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INTRODUCTION

In recent years, opponents of wind energy projects have begun employing the common and statutory law of nuisance to delay and restrict the construction of wind power developments in their neighborhoods and in nearby regions. The case law on this subject is limited, but opponents of wind developments have filed nuisance suits due to various concerns: the noise created by wind turbines; the "flicker" or "strobe" effect created when light from the rising or setting sun hits the turbine blades; the danger posed by thrown blades, ice, or collapsing towers; the unsightly or aesthetically displeasing nature of wind turbines; and the reduction of property values near a wind project.[1] The sparse history of

† J.D., University of California, Berkeley, School of Law, 2009; B.A., Yale University, 2006. I would like to thank Professor Steven Weissman for his invaluable feedback and insights at every stage of the writing process. Many of the ideas in this paper were inspired by Professor Weissman's outstanding 2008 course, "Energy Regulation and the Environment." I would also like to thank Trey Cox at Lynn Tillotson Pinker & Cox, LLP in Dallas, Texas, who provided me with much of the background and case materials from the *Rankin* litigation. I am grateful for the assistance of Steven Baron of Steven Baron Consulting and Legal Services in Austin, Texas. My discussion of the Roman roots of nuisance doctrine owes much to coursework with Professor James Gordley, now at Tulane University Law School, whose book on the origins and development of private law is essential reading. I truly appreciate the diligent work of the editorial board of the *California Law Review*, whose comments have been immensely valuable.

1. *See* Burch v. NedPower Mount Storm, LLC, 647 S.E.2d 879, 885 (W. Va. 2007).

these nuisance suits has shown mixed results. Several courts have found that wind plants constitute an enjoinable nuisance,[2] while others have ruled that they do not create a nuisance.[3]

In 2009, America's need for new sources of energy and electricity has taken on a new sense of urgency due to environmental and economic concerns. While gasoline prices have remained volatile since a spike in 2008, climate change concerns have intensified, the newly elected Obama administration has pushed for increased investment in renewable energy, and America's economic dependence on imported fossil fuels appears increasingly unsustainable.[4] In 2004, renewable sources supplied approximately 7 percent of the energy consumed worldwide.[5] In 1999, renewable sources of energy constituted only approximately 5.4 percent of the United States' primary energy supply.[6]

Hydroelectric energy supplies the bulk of U.S. renewable energy generation.[7] However, hydroelectric power has little room for expansion on a large scale in the developed world[8] and creates significant environmental impact.[9] If the United States is to decrease its reliance on fossil fuels by increasing renewable energy generation, it must expand in areas outside of hydroelectricity. Entrepreneurs, politicians, and other promoters of renewable energy have piqued the public's interest with proposals ranging from hydrogen-producing algae[10] to placing turbines in the ocean currents beneath the Golden Gate Bridge.[11] The most commercially proven technologies—wind, solar, biomass, and geothermal power—only provided 6 percent of the U.S. power

2. *See, e.g.*, Rose v. Chaikin, 453 A.2d 1378, 1384 (N.J. Super. Ct. Ch. Div. 1982) (enjoining the operation of a sixty-foot wind turbine constructed ten feet from one of the plaintiffs' property lines).

3. *See, e.g.*, Rassier v. Houim, 488 N.W.2d 635, 639 (N.D. 1992) (refusing to grant relief against a wind generator that was built before plaintiffs purchased the adjoining lot).

4. *See, e.g.*, Jad Mouawad, *Oil Giants Loath to Follow Obama's Green Lead*, N.Y. Times, Apr. 7, 2009, at B1.

5. Energy Information Administration, International Energy Outlook 2007 [hereinafter Energy Outlook 2007], http://www.eia.doe.gov/oiaf/archive/ieo07/highlights.html (last visited Apr. 15, 2008).

6. Bob Williams, *Peak-Oil, Global Warming Concerns Opening New Window of Opportunity for New Alternative Energy Sources*, Oil & Gas J., Aug. 18, 2003, at 7.

7. National Commission on Energy Policy, Ending the Energy Stalemate 62 (2004) [hereinafter Stalemate], *available at* http://www.energycommission.org/ht/a/GetDocumentAction/i/1088.

8. *See* Energy Outlook 2007, *supra* note 5 (explaining that most hydroelectric resources in OECD nations have already been developed or lie too far from population centers).

9. *See, e.g.*, World Commission on Dams, Dams & Development: A New Framework for Decision-Making 15 (2000), *available at* http://www.dams.org//docs/ overview/wcd_ overview.pdf (detailing ecological impacts of large dams, including forest and habitat loss, decreased aquatic biodiversity, and modified natural flooding patterns).

10. *See, e.g.*, Prachi Patel, *Hydrogen from Algae*, Tech. Rev., Sept. 27, 2007, http://www.technologyreview.com/read_article.aspx?ch=specialsections&sc=biofuels&id=19438&a=.

11. Cecilia M. Vega, *Newsom Backs Turbine Power Despite Study*, S.F. Chron., Mar. 5, 2008, at B1.

supply in 2007,[12] while other schemes are still years away from viability. Nevertheless, interest in renewable energy has increased rapidly in recent years. Due in part to the rapid construction of wind turbines in Texas,[13] in 2008 the United States surpassed Germany as the leading producer of wind energy, with twenty-five gigawatts of installed capacity.[14]

Despite its recent growth, wind energy will never be the panacea for all of America's future energy needs. Currently, we cannot effectively store electricity without significant costs.[15] Accordingly, reliable electricity production requires a steady and consistent source of power.[16] The erratic nature and variable speeds of wind at any particular location often make wind a risky choice as a dominant power source.[17] The consequences of wind energy's unpredictable nature were amply illustrated in late February of 2008 in northwest Texas: the region narrowly avoided rolling blackouts after a cold front and falling wind speeds caused a drop in wind-generated power from one thousand seven hundred megawatts to three hundred megawatts.[18] According to some analysts, a combination of wind and solar power can provide a maximum of 20 percent of a region's power; "[p]ast that point, either the [intermittent nature of wind power] causes too many power disruptions, or the cost of maintaining so much backup [to make up for shortfalls in wind power production] becomes too high."[19]

