

## Chapter 5

# Liability Concerns for Wind Development

This chapter discusses potential legal liabilities that might arise from wind power production on agricultural land. Many of these issues are mentioned elsewhere in this guide, but they are brought together here to review the types of risks farmers face when developing wind power on their land and how to deal with those risks. Where the distinction is important, this discussion will differentiate between a farmer who owns and operates the turbine and a farmer who leases land to a developer or utility.

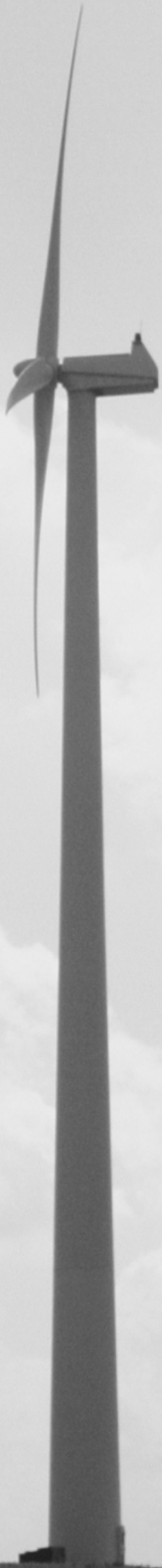
## I. Contract Liability

Developing a wind energy resource requires a farmer to enter into several contracts with different parties. A farmer entering into these agreements will presumably do so intending to fully carry out his or her obligations. However, circumstances may arise that prevent a farmer from fulfilling contract commitments. In many cases, such circumstances will be external events beyond the farmer's control—such as storms or other natural events, or actions by other people. In other cases, the farmer may become unable to satisfy the contract, for example, as a result of unexpected financial difficulties. Finally, once the project is underway, the other party to the contract may turn out to have a different understanding of the contract's requirements and may claim that the farmer has failed to satisfy those requirements to the other party's expectations.

In any case where one party to a contract believes that another party has failed to meet its commitments, there is a possibility that there will be a claim for breach of contract. Depending on the terms of the specific contract and the laws that govern it, a party who has breached a contract may be required to pay the other party a reasonable pre-set amount (called *liquidated damages*), or an amount based on the other party's actual losses as a result of the breach.<sup>1</sup> If the contract so

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<sup>1</sup> See Restatement (Second) of Contracts §§ 347, 356 (1981). For a more general description of contract law, Cornell University Law School maintains an on-line



requires, the breaching party might also be required to pay the other party's legal costs. In rarer cases, the party claiming breach of contract may be able to force the breaching party to take certain actions that were promised but not fulfilled.<sup>2</sup>

### **A. Contract Disputes**

Contract disputes can be quite expensive, and they divert everyone's attention and efforts away from the desired goal. One way to minimize contract disputes is to be sure from the beginning that each contract clearly and thoroughly addresses all of the issues related to the parties' commitments. It may seem that the discussions in other chapters of this guide about what should be included in different types of agreements are somewhat lengthy, but it is important to be sure that every factor that affects the parties' interests is addressed. It is equally important that the parties agree about the meaning of the contract terms, and that any uncertainties are addressed in the written contract. Farmers should always have an attorney draft and review contracts related to a wind project. It is better to spend the time and money needed to make sure that the agreement is right from the beginning, than it is to face a dispute in the future.

If a contract dispute does arise, the terms of the contract itself should provide guidance for pursuing a resolution. The contract might address: (1) which specific events or actions will result in termination of the contract; (2) whether the party seeking termination of the contract must provide notice and an opportunity to correct the situation before termination; (3) what time period and form are required for notice of a breach; (4) what time period, if any, is allowed for correction of a breach before termination can occur; (5) how the parties will determine whether the problems have been corrected; and (6) what payment may be due as a result of early termination, including attorney fees and the amount of any liquidated damages. A contract might also require that the parties use a particular dispute resolution method, such as mediation or arbitration. Farmers are strongly advised to seek experienced legal counsel for any contract dispute.

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resource at [http://www.law.cornell.edu/wex/index.php/Contracts#menu\\_of\\_sources](http://www.law.cornell.edu/wex/index.php/Contracts#menu_of_sources) (last visited June 19, 2007).

<sup>2</sup> See Restatement (Second) of Contracts § 357 (1981).

## **B. Potential Liability Under Specific Types of Contracts**

### **1. Easements or Covenants Prohibiting Wind Development**

Before starting a wind project or working with a developer, a farmer should make sure that there are no agreements tied to the property that would prohibit the farmer from putting wind turbines and related structures on the land. Types of agreements that might include such restrictions are discussed in Chapters 3 and 4 of this guide, related to wind property agreements and wind project siting considerations.

A title search for the farmer's property should reveal if there are any easements, covenants, or other agreements restricting how the farmer may use the land. The necessary records are typically located at the county records office, but a title search can be a complicated process. Farmers who are considering making the sizeable investment of developing a wind energy project are advised to get the assistance of an experienced attorney or title search company to do the title search.

If a farmer attempts to develop a wind project despite the existence of a binding agreement not to do so, the farmer will be in breach of contract. In such a case, the other party to the agreement could seek an injunction to prohibit the farmer from building or operating the wind project. A farmer who breaches an agreement that prohibits wind development might also be sued for money damages.<sup>3</sup>

### **2. Wind Development Contracts**

As discussed throughout this guide, wind development requires farmers to enter into several contractual arrangements, including a lease or easement with a developer, an interconnection agreement with a utility, and several possible types of financing agreements. These contracts create obligations for the farmer and may place restrictions on the farmer's future use of the property, such as whether the farmer may allow a lien to be attached to the property. Farmers must be sure to understand all of the commitments they are making through the various wind development contracts and take steps to avoid actions that would be a breach of contract.

The consequences of breaching a wind development contract will depend on the circumstances and the terms of the particular contract. These

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<sup>3</sup> See Restatement (Third) of Property: Servitudes § 8.3 (2000).

consequences typically might include termination of the contract, a demand for money damages, or a requirement to take certain actions.<sup>4</sup> However, there is such a wide range of contracts involved that the obligations imposed are often quite different, and therefore the liability the farmer faces for each will be quite different as well. For example, if a farmer breaches a financing contract, the creditor might demand immediate full repayment, payment of penalty fees, or seizure of collateral given as security for the debt. Other types of wind development contracts usually do not put the farmer at a direct risk of losing any property. Instead, an action for breach of those contracts would typically be aimed at compensating the other party for economic losses suffered due to the farmer's breach. A farmer's property may be indirectly at risk in such actions if a damages award is more than the farmer can pay and a judgment lien is placed on the property.

Common terms found in wind power development agreements are described in this guide in Chapter 3 (Wind and Land Agreements), Chapter 6 (Turbine Purchase), Chapter 8 (Financing), Chapter 9 (Selling Power), and Chapter 11 (Interconnection and Transmission). These discussions are intended to help farmers understand terms that are likely to appear in wind power development agreements. However, what will be actually required of a farmer pursuing wind development will be controlled by the terms of the specific agreements entered into. Farmers are urged to seek assistance from experienced attorneys and consultants to be sure that they understand and can comply with all contract terms.

