THE LAW OF WIND
—Litigation—

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I. Introduction. As with any development, wind energy projects can become the subject of litigation in state and federal courts. In addition, regulatory litigation before state utilities commissions and the Federal Energy Regulatory Commission ("FERC") can have profound effects on the viability of wind projects. Litigation can involve any of the topics previously discussed, as well as a host of other disputes that may develop during the operational life of a wind project. Anticipating what disputes may arise, and proactively planning for their resolution, whether through litigation or otherwise, will increase the odds of a favorable result. This chapter outlines some issues to consider when disputes first develop and discusses areas in which litigation may arise in the development and operation of a wind energy project.

II. When to Involve Litigation Counsel. Frequently, litigation counsel is first retained only when litigation becomes inevitable, either because a party has been sued or a dispute has reached the stage in which a party determines that a lawsuit must be filed. Involving litigation counsel before that stage is reached, however, can reap numerous benefits. Litigation counsel can advise on alternative dispute resolution procedures that can avoid the costs involved in litigation in state or federal court, and can ensure that actions taken during the early stages of a dispute do not prejudice any ultimate litigation. Furthermore, gaining an early understanding of the merits of any potential litigation can help resolve the dispute in an appropriate manner.

In selecting litigation counsel, a potential client should consider the counsel's expertise in the legal subject matter. It is essential to locate counsel that specializes in the types of legal issues that are involved in the dispute—environmental issues, for example, or labor and employment. It is also important, however, to consider counsel's knowledge of the wind energy industry and the energy industry in general. Counsel that has knowledge of the industry can greatly increase the odds that litigation will be successfully resolved.

III. Finding the Appropriate Forum—State and Federal Court, Regulatory Agencies, and Alternative Dispute Resolution. *Where* to engage in litigation presents an important decision for a client. What forum is available and appropriate for any given dispute depends, among other things, on the issues, the amounts in dispute, and the parties involved, and benefits and disadvantages of each available forum should be given careful consideration before one is chosen. Options may include state or federal court, administrative litigation before various regulatory agencies, or some form of alternative dispute resolution ("ADR"), such as mediation or binding arbitration.

When a dispute involves issues of federal law, or the parties are from different states, federal court may be an option. The regulation of the energy sector by both FERC and numerous state utilities commissions, as well as myriad other state and federal agencies, often make litigation before various regulatory agencies a prerequisite before any litigation in state or federal court. Often, if the dispute concerns a contractual matter, the contract will specify the forum where the litigation must be filed, and which law should govern the dispute. The contract may also specify that some form of ADR must be used, either prior to or instead of litigation in state or federal court. Even if not required to engage in ADR pursuant to the terms of an existing contract, the parties may also choose to engage in ADR after the dispute develops.

There are a variety of ADR methods. They include:

Mediation. Mediation is a form of negotiation guided by a neutral party, the mediator. Mediators have no authority to impose a resolution of the parties' dispute. Their role is to help the parties to communicate settlement offers and other information. Because the communications between a mediator and a party are not disclosed unless the party gives permission, mediators are well-suited to give candid and objective assessments of each party's position in a dispute. They may also help the parties formulate a negotiation strategy that leads toward settlement.

Arbitration. Arbitration is a form of dispute resolution in which a private party, the arbitrator, is given authority to resolve the parties' dispute. The parties can agree to the rules governing the arbitration process, which may be similar to the rules of court governing litigation in state or federal courts. Some ADR providers (such as the American Arbitration Association) publish sets of arbitration rules.

Dispute Resolution Board. A dispute resolution board (or "DRB") is a panel of people experienced in construction matters that is assembled (usually) at the beginning of the parties' relationship. Their use is generally limited to major construction projects. The DRB members become familiar with the parties and the project and are available to respond to disputes that arise. Because they are chosen by both parties for their expertise, DRB members' opinions may have considerable weight. Sometimes DRBs are given quasi-arbitral powers to decide disputes.

Other ADR methods are limited only by the parties' imaginations.

The chief benefit of ADR is that the parties are usually able to choose their own mediators, arbitrators, and DRB members. This gives parties the opportunity to select someone who has expertise in the industry and the issues involved in the dispute. By contrast, judges are simply assigned, giving the parties little control over who will decide the dispute.