Wind energy has major shortcomings, but it nevertheless shows substantial potential for growth, both in the United States and abroad. Over the last thirty years, the cost of wind power has shrunk by 80 percent, and it now tends to cost between four and six cents per kilowatt-hour (kWh).[20] Compared to the hundreds of millions, or even billions, of dollars of financing required to build new coal, gas, or nuclear plants, wind turbines are relatively cheap to construct on an individual basis: a twenty-megawatt facility, made up of twenty-six wind turbines, might require an initial investment of twenty million dollars.[21] However, the cost of installing a wind turbine per unit of electricity produced,

12. Energy Information Administration, Primary Energy Production by Source, Selected Years, 1949–2008 1, *available at* http://www.eia.doe.gov/emeu/aer/pdf/pages/ sec1_7.pdf.

13. Clifford Krauss, *Move Over, Oil, There's Money in Texas Wind*, N.Y. Times, Feb. 23, 2008, at A1.

14. U.S. Department of Energy, U.S. Wind Power Capacity Vaults to Top Spot due to Rapid Growth, Feb. 11, 2009, http://apps1.eere.energy.gov/news/news_detail.cfm/news_id=12237.

15. *See*, *e.g.*, Lazaros Exarchakos, Matthew Leach, and Georgios Exarchakos, *Modelling Electricity Storage Systems Under the Influence of Demand-Side Management Programs*, 33 Int'l J. of Energy Res. 62, 63 (2009) ("Investments in [energy storage systems] still face high capital costs even for the mature technologies").

16. *See id.*

17. *See id.*

18. Tom Fowler, *Slow Wind Nearly Caused Blackouts*, Hous. Chron., Feb. 29, 2008, at B1.

19. Paul Roberts, The End of Oil 190 (2004).

20. Stalemate, *supra* note 7, at 63.

21. American Wind Energy Association, 10 Steps in Building a Wind Farm, *available at* http://www.awea.org/pubs/factsheets/10stwf_fs.PDF.

which was $1540 per kilowatt in 2007,[22] is more than double the cost per kilowatt of building a new combustion turbine natural gas plant.[23] As of January 31, 2009, wind power plants had reached a total installed capacity of 26,274 megawatts in the United States, enough to supply power to 6.5 million homes.[24]

In theory, the aggregate wind resources of the United States could produce sufficient energy to meet the nation's entire electricity demand.[25] While the erratic nature of wind, transmission issues, and storage constraints would surely preclude growth in wind energy on such a large scale, the U.S. Department of Energy produced a report showing that a favorable policy environment and sufficient investment could lead to a scenario in which wind energy will provide 20 percent of the U.S. power supply by 2030.[26]

Wind energy also has significant tax benefits for operators of wind projects. A federal production tax credit grants taxpayers who construct wind farms a credit on their income taxes for every kilowatt-hour of wind energy they produce.[27] The economic stimulus package passed by Congress included tax incentives, loan guarantees, and direct payments to renewable energy companies that installed new wind power capacity.[28] Many states also grant some form of tax benefit to wind turbines, including small-scale turbines in residential areas.[29]

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22. U.S. Department of Energy, Annual Report on U.S. Wind Power Installation, Cost, and Performance Trends 2007, *available at* http://www1.eere.energy .gov/windandhydro/pdfs/43025.pdf.

23. Energy Information Administration, Electricity Market Module 3, *available at* http://www.eia.doe.gov/oiaf/aeo/assumption/pdf/electricity.pdf.

24. U.S. Department of Energy, *Wind Powering America*, http://www.windpoweringamerica.gov/.

25. U.S. Department of Energy, *Wind Energy Resource Potential*, http://www1.eere.energy.gov/windandhydro/wind_potential.html (last visited Apr. 11, 2009).

26. U.S. Department of Energy, 20% Wind Energy by 2030, at 1 (2008), *available at* http://www.20percentwind.org/20percent_wind_energy_report_revOct08.pdf.

27. 26 U.S.C. § 45(d).

28. *See, e.g.*, Anne C. Mulkern, *Stimulus, Policy Shifts Seen Spurring U.S. Renewable Energy Boom – Someday*, 10 Greenwire 9, Mar. 6, 2009.

29. *See, e.g.*, Mont. Code Ann. § 15-32-201 (granting income tax credit of up to five hundred dollars for the cost of a taxpayer's installation of a wind energy generator at his or her "principal dwelling"); *see also* Idaho Code Ann. § 63-3022C (granting deduction of up to twenty thousand dollars over four years for installation of "an alternative energy device" at taxpayer's residence); *see also* Mona L. Hymel and Roberta F. Mann, *Getting Into the Act: Enticing the Consumer to Become "Green" Through Tax Incentives*, 18 Ariz. Legal Stud., Discussion Paper No. 06-18 (2006), *available at* http://ssrn.com/abstract=894131 (discussing policy incentives for consumers to purchase renewable energy generators).