### **3. Pre-Existing Credit Agreements**

Security agreements used to ensure repayment of a debt, such as a mortgage, often contain restrictions on the owner's use of the security property. Common restrictions prohibit the property owner from (1) transferring any interest in the property, which would typically include a mortgage, easement, or lease; (2) allowing a third party to obtain a lien on the property; or (3) modifying the property. It is also common for lenders to require that the borrower protect property from decreases in value while the security agreement is in place.<sup>5</sup>

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<sup>4</sup> See Restatement (Second) of Contracts § 345 (1981).

<sup>5</sup> David R. Moeller and Stephen Carpenter, *Farmers' Guide to Minnesota Lending Law* 43 (FLAG, 2d ed. 2003), available at <http://www.flaginc.org/topics/pubs/index.php#Lending> (last visited June 19, 2007).

Entering into a lease or easement with a developer for a wind project could violate such restrictions in a farmer's existing security agreements. Even if there is no express restriction against leasing or giving an easement on the property, the lender may claim that doing so threatens the short-term or long-term value of the property and is therefore prohibited.

A restriction against allowing a lien to be placed on the property might also be violated when developing a wind project. Depending on state law, anyone who contributes labor, materials, or machinery for improving real estate (that is, making a permanent change that increases the usefulness or value of the property)<sup>6</sup> can get a mechanic's lien on property for the reasonable value of the work.<sup>7</sup> This might arise in a wind development project if bills related to construction, installation, or maintenance of the wind facility are not paid. Depending on the structure of the wind project, the farmer on whose land the turbines are located might not be directly responsible for paying the bills, but he or she could face the risk of such a lien attaching to the property.

Restrictions in a security agreement on the use of the security property only apply until the underlying debt is paid off. It might also be possible to negotiate with the lender for a written release from such restrictions in order to allow a wind development project to go forward.

Violating the restrictions in a mortgage or loan agreement could place the farmer in default, which may allow the lender to demand immediate payment or foreclose on the loan.<sup>8</sup> Before entering any agreements allowing wind development on the land, the farmer should be sure an attorney reviews existing mortgages or loans secured by the land to ensure compliance with restrictions or to begin negotiations for release from the restrictions.

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<sup>6</sup> See, e.g., *Phillips-Klein Cos. v. Tiffany Partnership*, 474 N.W.2d 370, 374 (Minn. App. 1991) ("The Minnesota Supreme Court has found that an 'improvement' is any permanent addition to or betterment of real property that increases its capital value and that involves the expenditure of labor or money and is designed to increase the usefulness or value of the property.") (citation omitted).

<sup>7</sup> See, e.g., Minn. Stat. § 514.01 (2006).

<sup>8</sup> David R. Moeller and Stephen Carpenter, *Farmers' Guide to Minnesota Lending Law* 43-44 (FLAG, 2d ed. 2003), available at <http://www.flaginc.org/topics/pubs/index.php#Lending> (last visited June 19, 2007).

## II. Tort Liability

Contract liability, discussed above, involves claims of harm based on a party's failure to fulfill its obligations under an agreement. Tort liability, discussed in this section, involves claims of harm between parties who do not have any pre-existing contractual relationship, or do not have a contractual relationship that is related to the harm that occurred.

Because there are no agreed-upon contract terms to govern resolution of a tort claim, the outcome will be determined by applicable state law. Tort liability is most commonly thought of in the context of personal injuries and damage to property, but it can also involve harm to economic interests. In very general terms, the goal of tort liability is to require a responsible party to compensate a person who is harmed with an amount that would make the damaged person "whole"; that is, a tort award is intended to as nearly as possible put the damaged person back in the position he or she was in before the tort occurred.

Not all claims of injury and harm will result in a damages award. Tort law establishes standards of care that all people are expected to meet in going about their lives. These standards vary depending on the situation, but are usually referred to as what a "reasonable person" would do. If the applicable standard of care is satisfied, a person will generally not be liable for tort damages, even if harm occurs.

### A. Negligence

Negligence means that a person has failed to exercise the degree of care that a reasonable person would have exercised under similar circumstances. This might involve taking dangerous actions or failing to protect or warn others from dangerous property that is owned by the person or is otherwise in his or her control.<sup>9</sup>

To make a successful negligence claim, a person who suffers harm must usually prove that: (1) the defendant did not exercise the degree of care that a reasonable person would have exercised under similar circumstances; (2) the defendant's action (or failure to act) was a direct cause of the harm; and (3) the harm suffered is of a type that is eligible for compensation.

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<sup>9</sup> Restatement (Second) of Torts, §§ 341, 341A, 343, 343A (1965).

If a negligence claim is successful, the defendant must usually compensate the injured person for his or her actual damages, including physical injury, emotional distress, lost wages or earning capacity, and replacement or repair of damaged property.<sup>10</sup> Punitive damages may be awarded if the defendant's actions were done with reckless indifference to the safety or rights of others.<sup>11</sup>

### 1. Negligence Liability for Farmer as Wind Project Owner-Operator

A farmer who owns and operates a wind turbine can protect himself or herself from negligence liability by taking reasonable care in its operation and having sufficient liability insurance to cover all claims that could reasonably be expected. The farmer has a legal duty to act reasonably to prevent and warn of dangers that he or she knows of or should know of, and that are not obvious to others. Even if a dangerous condition is obvious, the farmer could be held partially liable for injuries to another because the farmer has the most detailed knowledge of the property's condition and is ultimately responsible for its maintenance.<sup>12</sup>

If a farmer who owns and operates a wind facility hires an independent contractor to maintain the equipment, the farmer will generally not be liable for injuries caused by improper maintenance as long as the farmer exercised reasonable care in hiring the contractor, giving directions, supervising, and inspecting the work.<sup>13</sup> However, some states may consider that wind energy generation is inherently dangerous, in which case the farmer would be "strictly" liable for any injuries caused by wind equipment, even if the farmer exercised reasonable care in all of his or her actions.<sup>14</sup>

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<sup>10</sup> See Restatement (Second) of Torts §§ 901, cmt. a; 905; 906 (1979) (damage award attempts to put injured person in a position as nearly equal to position prior to the tort).

<sup>11</sup> See Restatement (Second) of Torts § 908 (1979).

<sup>12</sup> See Restatement (Second) of Torts, §§ 343, 343A (1965); Vincent F. O'Flaherty, *The Legal Landscape when a Tower Collapses*, 57 J. of the Mo. Bar 180, 180-81 (2001) (discussing cases involving communications and broadcast towers).

<sup>13</sup> See Restatement (Second) of Torts §§ 409 to 415 (1965); *Sutherland v. Barton*, 570 N.W.2d 1, 7 (Minn. 1997) (reasonable for owner to believe that independent electrical contractor and its employee would follow proper safety guidelines).

<sup>14</sup> Restatement (Second) of Torts §§ 422, 423, cmt. a (1965).

