

A Dozen Federal Lawsuits Filed Against West Virginia Wind Farm Operator

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On February 10, 2023, 12 separate civil actions were filed (by more than 20 individual plaintiffs) in the U.S. District Court for the Northern District of West Virginia, challenging the construction and operation of the Black Rock Wind Farm (BRWF) located in Grant and Mineral Counties, West Virginia. Defendants include the developer of the facility, Clearway Energy Group, LLC, and its wholly-owned subsidiary, Black Rock Wind Force, LLC. Presumably seeking to satisfy the statute of limitations on one or more of plaintiffs' common law causes of action, the complaints allege that they were filed exactly one year after the BRWF began operation.

The BRWF was authorized by an "Order Granting a Site Certificate" issued by the West Virginia Public Service Commission (PSC) on November 19, 2019. (As noted in that Order, Clearway Energy also owns the Pinnacle Wind Farm in Mineral County, West Virginia.) The application filed with the PSC sought approval to construct up to 29 wind turbines (each with a nameplate capacity between 3.6 MW and 5.8 MW), to be mounted at a hub height of 352.6 feet. Due to an existing 110 MW interconnection limit in Black Rock's proposed agreement with PJM Interconnection LLC (the regional transmission organization that coordinates the movement of wholesale electricity for West Virginia and 12 other states), only 23 turbines were authorized to be constructed by the PSC Order.

Plaintiffs assert that the operation of the 23-turbine BRWF has "substantially and unreasonably" affected the "serenity, ambience, wildlife viewing and aesthetic nature" of their real property, and that it has harmed their "personal mental, emotional and physical wellbeing" in a variety of ways. Though the complaints do not mention it, it appears that virtually all the conditions identified as the cause of plaintiffs' alleged injuries (excessive noise, vibration, shadow/light flicker, acoustic energy, and impaired viewsheds) were addressed in studies and testimony submitted by Black Rock to the PSC, and by the PSC Order. The PSC Order noted that, as of the date of its issuance, the owners of approximately 60 of the 193 occupied dwellings located within a one-mile radius of the facility had entered into or were negotiating "Neighbor Agreements" with Black Rock. The PSC also noted that existing wind turbines were visible in five of the nine viewpoints used in the analysis of the project's potential visual effects.

Each of the 12 complaints is virtually identical except for the identity of the plaintiffs and the

respective properties at issue. Each complaint asserts two claims. First, the complaints allege that the BRWF constitutes a nuisance. Under West Virginia law, there are two types of nuisance claims. A private nuisance is a substantial and unreasonable interference with the private use and enjoyment of another's land. West Virginia law also recognizes claims for public nuisance, which is a claim alleging that certain conduct adversely impacts the public at large. Public nuisance claims generally cannot be asserted by private citizens unless they can demonstrate a "special injury" they suffered that is different than the alleged impact of the condition on the general public.

A bill is currently pending before the West Virginia Legislature that would restrict the scope of public nuisance claims. Senate Bill 572 would prohibit public nuisance claims based on an action or condition "that is permitted, authorized, approved, or mandated by a statute, ordinance, regulation, permit, order, rule, court order, or other similar measure issued, adopted, promulgated, or approved by a federal, state, or local governmental entity." If passed, Senate Bill 572 would not likely affect the nuisance claims against the BRWF, because those claims appear to be for private nuisance (impacts on just the named plaintiffs' properties) rather than a public nuisance (impacts on the public at large).

The second claim in the complaints alleges that the defendants were negligent in "siting, constructing and operating" the BRWF, knowing that the sound generated by the turbines would cause various physical ailments to nearby residents, including headaches, dizziness, rapid heartbeat, sleeplessness, and other adverse conditions. Although they may not be enough to prevent the claim from being heard, the studies submitted for purposes of obtaining the PSC Site Certificate for the BRWF will presumably also be important in evaluating the merits of this claim.

The complaints request entry of an injunction order to abate the nuisance (which would presumably require the BRWF to cease operations) and an award of damages to compensate the plaintiffs for diminution of value of their properties and their personal injuries. Responses to the complaints will be due within 21 days after the named defendants are formally served with them.

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