Despite the fact that wind turbines require no fuel and produce no carbon-dioxide emissions,[30] wind projects have drawn significant amounts of opposition in recent years. Perhaps the most famous instance of community opposition to wind energy development lies in the proposed "Cape Wind" project in the Nantucket Sound on the coast of Massachusetts, which has inspired the ire of members of Congress and notable Nantucket residents such as the Mellon, DuPont, and Kennedy families.[31] On a smaller and less publicized scale across the United States, residents of areas targeted for wind power developments have voiced opposition to the projects. Some oppose wind turbine construction due to their "aesthetically unpleasing" nature.[32] Others worry about the noise created by high-speed wind turbines and the potential for wildlife to be hurt by the spinning blades.[33]

These concerns are at least partially justified. Aesthetic judgments vary among well-intentioned individuals, and although some view wind turbines as elegant alternatives to coal and gas power plants, many others find them unattractive. Wind turbines produce noise that has been variously described as "buzzing, whooshing, pulsing, and even sizzling."[34] However, one expert argues that the noise caused by wind turbines "can be related to other ambient noises" at higher wind speeds.[35] A report by the British government concluded that noise concerns should not hinder the development of wind power developments "where there is a reasonable distance between properties and turbines."[36] Wind turbines also have been estimated to cause ten thousand to forty thousand bird deaths per year in the United States[37] and may cause substantial numbers of bat deaths as well.[38] However, conservation groups such as the American Bird Conservancy have supported continued wind project developments, so long as these projects work carefully to minimize harm to birds and other wildlife via detailed environmental impact assessments and consideration of the habitats and migration routes that a new development

30. American Wind Energy Association, Wind Energy and Wildlife: The Three C's, *available at* http://www.awea.org/pubs/factsheets/050629-ThreeC%27sFactSheet.pdf.

31. Wendy Williams & Robert Whitcomb, Cape Wind 77, 128 (2007).

32. Joseph P. Tomain & Richard D. Cudahy, Energy Law in a Nutshell 361 (2004).

33. *Id.*

34. Daniel J. Alberts, Primer for Addressing Wind Turbine Noise 8 (2006), *available at* http://www.maine.gov/doc/mfs/windpower/pubs/pdf/AddressingWindTurbine Noise.pdf.

35. *Id.* at 9 ("While writing this paper, I visited the Bowling Green Wind Farm Project, in Bowling Green, OH. At the base of 1.8 MW turbine, we measured the noise level at 58–60 dB(A). However, the turbines stand in a corn field, and depending on our position relative to the turbines, it was very difficult to distinguish the sound of the turbine from the rustling of the corn stalks.").

36. Sustainable Development Commission, Wind Power in the UK 81 (2005), *available at* http://www.sd-commission.org.uk/publications/downloads/Wind_Energy-NovRev 2005.pdf.

37. Wallace P. Erickson et al., Avian Collisions with Wind Turbines, A Summary of Existing Studies and Comparisons to Other Sources of Avian Collision Mortality in the United States 1 (2001), *available at* http://www.nationalwind.org/ publications/wildlife/avian_ collisions.pdf.

38. *See, e.g.*, Catherine Brahic, *Wind Turbines Make Bat Lungs Explode*, New Scientist, Aug. 25, 2008, at 4.

could threaten.[39]

While the environmental impact of wind turbines remains controversial, wind turbines have been installed at a rapid pace in the United States and elsewhere in recent years.[40] Although some neighboring landowners have been content to allow wind turbines to be installed near their property, in spite of any noise or potential hazards to wildlife, others have attempted to use the legal system to halt these developments. This Comment assesses the recent trend of using nuisance lawsuits as a mechanism to halt the development of wind power projects. In Part I, this Comment discusses the historical origins of the nuisance doctrine and examines the evolution of the doctrine into the contemporary common law of nuisance. In Part II, this Comment explores the outcomes of recent nuisance lawsuits against wind developments. Part II focuses on two recent decisions, *Burch v. NedPower Mount Storm, LLC* and *Rankin v. FLP Energy, LLC*, which present contrasting visions of the merits of nuisance litigation against a wind development.[41] In Part III, this Comment assesses *NedPower* and *Rankin* in light of both public policy and the historical development of the nuisance doctrine. Part III will synthesize *NedPower*, *Rankin*, and public policy into a new standard for courts to apply when they confront nuisance claims against wind power developments.

I
THE ORIGINS AND EVOLUTION OF THE LAW OF NUISANCE[42]

Nuisance law has existed in some form since the days of the Roman Empire.[43] Over the centuries, the law has become more clearly defined, and its scope has gradually expanded. However, some of the principles underlying Roman nuisance doctrines, particularly an emphasis on the unreasonableness of an alleged nuisance, have lasted to modern times and are enshrined in contemporary American jurisprudence.[44]

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39. *See, e.g.*, American Bird Conservancy, American Bird Conservancy's Wind Energy Policy, http://www.abcbirds.org/abcprograms/policy/wind/wind_policy.html (last visited Apr. 11, 2009). The conservancy states:

> While ABC supports alternative energy sources, including wind power, ABC emphasizes that before approval and construction of new wind energy projects proceeds, potential risks to birds and bats should be evaluated through site analyses, including assessments of bird and bat abundance, timing and magnitude of migration, and habitat use patterns.

Id.

40. *See, e.g.*, Brit T. Brown & Benjamin A. Escobar, *Wind Power: Generating Electricity and Lawsuits*, 28 Energy L.J. 489, 490 (2007) ("[W]ind energy is the fastest growing source of electricity worldwide.").

41. Burch v. NedPower Mount Storm, LLC, 647 S.E.2d 879, 885 (W. Va. 2007).

42. The following section draws extensively from James Gordley & Arthur Taylor von Mehren, An Introduction to the Comparative Study of Private Law (2006).

43. *Id.* at 167–68.

44. *See, e.g.*, Restatement (Second) of Torts § 822 (1979).