A farmer who owns and operates a wind facility should keep all records of work done on the equipment as evidence of proper maintenance over the years. The farmer should also carry sufficient liability insurance to cover damage to property, structures, equipment, livestock, and crops; and personal injury, property damage, and compensable economic losses suffered by others.<sup>15</sup> Depending on the size, location, and purpose of the wind facility, it might be covered as an “appurtenant structure” on the farmer’s current insurance, similar to coverage for other farm structures.<sup>16</sup> Commercial-scale wind projects will almost certainly need to obtain separate insurance coverage. It is important for farmers to discuss a wind development project with their insurance providers to determine the proper levels of coverage and get coverage in place before there is any potential for an injury to occur. It is advisable to begin these discussions early on in the process, since it is likely that not all farm insurers will want to take on liability coverage for a wind project, and the farmer may need to find a new provider for this coverage.

## **2. Negligence Liability for Farmer as Landlord to Wind Developer**

A farmer who leases land to a wind developer or utility will generally not be held to the same standard of care that an owner-operator would be.<sup>17</sup> However, any person who suffers harm caused by a wind facility will likely sue both the landowner and the turbine owner. Accordingly, the farmer should require that the contract with the developer include a provision requiring the developer to carry sufficient liability insurance, to defend the farmer against claims by third parties arising from the developer’s use of the land for the wind project, and to indemnify the farmer for any amounts the farmer is required to pay.<sup>18</sup>

It is important for farmers to understand that a developer’s duties to defend the farmer (that is, arrange and pay for the farmer’s legal defense) and

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<sup>15</sup> Nancy Lang and William Grant, *Landowner’s Guide to Wind Energy in the Upper Midwest* 45 (Izaak Walton League of America, 2nd prtg. 2001).

<sup>16</sup> Mick Sagrillo, *Advice from an Expert: Insuring Your Wind System* (Am. Wind Energy Assoc. 2000), available at [http://www.awea.org/faq/sagrillo/ms\\_insur1.html](http://www.awea.org/faq/sagrillo/ms_insur1.html) (last visited June 14, 2007).

<sup>17</sup> Restatement (Second) of Torts § 355 (1965).

<sup>18</sup> Eugene L. Grant, *Avoiding the Risks: Subrogation, Indemnification, and Exculpation in the Context of Commercial Leases*, 21 Real Estate L.J. 255, 262 (1991).



indemnify the farmer (that is, compensate the farmer for any amounts he or she is required to pay out) are a matter of contract between the farmer and developer. They are not a complete shield against liability. If the developer does not have adequate resources to defend the suit, or if the defense is unsuccessful, the farmer may still be held liable; if the developer does not have adequate resources to compensate the farmer for any damages awarded, the farmer may still face a significant financial burden.<sup>19</sup> To protect against this, the farmer's agreement with the developer should require the developer to buy liability insurance of a sufficient amount that lists both the developer and the farmer as insured parties. The agreement should require the developer to provide proof of insurance and should give the farmer an opportunity to pay the premiums (and maintain the coverage) if the developer does not do so.<sup>20</sup>

## B. Nuisance

Nuisance is a tort that involves interference with another person's right to use and enjoy his or her property or public space. One typically thinks of nuisance as not involving direct physical damage to property, but rather intangible interference such as noise, odors, or loss of light or view. The remedy for a nuisance is generally that the offending activity must stop; in some cases, money damages might also be awarded.

A claim for *private nuisance* will arise if an activity, such as operating a wind turbine, substantially and unreasonably interferes with another person's use and enjoyment of his or her own land.<sup>21</sup> The court will balance the usefulness of the alleged nuisance against the interference with the neighboring land.<sup>22</sup> There are very few cases examining whether a wind turbine is a private nuisance. A North Dakota case found that a turbine in a residential area was not a nuisance,<sup>23</sup> while

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<sup>19</sup> Nancy Lang and William Grant, *Landowner's Guide to Wind Energy in the Upper Midwest* 45 (Izaak Walton League of America, 2nd prtng. 2001).

<sup>20</sup> Nancy Lang and William Grant, *Landowner's Guide to Wind Energy in the Upper Midwest* 45 (Izaak Walton League of America, 2nd prtng. 2001).

<sup>21</sup> Restatement (Second) of Torts § 822 (1979); Minn. Stat. § 561.01 (2006).

<sup>22</sup> Restatement (Second) of Torts § 826 (1979).

<sup>23</sup> *Rassier v. Houim*, 488 N.W.2d 635, 638 (N.D. 1992).

a New Jersey court found that a wind turbine in a residential area was a nuisance.<sup>24</sup>

*Public nuisance* is an unreasonable interference with a right that is common to the general public or which affects an entire community.<sup>25</sup> Conduct is unreasonable if it interferes with public health, safety, comfort, or convenience or is illegal, or the person responsible for the nuisance has reason to know that it will have a continuing or long-lasting effect on a public right.<sup>26</sup> Most states, including Minnesota, specifically define certain activities to be public nuisances, but operating a wind turbine is not one of them.<sup>27</sup> None of the reported cases involving nuisance claims against wind turbines have used the public nuisance theory.

For a wind project, the best defense against a nuisance claim is careful preparation in planning the site and scrupulous attention to all permit requirements. Through the process of obtaining the permits needed for a wind project, many of the problems that could be a nuisance will be examined.<sup>28</sup> Because installation and operation of a wind turbine is regulated by the government through several mechanisms, courts will be reluctant to step in and impose further regulation through a nuisance case.<sup>29</sup> The issuance of a permit also reflects a governmental recognition that the wind project would be useful, which should lead to a finding that the operation offers benefits to the public. These factors make it unlikely that operation of a properly sited and permitted wind turbine would be considered a nuisance.

However unlikely a finding of nuisance might be, the fact that a wind project has been properly permitted would not prevent a court from finding the facility to be a nuisance. The possibility, though slight, always remains. If a court should find that a wind turbine is a nuisance, the farmer could be liable for damages to the

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<sup>24</sup> *Rose v. Chaikin*, 453 A.2d 1378, 1384 (N.J. 1982).

<sup>25</sup> Restatement (Second) of Torts § 821B (1979); *see also* N.D. Cent. Code § 42-01-06 (2005); S.D. Codified Laws § 21-10-3 (2006).

<sup>26</sup> Restatement (Second) of Torts § 821B (1979).

<sup>27</sup> Restatement (Second) of Torts § 821B, cmt. c (1979).

<sup>28</sup> *See* Gregory H. Birne, Annotation, *Tower or Antenna as Constituting Nuisance*, 88 A.L.R.5th 641 (2001).