Other aspects of ADR that must be considered include the parties' control over the rules of the process, which may speed a just resolution (or may deny a party a fair opportunity to present its case); the private nature of ADR proceedings, which can protect sensitive business information (or remove a threat of publicity that might have made a party more willing to settle); and the finality of arbitration decisions, which saves the costs of appeal (but could leave a party disadvantaged by an erroneous decision that cannot be challenged effectively).

Experienced parties do not automatically choose court resolution or ADR for all their business relationships. Instead, they evaluate the advantages and disadvantages of each available method and choose the one best for them in each situation.

IV. Areas Where Litigation May Arise. Litigation may arise in a variety of areas during the development and operation of a wind energy project.

A. Real Property and Environmental Litigation. Like any large development project, wind power projects may generate local opposition. Although many people welcome wind projects as an environmentally friendly alternative energy source that can generate clean energy as well as new local jobs, others see wind farms as a visual impairment and a potential threat to avian wildlife. When outreach, education, and

consensus building break down, opponents of a project may resort to litigation. Litigation can lead to costly delays, and litigation strategy often focuses on allowing a project to continue development pending resolution of the claim.

1. **Challenges to Local and State Permitting Decisions.** An opponent to a wind power project may attempt to delay or prevent a project by participating in the permitting decision. When local opposition is particularly strong, this opposition may result in the local or state planning agency denying permits. The permit applicant generally must challenge the denial of its permit through an internal administrative appeal process, and then, if necessary, to the appropriate courts. An opposition group may appeal the grant of a permit for a wind project through the same procedure. The permit holder may then need to intervene in the opposition group's challenge to protect its interests.

Proper defense of a permit decision begins by actively participating in the permit process and making sure that the local government or state agency follows all necessary steps and has all relevant information necessary to support the grant of the permit. The decision of the permitting agency is then substantially easier to defend during the appeal process.

As discussed in detail in Chapter 3, "Siting and Permitting Wind Projects"), several states also have broad environmental review statutes that provide fertile ground for challenges to wind energy development. For example, the California Environmental Quality Act ("CEQA") requires any governmental agency in California that makes any type of discretionary decision that potentially has an impact on the environment to conduct an environmental review and may require that an Environmental Impact Report be prepared before approval of the project. Washington also has a statute similar to CEQA, the State Environmental Policy Act ("SEPA"). Like CEQA, SEPA allows agencies to deny projects with significant unmitigated adverse impacts if feasible alternatives exist.

2. **Challenges to Federal Permit Decisions.** For some wind power projects, such as those on federal land, the project proponent must seek federal permitting and lease approval. The federal action required to approve these projects creates a federal nexus and a host of potential mechanisms to challenge the wind power project. Federal agencies, such as the Bureau of Land Management ("BLM"), must comply with numerous federal mandates before authorizing a project on federal land. Failure to comply with any one of these federal mandates gives rise to a potential citizen suit under the Administrative Procedure Act ("APA"). Among other federal requirements, the BLM's approval of wind development projects will commonly need to comply with the National Environmental Policy Act, the Federal Land Policy Management Act, and the Endangered Species Act ("ESA").

As with the local permitting decisions, challenges to BLM decisions to grant a right-of-way or allow a project first must be taken to the Interior Board of Land Appeals ("IBLA"). Following appeal to the IBLA, the opponents of a project may then challenge the agency action in federal court under the APA. APA cases generally are limited to reviewing the "record"—the information considered by the agency at the time it makes a decision. Consequently, the key to defending such actions is to participate early in the decision-making process and make sure the agency's decision is adequately supported by the information in its possession. If the agency action is deemed

arbitrary and capricious or otherwise contrary to law, the permit or approval may be invalidated and sent back to the agency for further consideration, resulting in substantial delay.

3. Post-Construction Challenges.

a. Nuisance. The permitting process provides many opportunities to challenge a project. However, post-construction challengers must demonstrate that the operation of the wind power project violates some state or federal law and that a private lawsuit is authorized. Preeminent among these challenges is a common-law nuisance lawsuit. The theory behind a nuisance lawsuit in the context of a wind power project is that the project operator is using its land in a manner that "substantially and unreasonably" interferes with a nearby property owner's ability to "use and enjoy" his or her own property. Plaintiffs will allege that a wind power project creates too much noise, casts too much shadow or shadow flicker, or creates a visual impairment. Nuisance suits generally seek monetary damages for compensation, and in rare cases, may be awarded injunctive relief to abate the nuisance.