A. Historical Origins

Some of the earliest laws regarding nuisance are found in the Digest. Compiled by the Roman emperor Justinian in 533 A.D., the Digest contains a compilation of the writings of the "great jurists" of Roman law and provides a glimpse of the first manifestations of the nuisance doctrine.[45] In section 8.5.8.5 of the Digest, for example, the jurist Aristo declares that a cheese shop may not lawfully discharge smoke into the buildings above it and that a higher property may not discharge water onto a lower property.[46] The Digest is far from consistent, however: in section 8.5.8.6, the writer Pomponius expresses the view that a neighbor's creation of a "moderate amount of smoke on his own premises, for example, smoke from a hearth" does not give rise to a cause of action.[47]

Five hundred years after the completion of the Digest, as Europe began to emerge from the Dark Ages that followed the fall of Rome, medieval scholars in Western Europe began to use the compilation "as a source of rules and arguments."[48] One jurist, Odofredus, developed the maxim that one's land cannot be used "in a way that bothers others."[49] Much later, this same idea was incorporated into William Blackstone's *Commentaries on the Law of England*, the "first attempt to describe the common law systematically,"[50] with only slightly modified wording: "use what is yours so as not to injure another."[51]

One medieval scholar, Bartolus, recognized that reasonable uses of one's own property should not lead to a cause of action for neighbors: a household's discharge of fire from the hearth or water from a water clock would be legal "unless [the property owner] acts with an intention to injure."[52] On the other hand, Bartolus argued that discharges of great amounts of smoke by a shop, or of water "beyond what is normal," would not be legal.[53] Thus, although the state of nuisance law remained unsettled in Roman and medieval times, some jurists like Bartolus began to consider both the extent of the interference with a neighbor's property and the reasonableness or normal character of the behavior as mitigating factors for otherwise actionable behavior. Only interferences that were substantial and abnormal would be prohibited.

45. Gordley & von Mehren, *supra* note 42, at 31, 167–68.
46. *Id.* at 167–68.
47. *Id.* at 168.
48. *Id.* at 33.
49. *Id.* at 168.
50. *Id.* at 17.
51. *Id.* at 168 (quoting 2 William Blackstone, Commentaries *306).
52. *Id.* at 169.
53. *Id.*

Although the U.S. common law system did not arise directly from the Roman civil code that was compiled by Justinian and later interpreted by jurists like Bartolus, some of the same policies underlying the Roman code can be seen in contemporary legal systems. Reasonableness was the ultimate standard in the Digest—normal uses of land would not be actionable, even if they bothered neighbors, but activities that were either abnormal or excessive for their location could be stopped.[54] Bartolus's language suggests that these early nuisance guidelines were an attempt to balance the right of a landowner to use his property as he wished with the rights of adjacent landowners to be free of disturbances. If, therefore, a homeowner made a fire "in the usual way for the ordering of his family," he could not be liable for smoke bothering his neighbors, because making a fire is the right of a homeowner.[55] Similarly, contemporary nuisance law in the United States considers whether behavior is "unreasonable" and if "the gravity of the harm outweighs the utility of the actor's conduct."[56] In both legal systems, the rights of the offending landowner to do what she wishes with her land must be carefully weighed against the rights of neighboring landowners to be free of unreasonable disturbances.

B. Current U.S. Nuisance Law

In modern U.S. jurisprudence, the law of nuisance has assumed a prominent role as the "most common method of asserting an environmental right."[57] A plaintiff can sue either for an injunction or for damages when a defendant has interfered with the plaintiff's use of property.[58] To prevail in a private nuisance suit, the defendant's conduct must cause significant harm to the plaintiff's private use and enjoyment of land, and the conduct must be either intentional and unreasonable or unintentional and negligent, reckless, or abnormally dangerous.[59] An intentional nuisance involves "interference with use and enjoyment of land . . . that continues over time and is known by the defendant to result from its activities."[60] Commonly invoked examples of such an interference include "pollution, noise, odors, vibrations . . . [and] excessive light."[61]

The unreasonableness of an alleged nuisance plays a key role in establishing liability.[62] Just as Bartolus said that the normal or abnormal character of an activity would play a key role in determining the presence of a

54. *Id.*
55. *Id.*
56. Restatement (Second) of Torts § 826 (1979).
57. Note, *Aesthetic Nuisance: An Emerging Cause of Action*, 45 N.Y.U. L. Rev. 1075, 1077 (1970) [hereinafter *Aesthetic Nuisance*].
58. E.E. Woods, Annotation, *Electric Generating Plant or Transformer Station as Nuisance*, 4 A.L.R.3d 902 § 1[c] (1965) (discussing mechanics of nuisance lawsuits against electric plants and other power infrastructure).
59. Restatement (Second) of Torts §§§ 821D, 821F, 822 (1979).
60. Jesse Dukeminier et al., Property 642 (6th ed. 2006).
61. *Id.*
62. *See id.*

nuisance,[63] American law inquires as to whether an interference is unreasonable on a case-by-case basis.[64] A determination of whether a particular activity is in fact unreasonable requires weighing the "utility of the actor's conduct" against the "gravity of the harm" to neighboring landowners.[65]

The location of the alleged nuisance and the character of the surrounding neighborhood also play significant roles in determining whether a particular activity is reasonable or unreasonable.[66] For example, a plaintiff who bought an apartment in an industrial area in Buffalo had no cause of action for smoke and dust from nearby factories, since "[a] person who prefers the advantages of community life must expect to experience some of the resulting inconveniences."[67] In another case, the West Virginia Supreme Court refused to enjoin an automobile junkyard for unsightliness in "a section of a municipality [that was] not a clearly established residential community."[68] The converse, of course, is also true: an activity that might not be a nuisance in an industrial area may be held to be an actionable nuisance when constructed in a residential neighborhood.[69]

Thus the underlying policy from Bartolus, that the reasonableness of an interference should act as a mitigating factor, remains the same, but its scope has been expanded somewhat. Reasonable activities now include not only the typical rights of a landowner, but also more intrusive and bothersome activities if they are found to have significant social or economic value. In Bartolus's time, defining reasonable rights in terms of a homeowner's right to light a fire or to dump household water may have made sense. But in an industrialized society, where households vie for space with sewage plants, landfills, factories and power plants, reasonableness must also account for the rights of the noisy,

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63. *See* Gordley & von Mehren, *supra* note 42, at 169.

64. *See, e.g.*, Morgan v. High Penn Oil, 77 S.E.2d 682 (N.C. 1953).