<sup>29</sup> Restatement (Second) of Torts § 821B, cmt. f (1979).

affected party, could have limits placed on the operation of the turbine, or could be ordered to stop operating the wind turbine altogether.<sup>30</sup>

### C. Specific Aspects of Wind Power Production that Could Lead to Tort Liability

Operation of a wind project carries the potential for personal injury, property damage, or interference with the property rights of neighbors. Although most of the negative effects of wind power production can be reduced through proper siting and permitting, the impacts of the project may be more significant than expected. Potential problems associated with wind turbines include noise; interference with communication, radio, or television signals; obstruction of view or altering the landscape; obstruction of light; and obstruction of wind and electromagnetic radiation. As the discussions below indicate, some of these impacts present very little risk of liability for a farmer developing a wind project, while others can present significant risk that the farmer may face a question of liability at some point.

#### 1. Personal Injury or Property Damage

As with any operation involving large machinery and electricity, wind facilities present a risk of serious personal injury and property damage. Damage could range from the catastrophic—collapse of a tower—to the mundane—a visitor tripping on a guy wire. Although it is uncommon for a tower to collapse or for a blade to become detached and thrown, it is not unheard of.<sup>31</sup> Furthermore, the electrical components and wiring could cause personal injury to a contractor or other third party who comes in contact with the equipment. There is also the potential for liability as an “attractive nuisance” if a child becomes interested in the turbine, comes onto the property to get a closer look, and is injured as a result.<sup>32</sup>

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<sup>30</sup> Restatement (Second) of Torts §§ 821B, cmt. i; 822, cmt. d (1979).

<sup>31</sup> The Minnesota Project, *Companion Document to the Minnesota Model Wind Energy Conversion Ordinance—2005*, at 7 (2005), available at <http://www.cleanenergyresource teams.org/publications.html> (click “Companion Document” under “Other Publications”) (last visited June 17, 2007) (noting that a tower collapse has not occurred in Minnesota, but a blade throw event did happen at a project in Lake Benton, Minnesota).

<sup>32</sup> The Minnesota Project, *Companion Document to the Minnesota Model Wind Energy Conversion Ordinance—2005*, at 9 (2005), available at

Other potential risks are less likely, but cannot be entirely dismissed. For example, the likelihood of damage caused by ice thrown from or shed by a wind turbine is extremely low, but it is possible if someone is directly under the blades while ice is melting off.<sup>33</sup> Lightning strikes have also caused damage to wind turbines, causing debris to be thrown from the site.<sup>34</sup>

The best way to minimize the risk of personal injury and property damage from a wind facility is to follow all setback and safety requirements and to be sure the facility is properly maintained over the years. A security fence around the turbine will also protect against trespassers who might come to harm.

## 2. Noise

Noise may constitute a private nuisance if it interferes with the health and comfort of ordinary people in the area.<sup>35</sup> Characteristics considered include the noise's nature, volume, duration, time, and locale.

Noise was the main issue in three reported cases in which a wind turbine was accused of being a private nuisance. In these instances, the turbines were located in residential areas. In a relatively old New Jersey case, the turbine was held to be a nuisance because, among other factors, it produced a distinctive sound that exceeded the limits set by the local zoning ordinance.<sup>36</sup> In North Dakota 10 years later, a turbine was held not to be a

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<http://www.cleanenergyresourceteams.org/publications.html> (click "Companion Document" under "Other Publications") (last visited June 17, 2007) (stating that no such problems have been reported in Minnesota, and schools have been among the sites of on-site wind turbine installation).

<sup>33</sup> The Minnesota Project, *Companion Document to the Minnesota Model Wind Energy Conversion Ordinance—2005*, at 8 (2005), available at <http://www.cleanenergyresourceteams.org/publications.html> (click "Companion Document" under "Other Publications"); Mick Sagrillo, *Advice from an Expert: Wind Turbines and Flying Ice* (Am. Wind Energy Assoc. 2003), available at [http://www.awea.org/faq/sagrillo/ms\\_ice\\_0306.html](http://www.awea.org/faq/sagrillo/ms_ice_0306.html) (last visited June 14, 2007).

<sup>34</sup> The Minnesota Project, *Companion Document to the Minnesota Model Wind Energy Conversion Ordinance—2005*, at 7 (2005), available at <http://www.cleanenergyresourceteams.org/publications.html> (click "Companion Document" under "Other Publications").

<sup>35</sup> Alois Valerian Gross, Annotation, *Windmill as Nuisance*, 36 A.L.R.4th 1159 (1985).

<sup>36</sup> *Rose v. Chaikin*, 453 A.2d 1378, 1384 (N.J. 1982).

nuisance because, among other things, the complaining neighbor “came to the nuisance,” and the city did not have sound limits established.<sup>37</sup> Finally, in a 2007 West Virginia case, the court allowed a private nuisance claim against a wind development to proceed without yet deciding specific issues.<sup>38</sup>

Today, the noise from a wind project should be of less concern as a possible source of liability. With advances in wind turbine technology has come a decrease in the sound produced by the turbines. At a commercial wind farm, for example, the sound of the turbines at 750 to 1,000 feet away is said to be comparable to that of a refrigerator.<sup>39</sup> Thus, proper siting of a wind turbine away from residential areas and dwellings would make it highly unlikely that it would be held to be a nuisance.

### 3. Signal Interference

Tall objects on the landscape can cause interference with television, telecommunications, and radio reception by blocking or reflecting the signals. Commercial-scale wind turbines have been known to interfere with television reception, while small-scale turbines for on-site use do not create interference problems.<sup>40</sup>

Courts in Illinois, Massachusetts, and New Mexico have held that the right to build on one’s own land outweighs any right of a neighbor to television or

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<sup>37</sup> *Rassier v. Houim*, 488 N.W.2d 635, 638 (N.D. 1992).

<sup>38</sup> *Burch v. Nedpower Mount Storm, LLC*, No. 33201, slip op. (W.Va. June 8, 2007) (not yet published).

<sup>39</sup> The Minnesota Project, *Companion Document to the Minnesota Model Wind Energy Conversion Ordinance—2005*, at 13 (2005), available at <http://www.cleanenergyresourceteams.org/publications.html> (click “Companion Document” under “Other Publications”) (last visited June 17, 2007).

<sup>40</sup> The Minnesota Project, *Companion Document to the Minnesota Model Wind Energy Conversion Ordinance—2005*, at 11 (2005), available at <http://www.cleanenergyresourceteams.org/publications.html> (click “Companion Document” under “Other Publications”) (last visited June 17, 2007); Mick Sagrillo, *Advice from an Expert: Telecommunication Interference from Home Wind Systems*, (Am. Wind Energy Assoc. 2003), available at [http://www.awea.org/faq/sagrillo/ms\\_telint\\_0304.html](http://www.awea.org/faq/sagrillo/ms_telint_0304.html) (last visited June 14, 2007).

radio reception.<sup>41</sup> Based on this precedent, it is unlikely that a court would find that a wind facility's interference with television or radio reception constitutes a private nuisance. Those who experience such interference can address it by adding a reception booster to their television antennas.