Nuisance suits have not proven very successful against wind power projects, largely because it is difficult to show that the impairment to an adjoining property owner is substantial and unreasonable. Most states generally do not recognize visual nuisance absent some extreme circumstances, and the shadow and noise issues would likely only rise to substantial and unreasonable levels where affected landowners are immediately adjacent to wind power projects. A qualified consultant can model shadow, shadow flicker, and noise issues before a project is built and help avoid any potential conflicts. Where such conflict nonetheless arises, the same modeling can be used in defense of the project.

b. Federal Wildlife Laws. Several other federal laws present litigation potential related to ongoing operations. The ESA, the Bald and Golden Eagle Protection Act ("BGEPA"), and the Migratory Bird Treaty Act ("MBTA") all prohibit injuring or killing particular species. Of the three, only the ESA contains a citizen suit provision allowing a party other than the federal government to file a civil action against a wind power project. Suits under the BGEPA and the MBTA may only be initiated by the federal government.

Unfortunately, the operation of wind turbines may result in injury to birds and bats. Although bat species in particular appear to be highly susceptible to turbine strikes, the potential for an ESA suit is relatively small absent a significant number of documented injuries to protected species. However, the listing of additional bat species as threatened or endangered under the ESA could increase the chances of an ESA citizen suit in the future. Should the possibility of an ESA citizen suit become more likely, there are means to avoid ESA liability through the development of habitat conservation plans. There are no current mechanisms to avoid liability from the federal government under the BGEPA or the MBTA. As a result, every wind project should work closely with federal wildlife officials to ensure that all reasonable and practical mitigation measures to limit avian impacts are incorporated into the design, placement, and location of the turbines.

4. **Examples of Real Property and Environmental Litigation.**

a. **Avian Impact Issues.** *Kerncrest Audubon Society v. City of Los Angeles Department of Water and Power*, No. CV-255604, 2007 WL 2208806 (Cal. Ct. App. Aug. 2, 2007) (unpublished). This matter involved a CEQA challenge to the proposed Pine Tree Wind Development project in Kern County, California, to be developed by Wind Turbine Prometheus, LP, and to be owned and operated by LADWP. Stoel Rives represented the developer in the litigation. Plaintiff contended, among other things, that the final environmental impact report failed to study the project's impacts on nocturnally migrating songbirds and failed to consider Pine Tree's individual and cumulative growth-inducing impacts in Los Angeles. Plaintiff's petition was denied, and the denial was affirmed on appeal.

Center for Biological Diversity, Inc. v. FPL Group, Inc., No. RG04183113, 2006 WL 2987634 (Cal. Super. Ct. Oct. 13, 2006). Plaintiff brought claims against wind energy projects in the Altamont Pass, asserting that the turbines killed and injured thousands of wild birds in violation of the California Fish and Game Code and federal laws protecting eagles and migratory birds. The court granted judgment on the pleadings in favor of defendants. Stoel Rives represented one of the wind turbine operators in this litigation.

b. **Other Environmental Challenges.** *Flint Hills Tallgrass Prairie Heritage Foundation, Inc. v. Scottish Power, PLC*, 147 F. App'x 785 (10th Cir. 2005) (unpublished). Plaintiffs filed an action in federal district court in Kansas, alleging that defendants' construction of wind turbine projects in Butler County, Kansas and elsewhere would cause permanent and irreparable damage to the Flint Hills regional environmental system. Stoel Rives represented the defendants. The district court dismissed the complaint for failure to state a claim, and the dismissal was affirmed on appeal.

B. **Contractual Disputes: Leases, PPAs, Construction, Insurance Coverage, and O&M Agreements.** Another frequent subject of litigation involves disputes over the performance of myriad contracts associated with a wind energy project, including leases, power purchase agreements ("PPA"), construction contracts, insurance contracts, and operation and maintenance ("O&M") agreements. Retaining experienced counsel to assist with the drafting of such contracts, however, can help avoid future disputes, and provide a clear roadmap for resolution should a dispute over contract performance arise. Although contracts may specify that ADR be used either as a prerequisite to the initiation of a lawsuit, or as an alternative to litigation in state or federal court, thought should be given to the pros and cons of ADR, as discussed above.