65. Restatement (Second) of Torts § 826(a) (1979). The following sections further state:

> In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important: (a) The extent of the harm involved; (b) the character of the harm involved; (c) the social value that the law attaches to the type of use or enjoyment invaded; (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and (e) the burden on the person harmed of avoiding the harm.

Id. § 827.

> In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important: (a) the social value that the law attaches to the primary purpose of the conduct; (b) the suitability of the conduct to the character of the locality; and (c) the impracticability of preventing or avoiding the invasion.

Id. § 828.

66. *See* Gordley & von Mehren, *supra* note 42, at 178.

67. Bove v. Donner-Hanna Coke Corp., 258 N.Y.S. 229, 232 (N.Y. App. Div. 1932).

68. Parkersburg Builders Material Co. v. Barrack, 191 S.E. 368, 371 (W. Va. 1937).

69. *See, e.g.*, Bloch v. McCown, 123 So. 213, 214 (Ala. 1929) ("A business, lawful in its nature, as is the business proposed by the defendant in this cause, and not a nuisance per se in one locality, may become a nuisance when conducted and maintained in another which is residential in character.").

smelly, and obtrusive activities that are a necessary part of a well-functioning and prosperous nation. The law cannot permit these useful but annoying activities to operate everywhere, of course, but conversely, nuisance lawsuits cannot be allowed to strip landowners everywhere of their right to perform these activities on their land.[70] Citizens may still use the nuisance mechanism to vindicate their property rights and their environmental interests, but for policy reasons courts will carefully deliberate before ruling against a harmful activity that has significant utility and that is appropriately sited.

This balancing of utility and harm can be vividly seen in *Boomer v. Atlantic Cement Co.*, in which plaintiff landowners sued a nearby cement plant for nuisance due to dirt, smoke, and vibrations from the plant.[71] The Court of Appeals of New York acknowledged that the normal state rule required an injunction, even if the economic impact of the injunction exceeded the effect of the nuisance by a "marked disparity."[72] Since the pollution and noise from the cement plant had clearly damaged the neighboring plaintiffs' properties, the state rule mandated an injunction.[73]

Nevertheless, the court in *Boomer* recognized that to literally follow the rule would result in the immediate closure of the plant and elimination of its jobs.[74] The court chose to strike a middle path, since "the judicial establishment [was not] equipped . . . to lay down and implement an effective policy for the elimination of air pollution."[75] The court allowed the defendants to pay permanent damages to the plaintiffs, thereby avoiding the injunction that it would otherwise issue.[76] *Boomer*, and other cases like it, evince a desire by American courts in recent decades to "balance the equities"[77] by considering both the harm caused by the nuisance and the harm that would be incurred by enjoining the offensive activity due to the loss of its social utility. This desire to weigh the competing interests in a nuisance suit can be seen as a direct heir to Bartolus' concern that only abnormal and excessively offensive activities be declared unlawful.

The *Boomer* decision also speaks, quietly, to the importance of another important principle in nuisance litigation: judicial restraint. The court explicitly acknowledged that it did not have the resources or the expertise to effectively police air pollution.[78] In view of this limitation, although the *Boomer* court had

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70. *See, e.g.*, Restatement (Second) of Torts § 828(b) (1979) (noting that "the suitability of the conduct to the character of the locality" can be a factor indicating the utility of a particular activity, and thus weighing against finding it to be an unreasonable nuisance).

71. Boomer v. Atl. Cement Co., 257 N.E.2d 870, 871 (N.Y. 1970).

72. *Id.* at 872.

73. *See id.*

74. *Id.* at 873.

75. *Id.* at 871.

76. *Id.* at 875.

77. Program of Policy Studies in Science and Technology, George Washington University, Legal-Institutional Implications of Wind Energy Conversion Systems (WECS) 169 (1977) [hereinafter WECS] (quoting Restatement (Second) of Torts, § 822 (1979)).

78. *Boomer*, 257 N.E.2d at 871.

the authority to halt the operation of the noisy and dirty cement plant at issue, it chose not to take that drastic step. Instead, the court attempted to compensate the plaintiffs while leaving bigger-picture decisions for future legislators or expert policy-makers. *Boomer*'s attempt to forge a decision that was fair and modest in scope resulted in an opinion that was remarkable both in its balance between the two parties' interests and in its refusal to create a precedent that would usurp the legislature's role in crafting proper public policy.

C. Nuisance Law's Applicability to Wind Energy Plants

As discussed earlier, the most likely successful avenues for nuisance suits against a wind farm lie in the noise, vibrations, and negative aesthetic qualities (including any "strobe" or "flicker effect" on sunlight) relating to the wind project.[79] Significant case law addresses the issue of electric plants and other industrial plants as nuisances, and presumably the same general standards would apply to wind turbines. Wind turbines have an initial advantage over fossil-fuel-burning power plants, however, in that they do not produce smoke, soot, or other pollution. Since the time of Bartolus,[80] large quantities of smoke and other soot have been a textbook case of nuisance, and courts continue to fine or enjoin pollution-producing enterprises using similar logic.[81]

This Comment will not dwell on the potential for nuisance lawsuits arising from thrown ice or other debris from a wind turbine. At least one study has shown that the risk of damage from thrown ice from wind turbines should be quite low, since they tend to be built in rural areas and far from population centers or residential neighborhoods, where the risk would be highest.[82] This study resulted in a simplified empirical calculation for the "maximum throwing distance."[83] Based on this formula, the maximum throwing distance of a turbine would be approximately 243 meters (797 feet).[84] Although this is a significant

79. *See* Burch v. NedPower Mount Storm, LLC, 647 S.E.2d 879, 885 (W. Va. 2007).

80. *See* Gordley & von Mehren, *supra* note 42, at 169 ("if the owner of the lower premises wants to make a shop or inn where he is continually making a fire and a great deal of smoke, he is not allowed to do so").