#### 4. View Obstruction

Some people feel that wind turbines can ruin a view. It is unlikely, however, that such persons would be able to bring a successful case claiming damage to their view. Courts have proven reluctant to recognize a right to an unobstructed view.<sup>42</sup> In general, whenever a court has found a tower of some type to be a nuisance, it was because the tower violated zoning laws. A tower's size or appearance alone has not been deemed a substantial interference with the property rights of a neighbor.<sup>43</sup>

A neighbor might also claim that he or she has an implied easement giving the right to an unobstructed view, but this claim is also not likely to succeed. Courts typically only recognize an implied easement if a clear intention to create the easement is apparent or the maintenance of the view comes from "long, continued, obvious or manifest use."<sup>44</sup> While the view of a farmer's land may be enjoyed by many, enjoying a view is not normally considered a "use" of neighboring property.

#### 5. Light

A wind facility must be properly sited so as not to disturb the light to adjacent residences. While a turbine itself will not cast a substantial shadow, the shadow of the rotating blades has a "blinking" or "flicker" effect that could affect neighbors' use and enjoyment of daytime living or working space. Courts have been reluctant to imply an easement requiring access to

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<sup>41</sup> See *Public Serv. Co. v. Catron*, 646 P.2d 561, 564-65 (N.M. 1982); *People ex rel. Hoogasian v. Sears, Roebuck & Co.*, 287 N.E.2d 677, 679-80 (Ill. 1972); *Richmond Bros., Inc. v. Hagemann*, 268 N.E.2d 680, 682-83 (Mass. 1971); see also Joseph T. Bockrath, Annotation, *Interference with Radio or Television Reception as Nuisance*, 58 A.L.R.3d 1142 (1974).

<sup>42</sup> 28A C.J.S. *Easements* § 87 (2007).

<sup>43</sup> Gregory H. Birne, Annotation, *Tower or Antenna as Constituting Nuisance*, 88 A.L.R.5th 641 (2001).

<sup>44</sup> 28A C.J.S. *Easements* § 87 (2007); see also *Hwy. 7 Embers, Inc. v. Northwestern Nat'l Bank*, 256 N.W.2d 271, 276 (Minn. 1977).

light and would presumably also be reluctant to hold that restricting access to light is a nuisance.<sup>45</sup> Nevertheless, it is recommended that wind turbines be sited far enough away from houses and workplaces to avoid casting a shadow.

A recent West Virginia case indicates that the alleged unsightliness of a wind turbine resulting from this “flicker” effect would not be enough by itself to constitute a valid private nuisance claim.<sup>46</sup> However, the court in that case did suggest that if the unsightliness was combined with other nuisance factors, such as noise and being located in a residential area, a court might award a remedy for the unsightliness concerns.<sup>47</sup>

## 6. Wind Shadow

A *wind shadow* is an area of still air created behind a wind turbine. It is typically a cone whose length across the land is 10 times the diameter of the wind turbine rotor.<sup>48</sup> No wind turbines may be erected in this area of still air, because they would not have enough wind to operate. This could present a problem for a neighbor who wishes to install his or her own turbines in an area that falls in the wind shadow of the farmer’s current turbines. However, it seems unlikely that the farmer would face any liability in this situation. The courts’ reluctance to recognize an implied easement requiring access to air suggests that they would also resist holding that it is a nuisance to restrict air even though it would decrease the adjacent land’s value.<sup>49</sup>

With proper siting, there should be no problem with wind shadow. It is not uncommon to site many turbines in close proximity and get adequate

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<sup>45</sup> 28A C.J.S. *Easements* § 85 (2007).

<sup>46</sup> *Burch v. Nedpower Mount Storm, LLC*, No. 33201, slip op. (W.Va. June 8, 2007) (not yet published).

<sup>47</sup> *Burch v. Nedpower Mount Storm, LLC*, No. 33201, slip op. (W.Va. June 8, 2007) (not yet published).

<sup>48</sup> See The Minnesota Project, *Companion Document to the Minnesota Model Wind Energy Conversion Ordinance—2005*, at 14 (2005), available at <http://www.cleanenergyresourceteams.org/publications.html> (click “Companion Document” under “Other Publications”) (last visited June 17, 2007).

<sup>49</sup> 28A C.J.S. *Easements* § 85 (2007).

wind.<sup>50</sup> Nonetheless, a farmer or developer may want to prevent disputes about wind shadows and neighbors' wind development interests by getting easements to the airspace on neighboring land that is in the wind shadow of the proposed turbines. The landowner who is in the wind shadow of the turbines is then compensated for the loss of his or her wind development potential. Wind easements are discussed in more detail in Chapter 3 of this guide.

## 7. Electromagnetic Fields

A wind turbine generates electricity and thus produces an electromagnetic field. Negligence and nuisance claims have been brought against electric companies for property damage and personal injury resulting from electromagnetic fields, usually associated with high-voltage power lines; however, most such claims that have gone to trial have been unsuccessful.<sup>51</sup> Courts have generally rejected these claims because it has not been proven that the fields cause harm. No studies have yet been able to establish a connection between health problems and the electromagnetic fields associated with the generation of electricity.<sup>52</sup>

Even if electromagnetic fields were a notable liability risk, a farmer's possible liability for a wind project would be slight. Because the wind facility is located on the farmer's land, other persons are unlikely to have significant exposure to the electromagnetic fields created by the turbines. Any claims related to the transmission lines carrying the power from the turbine to a utility are likely to be brought against the utility, as the owner and operator of the lines.

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<sup>50</sup> See The Minnesota Project, *Companion Document to the Minnesota Model Wind Energy Conversion Ordinance—2005*, at 14 (2005), available at <http://www.cleanenergyresourceteams.org/publications.html> (click "Companion Document" under "Other Publications") (last visited June 17, 2007).

<sup>51</sup> Michael C. Anibogu, *The Future of Electromagnetic Field Litigation*, 15 Pace Env'tl. L. Rev. 527, 565 (1998).

<sup>52</sup> Michael C. Anibogu, *The Future of Electromagnetic Field Litigation*, 15 Pace Env'tl. L. Rev. 527, 565 (1998). For a general overview of the issue of electromagnetic radiation and health effects, see Wisconsin Public Service Commission, *EMP—Electric & Magnetic Fields*, available at <http://www.atcllc.com/pdf/PSCWEMFpublication.pdf> (last visited June 14, 2007).



## 8. Stray Voltage

Stray voltage is caused by inadequate or degraded wiring at the location that is experiencing the stray voltage. It is not a problem related to energy generation.<sup>53</sup> Stray voltage occurs when the ground wire in a structure (for example, a barn) allows a small amount of current to flow to other conductive materials in the structure, such as water pipes. This results in a constant low-level electric current being present in the materials of the structure. People or animals may feel a light shock when making contact with the charged structure. This has been a particular concern in dairy barns, as cows are far more sensitive to electric current than humans are.<sup>54</sup>

Any liability for stray voltage should lie with the utility or electrician responsible for the improper wiring or distribution of power within the affected structure.<sup>55</sup> A farmer who merely generates power that is then purchased and distributed by a utility would not have any connection to the cause of the stray voltage and therefore should not need to be concerned about liability in most cases.