1. **Leases.** As noted in Chapter 1, "Wind Energy Lease Agreements," the term of a lease agreement can extend for 70 years or more. The long terms of these agreements can result in disputes developing later in the relationship, especially if ownership of the property subject to the lease changes hands, by either sale or transfer to successors or heirs. Disputes can also develop concerning what facilities are sited on the land, as discussed in more detail in Chapter 1. Stoel Rives currently represents a wind developer in litigation brought by a landowner whose property was initially leased but not ultimately used in an adjacent wind project. The landowner has disputed the developer's right to terminate the lease.

2. **Power Purchase Agreements.** As explained in Chapter 5, "Power Purchase Agreements and Environmental Attributes," the term of a PPA may extend for 20 years or more from the commercial operation date. Disputes can arise early in the relationship when certain project milestones are not

timely met, or later in the relationship when unanticipated regulatory changes result in material changes to the economics of the transaction for one or more parties.

3. **Construction.** Construction contracts often include detailed provisions allocating risks and costs expected to arise during the construction process. These provisions are intended to anticipate problems and provide agreed resolutions so that disputes can be avoided. However, sometimes disputes arise despite the parties' best efforts.

Major construction projects are complex, involving large numbers of participants and generating large volumes of paperwork. Construction disputes are correspondingly complex, which makes them expensive to analyze and resolve. All parties have an incentive to avoid the expense of full-blown disputes if they can. For this reason, construction contracts often contain provisions intended to make the dispute resolution process more efficient and more predictable.

4. **Insurance Coverage.** Most businesses have a package of insurance policies that cover them and their employees against liability for bodily injury and property damage claims by third parties outside the organization. These policies are commonly known as Comprehensive General Liability Policies ("CGL"). CGL policies may cover the organization and its employees against claims by third parties for slander, invasion of privacy, misrepresentations, and false advertising. These CGL policies may also cover the organization for automobile liability and employment practices (such as claims for employment discrimination or wrongful discharge). Sometimes these coverages are contained in separate policies. These policies are very valuable because they usually provide both defense coverage and coverage for indemnity. Often the defense coverage is not limited by the amount of insurance available to pay claims.

Businesses also commonly have a form of property insurance that protects the business against losses to its own property from natural or unexplained causes (such as lightning, fire, flood, earthquake, or collapse). These policies usually do not provide any defense to the business but provide indemnification for its property losses. Businesses can also be covered under a third person's insurance policy as a result of a contractual requirement or business arrangement. Larger businesses will also typically have a form of Directors and Officers' Liability Insurance Policy ("D&O Insurance"). D&O Insurance protects the company's directors and officers against claims for securities fraud or other alleged breaches of duty to the shareholders. Finally, many businesses will typically have some sort of fiduciary liability policy that protects any of its officers, directors, or employees acting as fiduciaries of the company's ERISA plans. Many other types of specialized coverages are also available, such as excess insurance, business interruption, pollution liability, and difference in conditions.

Almost all insurance policies for business require a form of notice whenever there is a claim or a potential situation that might result in a claim. Some policies have very specific notice requirements (like notice within 60 days of the loss, followed by submission of a proof of loss within 90 days of the initial notice) or limitations on suit against the insurance carrier (like one year from the date of loss). Other policies may require a specific form

of notice or specific details about the claim. The notice provisions of the policy must be followed carefully by the company in order to properly initiate the duties of the insurance carrier for the claim.

Insurance coverage disputes typically arise when the company gives notice of the claim to the appropriate insurance carrier and the insurance carrier states it will refuse to defend and/or pay the claim. Sometimes the insurance carrier with a defense obligation will agree to defend the company but will reserve its rights to deny coverage under certain provisions of the policy and if certain facts develop in the litigation. In all cases when this occurs it is extremely important that the company have a full and complete copy of its insurance policy to review. The policy should be reviewed by a competent insurance professional versed in the type of insurance at issue. Oftentimes insurance coverage disputes turn on nuances in policy language; it is therefore very dangerous for a company to rely on conventional thinking about the scope of coverage that may be available under its insurance policies. For example, property policies are often very complex, do not follow any particular form, and provide a variety of coverages that may not be thought of as part of property damage (such as temporary repair, removal of damaged property, and automatic coverage for a failure to follow the terms of the policy). Obtaining the complete policy is also just as important for those situations when the company is named as an additional insured under someone else's policy. (Relying on the certificate of insurance for coverage is very risky as the certificate is not the policy and the company may not be insured as it thought it was going to be even if the certificate shows that the insurance exists. Moreover, in some states such as Oregon an insurance broker is not liable if it issues a certificate that incorrectly states the existence or scope of insurance.)