81. *See, e.g.*, Searcy v. Ky. Util. Co., 267 S.W.2d 71, 72 (Ky. 1954) ("[s]ince the [jury] instructions are based upon the pleadings and proof, the words, 'soot and smoke,' should have been included therein"); *see also* Parsons v. Uvalde Elec. Light Co., 163 S.W. 1 (Tex. 1914) (affirming nuisance liability for electric generating plant when it deposited smoke, dust, and cinders in and around plaintiff's home).

82. Henry Seifert et al., Risk Analysis of Ice Throw from Wind Turbines 1, 9 (2003), *available at* http://web1.msue.msu.edu/cdnr/icethrowseifertb.pdf (noting, however, that ice thrown by wind turbines can be a serious hazard and that "wind farm developers should be very careful at ice endangered sites in the planning phase and take ice throw into account as a safety issue").

83. *Id.*

84. The maximum throwing distance is calculated by multiplying 1.5 by the sum of the rotor diameter and the hub height in meters. According to the New York State Energy Research and Development Authority, the tallest wind turbine in the United States in May 2005 had a hub height of eighty meters and a rotor diameter of eighty-two meters. New York State Energy Research and Development Authority, Wind Turbine Technology Overview 7 (2005), *available at* http://www.powernaturally.org/Programs/Wind/toolkit/9_windturbinetech.pdf.

distance, this Comment will assume that most major wind farm developments of the type at issue in *NedPower* and *Rankin* are located at least that distance from residential areas or from the property of homeowners who would consider bringing a nuisance suit. Any wind turbine closer than this to a residential neighborhood or that actually threw ice onto neighboring residential property would show clear potential for a nuisance claim. The legal implications of noise, vibrations, and aesthetic concerns associated with wind farms will now be considered in turn.

1. Nuisance Suits Arising from Noise and Vibrations

Noise and vibrations often give rise to nuisance claims. U.S. courts typically balance the equities in an attempt to decide whether or not a particular source of noise is unreasonable.[85] *Boomer*, discussed above, was a seminal case in the jurisprudence of nuisance due to noise and vibrations, but air pollution was also alleged.[86] Other courts have found noise and vibration to constitute valid causes of action without any ensuing air pollution.[87] In *Fendley v. Anaheim*, a California Court of Appeals found a power plant one hundred to one hundred fifty feet away from the plaintiffs' home to constitute a nuisance when the plant's operation caused constant shaking that disturbed the plaintiffs and their tenants.[88] Similarly, in *Kentucky & West Virginia Power Co. v. Anderson*, the Kentucky Supreme Court upheld a nuisance verdict against a transformer substation fifteen feet from the plaintiff's home, when the substation caused a "constant vibrating noise or humming" that was fully audible on the plaintiff's property.[89]

On the other hand, in *Mississippi Power Co. v. Ballard*, the plaintiffs complained of a humming noise, but their nuisance verdict against a substation

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85. *See* 58 Am. Jur. 2d *Nuisances* § 139 (2009). The section states:

> Whether noise constitutes a nuisance is a relative question, requiring the weighing of the competing interest and rights of the parties in each case, and to constitute a nuisance and a disturbance of the peace, a noise must be an unreasonable one in the circumstances or cause material annoyance. A noise becomes an actionable nuisance only when it passes the limits of reasonable adjustment to the conditions of the locality and of the needs of the maker when considered against the needs of the listener.

Id.

86. *See, e.g.*, Joel C. Dobris, Boomer *Twenty Years Later: An Introduction, with Some Footnotes About "Theory,"* 54 Alb. L. Rev. 171, 181 (1990) ("The property scholars' love affair with the notion that damages are superior to the permanent injunction as a remedy for nuisance has its direct origins in the *Boomer* decision").

87. Woods, *supra* note 58, § 10.

88. Fendley v. Anaheim, 110 Cal.App. 731, 735 (Cal. App. 4th 1930). The court stated:

> [W]e cannot perceive how a residence could escape some appreciable damage from a vibration that would cause a bouquet of flowers on the dining-room table to reveal the vibrations, and liquid in small bottles to manifest the presence of vibrations; in fact, it appears by respondent's own evidence that they were of such a nature as to declare the presence of vibrations or shaking that would materially damage property.

Id.

89. Ky. & W. Va. Power Co. v. Anderson, 156 S.W.2d 857, 858 (Ky. App. 1941).

was remanded to the trial court.[90] The court acknowledged that noise could create an actionable nuisance when "it is of such character and intensity as to so unreasonably interfere with the comfort and enjoyment of private property."[91] The court held, however, that the substation's noise was not "of sufficient intensity" to meet the standard of unreasonable interference.

Although cases have come out on both sides of the issue of whether noise constitutes a nuisance in any particular instance, general principles emerge that mirror the view of the Restatement of Torts. In cases like *Fendley* and *West Virginia Power*, the noise or vibration was extremely loud or bothersome and quite close to the plaintiffs' homes. In *Fendley*, the plaintiffs could not even have the plaster on their house repaired because the constant vibrations caused "difficulty in getting the plaster to stick to the laths."[92] Likewise, in *West Virginia Power*, "[p]ersons in the house [were] annoyed and disturbed in their conversations and sleep."[93] In *Mississippi Power*, on the other hand, the same level of disturbance was not apparent, and the low-level humming was not considered unreasonable under the circumstances.[94]

These cases embody the Restatement's view that the utility of an activity should be weighed against the gravity of the harm it causes to others' property interests.[95] In all three cases, the utility of the interfering electric infrastructure was manifest. However, in both *Fendley* and *West Virginia Power* the stations caused significant disturbances. In *Mississippi Power*, on the other hand, the court found insufficient noise intensity "to interfere with the comfortable use of property."[96] These noise and vibration cases thus seem to turn on the "the extent of the harm involved," which the Restatement cites as a factor in determining the gravity of harm and whether an activity is unreasonable.[97] While not drawing a bright-line rule, courts have attempted to approach noise and vibration nuisance cases based on the Restatement's twin requirements of a substantial and unreasonable interference.[98] Once again, the rule has changed little since the time of Bartolus.

