, Wis.), Apr. 13, 2006, at 1A. Despite this well-researched ordinance, some wind advocates view its setback requirements as overly burdensome. *See supra* note 178.

180. For instance, the Manitowoc County ordinance requires the Board of Adjustment conduct a hearing "within sixty days after . . . receiv[ing] the completed application." MANITOWOC COUNTY, WIS., CODE § 24.08(2). Again, the amount of time before a hearing must be held is a matter for a legislature to decide. Determining the time frame requires weighing the general public and wind developer's interest in obtaining a permit as quickly as possible against giving any neighbors who object a reasonable amount of time to research and adequately prepare a statement against granting the right-to-wind license.

181. Although I hesitate to speculate on what type of situation may lead the statutory minimum protections to be insufficient, one can imagine a situation in which the unique geological nature of the area may require more stringent standards than those outlined in the statute. For instance, if the proposed wind farm were on a hill above the plaintiff's property, it could conceivably create unusually bothersome strobe effects that normally would be insignificant with the minimum setback requirement.

182. The Manitowoc County ordinance has a slightly different formulation: "The Board will grant a . . . permit if it determines that the requirements of this ordinance are met and that granting the permit will not unreasonably interfere with the orderly land use and development plans of the county." MANITOWOC COUNTY, WIS., CODE § 24.08(3).

developer would become immune from nuisance litigation for the licensed project. This immunity would provide an absolute defense to nuisance litigation,¹⁸³ so long as the wind farm or generator complied with the terms of the license.¹⁸⁴ Parties could appeal administratively either the granting or withholding of the license,¹⁸⁵ but judicial review should be specifically precluded by statute.¹⁸⁶

By having the administrative agency consider the effect on the neighbor, including potential nuisance issues, before the granting of the license and immunity, several goals would be accomplished. First, and foremost, the wind developer could proceed with the construction of the wind farm or wind generator without fear of increased costs or delays from nuisance suits.¹⁸⁷ Second, the rights of the neighbor would be preserved.

183. The absolute defense is necessary to deter people from bringing nuisance suits against wind farms. Only certain right-to-farm statutes provide an absolute defense from nuisance suits. *See* Randall Wayne Hanna, Comment, “Right to Farm” Statutes—The Newest Tool in Agricultural Land Preservation, 10 FLA. ST. U. L. REV. 415, 433 (1982). The Mississippi statute is an example of one that does provide an absolute defense: “In any nuisance action, public or private, against an agricultural operation, including forestry activity, proof that the agricultural operation, including forestry activity, has existed for one (1) year or more is an absolute defense to the nuisance action” MISS. CODE ANN. § 95-3-29(1) (Supp. 2010); Hanna, *supra*, at 433. By comparison, the Vermont statute does not provide an absolute defense, but “[a]gricultural activities [are] entitled to a rebuttable presumption that the activity does not constitute a nuisance” VT. STAT. ANN. tit. 12, § 5753 (Supp. 2010); Hanna, *supra*, at 433–34. If the right-to-wind statute only granted wind-energy producers a rebuttable presumption that the activity does not constitute a nuisance, it would leave greater room for litigants to challenge their development in court.

184. Similarly, even though it is deemed an “absolute defense,” the Mississippi statute is qualified, only granting the defense “if the [agricultural] operation is in compliance with all applicable state and federal permits.” MISS. CODE ANN. § 95-3-29(1) (Supp. 2010).

185. The administrative appeals would follow the applicable state agency’s appeal process. Many states have designated appeals boards for hearing appeals of state agency action. *See, e.g.*, OHIO ENVIRONMENTAL REVIEW APPEALS COMMISSION, <http://erac.ohio.gov/> (last visited Jan. 10, 2011).

186. If judicial review were not precluded by statute, then many of the advantages of having the process in the administrative realm would be lost if a dissatisfied neighbor could appeal the agency determination through the court system. However, “states vary considerably in their approach to preclusion of judicial review.” MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 625 (3d ed. 2009). For instance, Connecticut’s and Kansas’s legislatures may preclude judicial review in any circumstance, but New York does not allow preclusion of review if the agency acted improperly. *Id.* “In Indiana and New Jersey, apparently no limits can be placed on the right of judicial review.” *Id.* If a right-to-wind statute were passed in one of those states, it would lose some of its efficacy if dissatisfied neighbors sought to appeal the granting of the license. However, the licensing hearing would still give neighbors an outlet to voice their concern about a proposed wind farm without resorting to nuisance litigation as the first option.

187. Although the license application process would certainly take time and money, it would likely be less than nuisance litigation. For instance, the Manitowoc County ordinance requires a hearing within sixty days of application. *See supra* note 180. By contrast, the median length of time from filing to disposition of personal injury or property damage cases in Wisconsin circuit courts was 363 days in 2008. WIS. CT. SYS., AGE AT DISPOSITION SUMMARY: STATEWIDE REPORT (2008), available at <http://www.wicourts.gov/about/pubs/circuit/docs/agedispostate08.pdf>. This does not include the average of 242 days between a notice of appeal and an opinion in the Wisconsin Court of

Even though the neighbor would no longer have the right to sue based on nuisance, the licensing requirements and consideration by the agency of possible interference in the use and enjoyment of the neighbor's property would provide adequate protection for the neighbor with a legitimate nuisance claim.

CONCLUSION

The development of wind energy is a national priority. Wind energy has the potential to reduce carbon emissions and slow the effects of climate change and also has the potential to reduce our dependence on foreign sources of energy.¹⁸⁸ Given the importance of wind energy and its potential to address some of the most fundamental challenges facing the United States, anything that needlessly prevents its development is a social harm. Litigation, especially based in nuisance law, can be one such obstacle to the development of wind energy. Nuisance suits against wind farms or generators can be made on several grounds, and the most successful in the past have been based on noise.¹⁸⁹ These suits, whether ultimately successful or not, serve to delay and increase the cost of wind energy development and are therefore contrary to public interest. However, when a landowner brings a suit in nuisance, he or she does so to preserve his or her "interest in the private use and enjoyment of [his or her] land."¹⁹⁰ My proposed right-to-wind legislation advances the public interest by eliminating nuisance litigation against wind development, while preserving the right of nearby landowners to enjoy their land. By creating a clear set of requirements for wind developers to obtain a license—which carries immunity from nuisance litigation—the neighbor's, the developer's, and the public's interests are advanced. The neighbor is protected by the minimum statutory requirements for the license, as well as the agency's consideration of whether the proposed development would interfere with the neighbor's use and enjoyment of the land. The developer knows from the outset what is required of it and faces less uncertainty, cost, and delay from potential nuisance litigation. Finally, the public benefits from the faster and more cost-effective development of

Appeals. WIS. CT. SYS., COURT OF APPEALS ANNUAL REPORT: 2009 COURT OF APPEALS—CASE LOAD STATISTICS (2010), <http://www.wicourts.gov/ca/DisplayDocument.html?content=html&seqNo=47578>.

188. See *supra* note 13 and accompanying text.

189. See *supra* note 142 and accompanying text.

190. RESTATEMENT (SECOND) OF TORTS § 821D (1979).

wind energy and the corresponding reduction in greenhouse gases and negative effects of climate change.

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