When a defense is being provided by the insurance company with a reservation of rights to later deny coverage, the company needs to monitor the underlying litigation closely to see if the facts as developed will fit into the carrier's list of reservations. Furthermore, the company should satisfy itself that the defense provided by the carrier is satisfactory both as to scope and as to the competence of counsel for that kind of case. Once the carrier decides to provide a defense to the company, it is obligated to provide a good-faith defense. That typically means a complete and thorough defense with competent defense counsel. If the company is not satisfied, it has the right to complain and request a new defense team. And if the carrier decides to defend only certain claims and not others, the company will need to provide its own counsel for those uncovered claims.

If the company and its insurance carrier are at loggerheads and a suit against the insurance company is needed to obtain the full benefits of the policy, the company should consider the timing of the suit. If possible it is desirable to first resolve the underlying claim so the company does not have to fight a two-front war, one against the claimant and one against the insurance company. Second, most states provide that a company that must sue an insurance company to obtain coverage will be entitled to recover its attorneys' fees and costs incurred in such litigation in addition to any damages it sustained because of the breach of the insurance policy. Finally, most states allow generous rewards for prevailing on a bad-faith claim against the insurance company.

5. **O&M Agreements.** Once a project begins commercial operation, project owners may engage a third party to operate and maintain the wind project. Disputes may develop between the parties concerning responsibility for losses in production and other disputes. For example, Stoel Rives currently represents an O&M company in litigation with a project owner over nonpayment of O&M fees and allegations that the O&M company performed inadequate maintenance, resulting in lost production.

C. Tax and Royalty Payments. As explained in detail in Chapter 8, "Tax Issues," wind power projects raise numerous federal, state, and local tax issues that can develop into administrative litigation with various federal, state, and local taxing agencies. In addition, federal law provides opportunities for private citizens to seek to enforce tax and royalty obligations under the False Claims Act. The False Claims Act extends liability to any person who knowingly makes or uses a false record or statement to avoid or decrease an obligation to pay taxes or royalties. A suit under the False Claims Act may be brought by either the attorney general or a private citizen. A private citizen who successfully brings such a claim is entitled to a share of the proceeds from the lawsuit, providing a significant incentive for private citizens to file False Claims Act claims.

D. Public Company Litigation. By choosing to "go public," a company subjects itself to a whole new category of potential litigation. By going public, a company subjects itself to state and federal laws and regulations that govern the company's internal management and its relationship with its shareholders. These regulations require corporate accountability for the truth of financial statements and transparency in corporate operations and are designed to ensure that the public company acts responsibly and fairly toward its shareholders. If a public company fails to comply with these regulations, or if the company's directors and officers fail to place the interests of the company above their own, the company may be exposed to potential liability. Every company should be aware of and understand the risks associated with going public and the possible litigation that could result from the derogation of the obligations owed to company shareholders. Three types of actions that a public company may face are securities fraud actions, derivative suits, and class actions.

1. Securities Fraud Actions. Securities fraud actions generally arise out of alleged violations of Rule 10b-5 of the Securities Exchange Act of 1934, which is directed at preventing fraud and manipulation in securities transactions. Essentially, Rule 10b-5 prohibits any corporate director, officer, board member, or anyone else in possession of material inside information from making any false statement or failing to disclose material information in connection with the purchase or sale of any security. Typical claims include allegations that a shareholder was induced into purchasing stock and paying a higher price than the stock was fairly and reasonably worth or that the shareholder was induced to sell the stock for a lower sum than its true value because of false and fraudulent statements made by the company, such as at the time of a merger or acquisition. Recently, securities fraud actions have included allegations of improper backdating, in which a plaintiff alleges that a company falsified the date of a stock grant as a way for an employee to make additional money from the exercise of the stock option.