2. Nuisance Suits Based on Unsightliness or Aesthetic Concerns

Historically, U.S. courts have been extremely hesitant to label ugly, unattractive, or otherwise visually unappealing structures as nuisances.[99]

90. Miss. Power Co. v. Ballard, 153 So. 874, 877 (Miss. 1934).
91. *Id.* at 875.
92. *Fendley*, 110 Cal. App. at 734.
93. *W. Va. Power*, 156 S.W.2d at 858.
94. *Miss. Power*, 153 So. at 875.
95. Restatement (Second) of Torts § 826 (1979).
96. *Miss. Power*, 153 So. at 875.
97. Restatement (Second) of Torts § 826 (1979).
98. *Id.* §§ 826–27.
99. 58 Am. Jur. 2d *Nuisances* § 85 (2009) ("a thing is not a nuisance merely because it is unsightly, offends the aesthetic sense, makes the vicinity less attractive, or creates mental discomfort"); *see, e.g.*, Mathewson v. Primeau, 395 P.2d 183, 184 (Wash. 1964) (citing past cases

However, aesthetic concerns can sometimes play a part in the "balancing" test to determine if the harm caused by the nuisance outweighs the harm resulting from an injunction.[100] *Mathewson v. Primeau*, a case from the Supreme Court of Washington, upheld the traditional U.S. rule and refused to grant a nuisance injunction on aesthetic grounds in a case where the defendants kept pigs, old cars, and assorted debris in an unsightly manner on their thirteen-acre property.[101] While the court granted some relief on account of the pigs' noxious smell,[102] it cited a long line of cases from multiple U.S. jurisdictions affirming the idea "[t]hat a thing is unsightly or offends the aesthetic sense of a neighbor, does not ordinarily make it a nuisance or afford ground for injunctive relief."[103]

The *Mathewson* ruling acknowledged that this doctrine arises in part from judicial restraint.[104] If, as the court in *Mathewson* seemed to assume, there had never been a custom of enjoining aesthetically displeasing developments, then crafting a new rule that changed this custom would be "a great enlargement of the powers of the courts over the properties and customs of the people, and it constitutes an encroachment by the courts into a field that should be occupied by the direct legislative representatives of the people."[105] In short, the *Mathewson* court insisted that changing such a fundamental legal principle required legislative authorization.

Yet the doctrine that courts should not regulate aesthetically displeasing developments has more substance than mere respect for tradition. The inherent problem with regulation of aesthetics is that "aesthetic considerations are fraught with subjectivity and . . . courts have no inclination to knowingly infuse the law with such rampant uncertainty as would result from a contrary rule."[106] Aesthetics are fundamentally different than other potential nuisances, such as noise, because aesthetics are impossible to quantify or to evaluate under normative standards. Whereas two randomly selected juries of citizens would likely reach similar results as to what threshold of noise constituted a nuisance that was unreasonable under the Restatement, the same groups could reach totally opposite results as to whether a given property was so ugly or offensive

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from California, Iowa, Maryland, Tennessee, and Vermont in support of this rule).

100. WECS, *supra* note 77, at 170. *But see* Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 512 (Tex. App. 2008). In *Rankin*, the court stated:

> [R]ecognizing a new cause of action for aesthetical impact causing an emotional injury is beyond the purview of an intermediate appellate court. Alternatively, allowing Plaintiffs to include aesthetics as a condition in connection with other forms of interference is a distinction without a difference. Aesthetical impact either is or is not a substantial interference with the use and enjoyment of land.

Id.

101. *Mathewson*, 395 P.2d at 184 ("It is affirmed, on excellent authority, that 'Pigs is Pigs.'").

102. *Id.* at 188–89.

103. *Id.* at 189.

104. *Id.*

105. *Id.*

106. 58 Am. Jur. 2d *Nuisances* § 87 (2009).

as to constitute a nuisance. The Montana appeals court that considered this issue in the 1980s acknowledged in *Ness v. Albert* that "[o]ne man's pleasure may be another man's perturbation, and vice versa."[107] The *Ness* court also pointed to the potential risk to property rights:

> Judicial forage into such a nebulous area would be chaotic. Any imaginary good from doing so is far outweighed by the lurking danger of unduly circumscribing inherent rights of ownership of property and grossly intimidating their lawful exercise. This court has no inclination to knowingly infuse the law with such rampant uncertainty.[108]

Similarly, American courts have tended not to enforce a right to light and air from neighboring properties. In *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, a court refused to enjoin the construction of a fourteen-story tower that would block sunlight from reaching the plaintiff's hotel's beach and sunbathing properties.[109] The court in *Fontainebleau* made the rationale for its decision very explicit:

> No American decision has been cited, and independent research has revealed none, in which it has been held that—in the absence of some contractual or statutory obligation—a landowner has a legal right to the free flow of light and air across the adjoining land of his neighbor.[110]

This concept, that a "building . . . cannot be complained of as a private nuisance merely because it obstructs the view of neighboring property," has been almost universally upheld.[111] A Nebraska appellate court, which upheld the rule in *Kruger v. Shramek*, found that American courts had universally repudiated the English common law doctrine of ancient lights, where a landowner could obtain an easement for light across neighboring property after a certain period of time and enforce this easement against neighbors who attempted to obstruct that view.[112] Enforcing such a right, the *Kruger* court held, would lead to poor policy outcomes in America because it "could not be applied to rapidly growing communities without working mischievous consequences to property owners," and because it would frustrate the purpose of recording statutes, which "ensure that all property rights are recorded and discoverable by a diligent title search."[113]

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107. Ness v. Albert, 665 S.W.2d 1, 2 (Mo. App. 1983) (refusing to enjoin a defendant from keeping "rusted objects," "broken concrete," and a "partially burned trailer" on his property in rural Missouri).