## III. Regulatory Liability

The previous sections of this chapter have discussed liability arising under formal agreements between people (contract liability) and liability arising under state law for harm done to a person or property outside a contractual relationship (tort liability). The third general category of liability that is of concern to farmers interested in wind development is regulatory liability.

Regulatory liability involves claims (usually by the government) of harm due to actions that are specifically prohibited (or failure to perform actions that are

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<sup>53</sup> Mick Sagrillo, *Advice from an Expert: Residential Systems and "Stray Voltage"* (Am. Wind Energy Assoc. 2000), available at [http://www.awea.org/faq/sagrillo/ms\\_strayvoltage\\_0406.html](http://www.awea.org/faq/sagrillo/ms_strayvoltage_0406.html) (last visited June 14, 2007).

<sup>54</sup> Mick Sagrillo, *Advice from an Expert: Residential Systems and "Stray Voltage,"* (Am. Wind Energy Assoc. 2000), [http://www.awea.org/faq/sagrillo/ms\\_strayvoltage\\_0406.html](http://www.awea.org/faq/sagrillo/ms_strayvoltage_0406.html) (last visited June 14, 2007).

<sup>55</sup> See Marjorie A. Shields, Annotation, *Recovery from Electric Utility for Personal Injury or Property Damage Resulting from Stray Voltage*, 91 A.L.R.5th 517 (2001).

specifically required) by law. These are actions that would typically not raise any question of liability under tort or contract law but are specifically addressed in federal or state statutes and regulations.

As a general matter, if a wind project does not fulfill all of the siting and operation requirements imposed by federal and state statutes and regulations, the project could be prohibited from operating, either permanently or until the requirement is met. Even if all of these requirements are met, however, there can be circumstances where issues of regulatory liability, and penalties, arise. Therefore, it is important for farmers to be aware not only of the specific permitting requirements that a project must satisfy, but also the various additional regulations that apply to—and could create liability issues for—wind projects.

## **A. Wildlife Protection**

As discussed in Chapter 4 of this guide (Siting a Wind Project), birds occasionally collide with wind turbines, as they do with all other tall structures such as buildings and transmission towers.<sup>56</sup> Proper siting of a wind project is the best way to reduce the potential for bird collisions, but even with careful planning, an occasional bird death will be inevitable.

Three federal statutes are implicated if wind turbines interfere with wildlife, particularly birds. The Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act make it a crime to kill protected birds. The Endangered Species Act makes it a crime to kill any endangered species or interfere with designated critical habitat.

### **1. Migratory Bird Treaty Act**

If migratory birds are killed by colliding with a turbine, there is a possibility of criminal prosecution under the Migratory Bird Treaty Act (MBTA).<sup>57</sup> The

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<sup>56</sup> The Minnesota Project, *Companion Document to the Minnesota Model Wind Energy Conversion Ordinance—2005*, at 15 (2005), available at <http://www.cleanenergyresourceteams.org/publications.html> (click “Companion Document” under “Other Publications”) (last visited June 17, 2007); American Wind Energy Association, *The Most Frequently Asked Questions About Wind Energy* 17 (2002), available at <http://www.awea.org/pubs/documents/FAQ2002%20-%20web.PDF> (last visited June 14, 2007).

<sup>57</sup> 16 U.S.C. § 703 (2006).

MBTA is a strict liability statute, meaning that a person can be found guilty of causing a protected bird's death, regardless of whether the person intended to kill the bird.<sup>58</sup> Some cases of bird killings have been prosecuted under MBTA, for example, illegal hunting, ingestion of pesticides or poisons, and electrocution. Other bird deaths have not been prosecuted, including collisions with automobiles, airplanes, and towers.<sup>59</sup> Even if an MBTA case is prosecuted, courts have shown reluctance to find that collisions with towers are a foreseeable cause of bird deaths.<sup>60</sup> Therefore, if a wind project is properly sited and permitted, it is rather unlikely that the farmer or developer would face liability for the occasional bird death from collision with a wind turbine. That may be particularly true if the farmer or developer can demonstrate that steps were taken to avoid bird collisions.<sup>61</sup>

Nonetheless, if a person is prosecuted and found guilty of a violation of the MBTA, the crime is a misdemeanor punishable by a fine of up to \$15,000, six months in prison, or both.<sup>62</sup>

## 2. Bald and Golden Eagle Protection Act

Like the MBTA, the Bald and Golden Eagle Protection Act (BGEPA) makes it a crime to kill a Bald or Golden Eagle.<sup>63</sup> However, liability under the BGEPA

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<sup>58</sup> See *United States v. Moon Lake Elec. Ass'n, Inc.*, 45 F. Supp. 2d 1070, 1074 (D. Colo. 1999) (“[W]hether Moon Lake intended to cause the deaths of 17 protected birds is irrelevant to its prosecution under [16 U.S.C. §] 707(a).”).

<sup>59</sup> Larry Martin Corcoran, *Migratory Bird Treaty Act: Strict Criminal Liability for Non-hunting, Human Caused Bird Deaths*, 77 Denv. U.L. Rev. 315, 316 (1999); but compare Victoria Sutton & Nicole Tomich, *Harnessing Wind Is Not (by Nature) Environmentally Friendly*, 22 Pace Env'tl. L. Rev. 91, 108 (2005) (arguing that collisions with towers should be prosecuted, as migratory bird studies make the collisions foreseeable).

<sup>60</sup> Larry Martin Corcoran, *Migratory Bird Treaty Act: Strict Criminal Liability for Non-hunting, Human Caused Bird Deaths*, 77 Denv. U.L. Rev. 315, 339-341 (1999).

<sup>61</sup> See *United States v. Moon Lake Elec. Ass'n, Inc.*, 45 F. Supp. 2d 1070, 1071 (D. Colo. 1999). Moon Lake did not take steps to avoid harm to birds. It was charged under the MBTA when it failed to install inexpensive protective devices on 2,450 power poles, causing migratory birds to die when they collided with the towers and the tower guy wires.

<sup>62</sup> 16 U.S.C. § 707 (2006).

<sup>63</sup> 16 U.S.C. § 668(a) (2006).

is both narrower and broader than under the MBTA. Liability is narrower under the BGEPA because it does require knowing or wanton behavior; accidental bird killings are not covered.<sup>64</sup> Liability under the BGEPA is broader than under the MBTA because it covers bird killings “at any time or in any manner,” and has been interpreted to include eagle deaths by electrocution on electric power poles and lines.<sup>65</sup> Taking these two differences together, it seems that farmers are unlikely to face liability under the BGEPA for wind projects if the farmer or developer took reasonable protective measures, including steps to properly site the turbines to avoid interference with protected birds.<sup>66</sup>

If a person is prosecuted and found guilty under the BGEPA, it is a misdemeanor punishable by a fine of up to \$5,000, one year in prison, or both.<sup>67</sup> Civil penalties of up to \$5,000 for each violation are also possible.<sup>68</sup>

### 3. Endangered Species Act

The Endangered Species Act (ESA) makes it a crime to kill, harm, or harass any animal species designated as endangered.<sup>69</sup> The ESA prohibits not only harm to the animal itself, but also damage to a protected animal's critical habitat.<sup>70</sup> ESA also prohibits removal of or damage to endangered plants.<sup>71</sup> If a wind project is likely to impact an endangered species, it could run into problems under the ESA.