Securities fraud actions, particularly class actions, often result in large settlement payouts to plaintiffs by public companies. However, with the enactment of the Private Securities Litigation Reform Act of 1995, which imposes heightened pleading requirements on plaintiffs purporting to bring securities fraud complaints, and increased pressure by the Department of Justice and the Securities & Exchange Commission on public companies to conduct internal investigations, the number of securities fraud complaints has decreased in the past few years. Nonetheless (usually led by outside counsel), every public company should take precaution in its representation and disclosure of financial information to protect itself from possible securities fraud claims.

2. Derivative Litigation. A public company also may face a shareholder derivative suit, which is an action brought by one or more shareholders of a corporation on behalf of the corporation to enforce the corporation's rights or to prevent or remedy a wrong to the corporation. The cause of

action belongs to the corporation itself, not to the shareholders bringing the action. Therefore the derivative suit may be used only to seek redress for wrongs that injure the corporation as a whole, not for individual injuries that the plaintiffs may have suffered. In essence, derivative suits are used to protect the corporation and minority shareholders against abuses by its directors and officers by making them accountable to the corporation's shareholders.

A shareholder has several hurdles to overcome to maintain a derivative action. Before filing the derivative suit, the shareholder must make a demand on the corporate directors, officers, or managers to bring the suit, which gives the corporation an opportunity to remedy the wrong before engaging in litigation. The demand requirement is excused only in limited circumstances, such as when the shareholder can demonstrate that demand would be futile. Additionally, the shareholder must have owned stock at the time that the alleged wrongful conduct occurred in order to have standing to maintain the derivative suit. Furthermore, a shareholder must fairly and adequately represent the interests of all of the shareholders enforcing the rights of the corporation. If a shareholder cannot satisfy these requirements, the derivative action is likely to be dismissed.

3. **Class Actions.** Public companies should also be aware of the potential liability exposure that can result from class action suits. The class action device has been widely popular in securities litigation involving public companies, largely because of its tendency to bring about big-dollar settlements. In one sense, a class action is similar to a derivative suit in that one shareholder—or a small number of shareholders—may bring an action on behalf of another party. In a derivative suit, that other party is the corporation itself. In a class action, however, the shareholder (or shareholders) may bring an action on behalf of all other shareholders to recover for the same individual injuries that they have suffered. Whereas the derivative suit is limited to addressing wrongs to the corporation as a whole, a class action may seek relief for any individual injuries caused directly to the shareholders.

Class actions involving public companies are subject to the same requirements that apply to all types of class action suits. A class action may arise only if the class members are too numerous to be joined, if their claims involve commons questions of law and fact that are typical to the class, and if the class representative will fairly and adequately protect the interests of the class. Because a shareholder class action can involve thousands—or even millions—of individuals, a public company's potential liability can be exceedingly high, and therefore many public companies choose to settle the class action rather than fight the class claims through litigation. This makes the class action device potentially lucrative for many class action plaintiffs and potentially worrisome to directors, officers, and board members of public companies. However, a public company that understands the risks, costs, and options in dealing with class action suits will be better prepared should one arise.

E. **Labor.** For litigation involving labor issues, see Chapter 11, "Labor Issues."

F. **Administrative Litigation.** Regulatory proceedings at FERC, state utility commissions, or other state agencies with regulatory jurisdiction over energy transmission and sales can have significant effects on a wind project's bottom line. A good example of this is the emergence of tradable renewable energy credits ("RECs") in recent years. Before the adoption of renewable portfolio standards and green tag markets, power purchase agreements would not specify which party was entitled to claim the RECs. With the development of a market for tradable RECs, separate and apart from the sale of the energy generated by the

project, disputes developed over which party—seller or purchaser—was entitled to claim the RECs. FERC further muddied the waters by issuing a declaratory judgment allowing each state to make its own determination of which party owned the RECs. This in turn led to state regulatory litigation over REC ownership. Petition for Declaratory Order and Request for Expedited Consideration, *Covantry Energy Group, Monteny Power Corp. and Wheelabrator Tech, Inc.*, FERC Docket No. EL03-133-000 (June 16, 2003). It often pays to ensure that proceedings at relevant agencies are monitored regularly to provide an opportunity to actively participate in any regulatory proceedings that may have an effect on the project before a decision is reached.