

# Sorting through the politics and environmental legal issues associated with wind energy developments in the United States

By Steven Miano

Something seems terribly awry with the siting and development process for wind energy projects in the U.S. Wind projects are, by and large, construction projects. They require the construction of access roads and small pads on which turbines are erected. Wind projects involve little or no water use, few if any chemicals, and virtually no waste disposal. Moreover, few if any greenhouse gasses are released in the construction process and none are released during operation. Yet, despite their relative simplicity, wind projects in the U.S. can take many years to permit. By contrast, and by way of example, Marcellus Shale gas development projects in certain eastern U.S. states can be permitted in as few as six months. This is the case despite the fact that such gas drilling projects involve the construction of access roads, the construction of 5-10 acre well pads and waste lagoons, the withdrawal of millions of gallons of water from nearby resources, the injection deep into the ground of millions of gallons of water containing unreported chemicals, and the management and disposal of millions of gallons of contaminated return flow wastewater. Such projects also release greenhouse gasses into the environment.

To be sure, the development of Marcellus shale is necessary to meet the U.S. appetite for energy. Moreover, there is a great deal of misinformation and hype surrounding some of the environmental and health effects of Marcellus shale projects. However, even the unimpassioned observer recognizes the broader environmental footprint inherent in oil and gas projects when compared to wind projects. Why then is there such a divide in the regulatory/permitting processes? The answer has a great deal to do with money and politics.

## Money and Politics

Money and politics are often inseparably intertwined. Unquestionably, the traditional energy sector commands significant political access in Washington. Such access was instrumental in the enactment of the Energy Policy Act of 2005. Portions of this law broadened existing exclusions from key federal environmental laws for oil and gas drilling projects, including the Clean Water Act's construction stormwater permitting program, the Safe Drinking Water Act's underground injection control program, and the National Environmental Policy Act's (NEPA) review process (for which a rebuttable presumption in favor of exempting oil and gas projects was created). No such exemptions are applicable to wind projects.

Money can also influence general public opinion, which in turn influences politics. For example, Marcellus gas projects typically pay significant leasing fees and royalties to landowners in exchange for the right to drill. Landowners can be paid many thousands of dollars per acre for an initial lease. Marcellus projects also generate economic benefits to many local communities through the job creation, and development of local infrastructure necessary to support the industry. These economic benefits translate into broad political support for the industry within these communities.



Even those who are negatively affected are less likely to protest. By contrast, wind projects provide relatively modest lease payments and royalties. This is due to tighter profit margins resulting from the lengthy permitting process, expenses associated with the transmission of power from remote locations, and the temporal variability of the wind resource itself. Community objections to wind projects can be significant and tend to focus on visual aesthetics, concerns about turbine noise, and effect on local birds and bats. Studies undertaken by wind energy groups show that wind projects actually result in far fewer bird/bat deaths than traditional power generating operations. One critical difference however, is that deaths from wind farms are quite obvious. Deaths from other power sources are not.

## Legal Issues in Wind Project Permitting

Wind projects are subject to very extensive permitting processes at both the federal and state level. Applicable laws vary depending on whether the project is land based or off shore. Land based projects require the construction of temporary and permanent access roads, small pad sites that house wind turbines, and linear transmission lines. Targeted tree removal is part of the process. Because land based wind farms are built in locations with the best wind resource, typically along remote ridge lines, construction invariably involves crossing small streams and wetlands. As a result, state and federal wetlands and stormwater permits must be obtained. State permitting programs will usually trigger reviews of state protected species. In cases involving federal action (e.g., federal wetlands permits and federally funded projects), NEPA review is triggered, including Environmental Assessments and, if necessary, Environmental Impact Statements. Should your project be located in an area containing federal listed endangered species, the federal Endangered Species Act will trigger impact studies, impact minimization and incidental take permits (allowing the incidental killing of a listed species). Should your project potentially impact migratory birds, review under the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act will be triggered.

Offshore wind projects trigger reviews and approvals under additional laws, including the Submerged Lands Act, the Rivers and Harbors Act, and the Marine Mammals Protection Act.

Both land based and offshore wind projects require significant coordination among many state and federal permitting agencies. A wind project triggering ESA and NEPA reviews can take 4 or 5 years to permit, even without litigation.

## Conclusions

Wind energy has the potential to contribute significantly to power generation in the U.S and to reduce greenhouse gas emissions in the process. However, the permitting process assures disproportionate treatment of wind projects compared to oil and gas projects, which translates into vastly higher costs for permitting wind farms. It is incumbent on state legislatures and Congress to level the playing field for wind projects.

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