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<sup>64</sup> 16 U.S.C. § 668(a) (2006).

<sup>65</sup> 16 U.S.C. § 668(a) (2006); *United States v. Moon Lake Elec. Ass'n, Inc.*, 45 F. Supp. 2d 1070, 1086-88 (D. Colo. 1999).

<sup>66</sup> *But see* Victoria Sutton & Nicole Tomich, *Harnessing Wind Is Not (by Nature) Environmentally Friendly*, 22 Pace Envtl. L. Rev. 91, 111 (2005) (arguing that eagle deaths resulting from collisions with a wind turbine may be prosecuted under the BGEPA).

<sup>67</sup> 16 U.S.C. § 668(a) (2006).

<sup>68</sup> 16 U.S.C. § 668(b) (2006).

<sup>69</sup> 16 U.S.C. § 1538(a)(1) (2006).

<sup>70</sup> Victoria Sutton & Nicole Tomich, *Harnessing Wind Is Not (by Nature) Environmentally Friendly*, 22 Pace Envtl. L. Rev. 91, 114 (2005); *see also* *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 692 (1995).

<sup>71</sup> 16 U.S.C. § 1538(a)(2)(B) (2006).

However, it is possible to be relieved of the ESA prohibitions if the potentially harmful project obtains a permit from the U.S. Fish and Wildlife Service.<sup>72</sup> Any federal agency involved in permitting or funding a project is required under ESA to ensure that the project is not likely to put an endangered or threatened species in danger, or impact their critical habitat.<sup>73</sup>

The ESA allows private parties to bring an action against any person who is in violation of the Act, or against the Secretary of the Interior for approving an action in violation of the ESA.<sup>74</sup> Courts have the power to issue a permanent injunction against a project that is in violation of the ESA. Courts have issued injunctions under the ESA against road construction, mining operations, commercial development, and other projects.<sup>75</sup>

Knowing violations of the ESA are punishable by civil penalties of up to \$25,000 per violation.<sup>76</sup> Criminal penalties include fines of up to \$50,000 per violation and one year in prison, or both.<sup>77</sup>

Once again, a thorough siting and permitting process is the best way to discover potential sources of liability for a wind project under the ESA, and to plan to avoid those sites or obtain needed permissions before construction begins.

## **B. Federal Farm Program Restrictions**

Enrollment in some federal farm programs places restrictions on farmers' use of their land. Violating the rules of the programs could mean a loss of benefits or serious financial penalties. Other federal laws prohibit certain activities on farmland, punishable by a loss of federal farm program benefits.

Because these restrictions and exceptions can be somewhat complicated and can change as statutes and policies are amended, farmers should always consult with the Farm Service Agency before siting wind turbines on any land that is enrolled

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<sup>72</sup> 16 U.S.C. § 1539 (2006).

<sup>73</sup> 16 U.S.C. § 1536(a)(2) (2006).

<sup>74</sup> 16 U.S.C. § 1540(g) (2006).

<sup>75</sup> Victoria Sutton & Nicole Tomich, *Harnessing Wind Is Not (by Nature) Environmentally Friendly*, 22 Pace Envtl. L. Rev. 91, 114 (2005).

<sup>76</sup> 16 U.S.C. § 1540(a) (2006).

<sup>77</sup> 16 U.S.C. § 1540(b) (2006).

in a federal farm program. Farmers should also consider including a provision in their wind development contracts requiring the developer to compensate the farmer for any government payments lost or penalties imposed if the developer's activities result in violation of farm program land use restrictions.

### **1. Commodity Payment Programs**

The federal commodity payment programs are a significant source of income for many farmers. In recent years, Congress has authorized temporary commodity payment programs as part of the so-called Farm Bills, statutes which set national agricultural policy for a period of 5 to 7 years. For example, from 1996 to 2002, eligible farmers received commodity payments under Production Flexibility Contracts authorized by the 1996 Farm Bill.<sup>78</sup> Beginning in 2002, eligible farmers could enroll in the Direct and Counter-cyclical Payment program (DCP), a commodity payment program authorized by the 2002 Farm Bill.<sup>79</sup>

Authority for DCP will expire in late 2007, and the general expectation is that Congress will authorize another temporary commodity payment program as part of the Farm Bill that is being drafted as this book is published. Although the specifics of the new program, if there is to be one, are not known, it is reasonable to make some predictions based on the characteristics of the previous commodity payment programs.

One characteristic that is important for farmers who are considering wind development is the DCP prohibition on making nonagricultural use of acreage enrolled in the program, that is, acreage used to determine what level of DCP payments the farmer can receive.<sup>80</sup> It is likely that any commodity payment program offered under a new Farm Bill will also prohibit farmers from using acreage enrolled in the program for non-agricultural uses.

This is particularly significant for farmers who would want to enroll in any new commodity payment program and who are also considering a wind development project that would begin in the next 5 to 7 years. These farmers will want to pay particular attention to the specific requirements and restrictions of any new commodity program that is offered. Questions to

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<sup>78</sup> 7 U.S.C. §§ 7201 et seq. (2006).

<sup>79</sup> 7 U.S.C. §§ 7911 et seq. (2006).

<sup>80</sup> 7 U.S.C. § 7915 (a)(1)(D) (2006).

consider include: Would it be possible to enroll all of the farmer's acreage in the program in the beginning and later withdraw any acreage needed for a wind project? Would there be a penalty for withdrawing acreage from the program for this purpose? What would the penalty be? Is there a limit on how much acreage could be withdrawn?

Depending on how the program would be structured, risks that a farmer might face as a result of using enrolled land for a wind project could include: loss of eligibility for future payments in proportion to the amount of acreage used; loss of eligibility for all future payments under the program; a demand for return of payments already received in proportion to the amount of acreage used; a demand for return of all payments received under the program; fines; and ineligibility for other farm programs. Because some of these penalties are quite severe, it will be very important for a farmer interested in wind development to learn as much as possible about the program requirements before enrolling.

## **2. Swampbuster**

As discussed in Chapter 4 of this guide, if wetlands are damaged during the construction or operation of a wind project, even accidentally, it can have serious consequences for the farmer's future eligibility for federal farm programs. The "Swampbuster" provision of the Food Security Act denies future eligibility for certain federal farm program benefits to farmers who produce agricultural commodities on converted or modified wetlands.<sup>81</sup> The Natural Resources Conservation Service (NRCS) determines if a farmer's land is subject to the Swampbuster provisions, and farmers should have opportunities to work with USDA and local wetland conservation authorities to mitigate wetland damage.

Although Swampbuster arguably would not apply if only a wind turbine is placed on the altered wetlands, it likely would apply if crops are later planted on some of the affected land. It is recommended that farmers check with NRCS before beginning any kind of work that might impact wetlands.

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<sup>81</sup> See Natural Resources Conservation Service, *Wetland Conservation Provisions (Swampbuster)*, <http://www.nrcs.usda.gov/programs/compliance/WCindex.html> (last visited June 14, 2007).

### **3. Conservation Security Program (CSP)**

As discussed in Chapter 4 of this guide, farmers who enroll land in the Conservation Security Program (CSP) enter into a contract that restricts their use of the land in exchange for payments from USDA. If a farmer uses the land in a way that violates the CSP contract or interferes with the conservation purposes of the contract, the contract can be terminated.<sup>82</sup> Termination would result in a loss of future payments and possibly a demand to refund payments already received.<sup>83</sup> It is likely that a wind project would be an acceptable use of land enrolled in CSP, but farmers participating in CSP should confirm this before proceeding with wind development.

### **4. Environmental Quality Incentives Program (EQIP)**

As discussed in Chapter 4 of this guide, entering into a contract under the Environmental Quality Incentives Program (EQIP) will restrict a farmer's use of the land.<sup>84</sup> It appears that the compatibility of wind energy development with EQIP will be determined on a case-by-case basis. If the farmer uses land in a way that tends to defeat the purposes of the EQIP contract, USDA may terminate the contract and require the farmer to repay amounts that have already been received.<sup>85</sup> Or, USDA may require the farmer to repay some of the past payments and change the calculation of future payments owed to the farmer under the contract.<sup>86</sup> Furthermore, if a farmer transfers an interest in the land to a wind developer or other party who is unable or unwilling to assume responsibility for the EQIP contract, the farmer may be required to refund all or a portion of the financial assistance received.<sup>87</sup>

### **5. Wildlife Habitat Incentives Program (WHIP)**

As discussed in Chapter 4 of this guide, a farmer participating in the Wildlife Habitat Incentives Program (WHIP) agrees not to take any action on

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<sup>82</sup> See 16 U.S.C. § 3838b(3), (4) (2006); 7 C.F.R. § 1469.21(e)(3)(ii) (2007).

<sup>83</sup> 16 U.S.C. § 3838b(4)(A)-(B) (2006).

<sup>84</sup> 16 U.S.C. § 3839aa (2006).

<sup>85</sup> 16 U.S.C. § 3839aa-4(3)(A) (2006).

<sup>86</sup> 16 U.S.C. § 3839aa-4(3)(B) (2006).

<sup>87</sup> 7 C.F.R. § 1466.25(c) (2007).



land under his or her control that would defeat the purposes of the program.<sup>88</sup> To the extent that a wind energy project would defeat the purposes of developing habitat for upland wildlife, wetland wildlife, threatened and endangered species, fish, and other types of wildlife, pursuing the wind project would likely be considered a violation of a WHIP agreement. In such cases, the farmer may receive reduced WHIP payments in the future or may be required to refund WHIP payments already received.

## 6. Farmland Protection Program (FPP)

As discussed in Chapter 4, land in the Farmland Protection Program (FPP) is subject to an easement restricting non-agricultural land uses.<sup>89</sup> Depending on the characteristics of a particular parcel of land and a specific wind project, wind development may or may not be prohibited under these restrictions. If a farmer constructs a wind project that is in violation of an FPP easement, either the private easement holder or USDA may take action to enforce the easement.<sup>90</sup> This would most likely involve an injunction to cease construction and operation of the project and perhaps to remove structures already installed.

## 7. Grassland Reserve Program (GRP)

As described in Chapter 4 of this guide, the Grassland Reserve Program (GRP) assists landowners in restoring and conserving eligible grasslands.<sup>91</sup> A GRP easement or rental agreement prohibits, among other things, conduct that disturbs the surface of the covered land.<sup>92</sup> Because a wind energy project will disturb the surface of the land, at least in some places, it may constitute a violation of GRP. Farmers who violate a GRP agreement may be required

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<sup>88</sup> Natural Resources Conservation Service, *Conservation Program Agreement: Wildlife Habitat Incentive Program Appendix Part 4(A)(6)*, Form CCC-1200-WHIP (Oct. 2005), available at

[http://www.nrcs.usda.gov/programs/whip/WHIP\\_signup/WHIP\\_CCCAgreement&Appendix\\_10\\_24\\_05.pdf](http://www.nrcs.usda.gov/programs/whip/WHIP_signup/WHIP_CCCAgreement&Appendix_10_24_05.pdf) (last visited June 14, 2007).

<sup>89</sup> 7 C.F.R. pt. 1491 (2007).

<sup>90</sup> 7 C.F.R. § 1491.30 (2007).

<sup>91</sup> 16 U.S.C. § 3838n-q; 7 C.F.R. pt. 1415 (2007).

<sup>92</sup> 16 U.S.C. § 3838o(b)(2)(B) (2006).

to refund all or a portion of the payments received under the program, as USDA deems appropriate.<sup>93</sup>

## 8. Wetlands Reserve Program (WRP)

The Wetlands Reserve Program (WRP) assists farmers to restore and protect wetlands through conservation easements.<sup>94</sup> The easement prohibits activities that alter, degrade, or diminish the functional value of the land unless specifically permitted under the easement.<sup>95</sup> Land under the WRP may be used for compatible economic uses, as long as the conservation plan specifically permits it, and the use is “consistent with the long-term protection and enhancement of the wetland resources for which the easement was established.”<sup>96</sup>

If a farmer participating in WRP pursues development of a wind facility in violation of the WRP easement, USDA is authorized to withhold further payments under the program, enter the farmer’s property to remedy the violation, and pursue all other available remedies, which presumably also includes seeking an injunction against the completion and/or operation of the wind facility.<sup>97</sup>

## V. Conclusion

This chapter identifies many areas of potential liability for farmers considering wind development. Later chapters in this guide cover still other specific areas of potential liability. For example, depending on how the wind project entity is structured, farmers may need to consider specific securities law requirements and some states’ prohibitions on corporate ownership of certain agricultural interests. The potential liability risks that arise from these laws are discussed in more detail in Chapter 10 (Business Structures). Moreover, while this chapter outlines basic contract principles, parties to specific types of contracts, such as power purchase agreements and interconnection agreements, will encounter specific liability issues that will need to be addressed in those contracts, as

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<sup>93</sup> 16 U.S.C. § 3838o(e) (2006).

<sup>94</sup> 16 U.S.C. §§ 3837 et seq. (2006); 7 C.F.R. pt. 1467 (2007).

<sup>95</sup> 16 U.S.C. § 3837a(b)(2)(A), (C), (D) (2006).

<sup>96</sup> 16 U.S.C. § 3837a(d) (2006); 7 C.F.R. § 1467.10(b)(2) (2007).

<sup>97</sup> 7 C.F.R. § 1467.14 (2007).

discussed in Chapters 9 (Selling Power) and 11 (Interconnection and Transmission).

The areas of potential liability from wind development may seem overwhelming. Farmers should certainly be aware of these potential risks and take steps to adequately protect themselves and their projects. However, with sufficient information and protective measures, the chance of facing any significant liability can be greatly reduced.