108. *Id.*

109. Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357, 361 (Fla. Dist. Ct. App. 1959).

110. *Id.* at 359.

111. *See, e.g.*, Kruger v. Shramek, 565 N.W.2d 742, 747 (Neb. App. 1997) ("The ancient lights doctrine as applied to claims involving views has been repudiated by every state considering it.").

112. *Id.*

113. *Id.*

Although many courts are wary, a few have issued nuisance injunctions, at least in part, on aesthetic grounds. In *Foley v. Harris*, in 1982, the Virginia Supreme Court issued an injunction against defendants who kept a mobile home and fourteen to sixteen wrecked automobiles on their lot in a residential subdivision.[114] The court, in granting the injunction, did attempt to limit the availability of new actions based on aesthetic complaints to significant interferences with neighbors' property:

> Freedom from discomfort and annoyance while using land, which inevitably involves an element of personal tastes and sensibilities, is often as important to a person as freedom from physical interruption with use of the land itself. *The discomfort and annoyance must, however, be significant and of a kind that would be suffered by a normal person in the community*.[115]

Other courts that have based their decisions on aesthetic grounds have all taken a similar approach: only aesthetic nuisances that were either coupled with other more traditional nuisances or found in a residential neighborhood have been enjoined. Thus, in *Yaegar v. Traylor*, the Pennsylvania Supreme Court instructed the builders of a parking garage in an "exclusively residential" neighborhood to redesign the structure out of consideration both for the "noise, gas, and vapors" coming from cars and for aesthetic reasons.[116] Similarly, in *Martin v. Williams*, the West Virginia Supreme Court enjoined a used car business built in a previously residential area.[117] The court found nuisance due to the dealership's bright lights, the substantial noise it created, and the aesthetic concerns cited by neighbors.[118] On the other hand, in *Parkersburg Builders Material Co. v. Barrack*, the West Virginia Supreme Court refused to enjoin the operation of a junkyard for abandoned vehicles on aesthetic grounds where the junkyard did not lie in a "clearly established residential community."[119] The court in *Parkersburg Builders* may have opened the door to future

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114. Foley v. Harris, 286 S.E.2d 186, 188 (Va. 1982).

115. *Id.* at 190–91 (emphasis added).

116. Yaeger v. Traylor, 160 A. 108, 109 (Pa. 1932). The court stated:

> The proposed building in the case before us, if erected, must be inclosed entirely and conform in architectural design to the building to which it is attached. Ramps and other devices having a tendency to disturb the peace and quiet of the neighborhood must be avoided, and all means for raising and lowering cars must be within the walls of the building. If it is proposed to supply parking space upon the proof and effective screen must be provided by means of a suitable balustrade or other device to hide the unsightly appearance which would be the result of such practice. No repairs of any character accompanied by noise should be carried on, and the sale of gasoline and oil should be limited strictly to tenants occupying the apartments and having cars stored in the garage.

Id.

117. Martin v. Williams, 93 S.E.2d 835, 845 (W. Va. 1956).

118. *See id.* at 843 ("Unsightly things are not to be banned solely on that account. Many of them are necessary in carrying on the proper activities of organized society. But such things should be properly placed, and not so located as to be unduly offensive to neighbors or to the public.").

119. Parkersburg Builders Material Co. v. Barrack, 191 S.E. 368, 371 (W. Va. 1937). The

suits, however, by noting that a junkyard "is not pleasing to the view," and that one therefore should not be built in a neighborhood of "unquestioned residential character."[120]

Thus, some courts have begun to take a closer look at the aesthetic qualities of an alleged interference when adjudicating a nuisance case. Other courts, however, have strictly adhered to the traditional rule that aesthetics provide no ground for a nuisance suit.[121] But there are clear limits to this inspection of aesthetic qualities by courts. As the West Virginia Supreme Court said in *Parkersburg Builders*, "The rights of property should not be sacrificed to the pleasure of an ultra-aesthetic taste."[122] Instead, aesthetics will play a decisive role only in cases where other forms of nuisance exist, where the aesthetics of a property's use are profoundly out of place in an otherwise residential neighborhood, or in some combination of the two scenarios. Otherwise, even more so than with noises and other traditional uses, the "reasonableness" prong of a nuisance suit will weigh heavily against a court finding nuisance liability for purely aesthetic reasons.

The traditional rule, that aesthetics provide no grounds for a nuisance suit, has thus been challenged, but the policy rationales supporting such a rule remain valid. Although some courts, such as the *Foley* court, are now willing to enjoin particularly outrageous aesthetic nuisances in residential neighborhoods, this decision will still ultimately be a subjective judgment call by the courts.[123] While the decision in *Foley* seems reasonable, courts still tread care-fully for fear of "unduly circumscribing inherent rights of ownership."[124]

3. Nuisance Suits Against Non-Electric Windmills

The jurisprudence of nuisance suits against non-electric windmills never developed into a distinct body of law; instead, the sparse history of these suits closely parallels that of the broader law of nuisance. One of the few mentions of windmills in early nuisance case law, from an 1877 Wisconsin Supreme Court decision, stated in dicta that windmills should not constitute a nuisance *per se*: "Railways, windmills, martial music, cannon, fire works, and many other things . . . are . . . very dangerous, and are actually the source of immense injury; yet courts never declare them public nuisances *per se*, because the

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court stated:

> [E]quity should not be aroused to action merely on the basis of the fastidiousness of taste of complainants. Equity should act only where there is presented a situation which is offensive to the view of average persons of the community. And, even where there is a situation which the average person would deem offensive to the sight, such fact alone will not justify interference by a court of equity. The surroundings must be considered.

Id.

120. *Id.*
121. *See* Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 512 (Tex. App. 2008).
122. *Parkersburg Builders*, 191 S.E. at 371.
123. 58 Am. Jur. 2d *Nuisances* § 87 (2009).
124. Ness v. Albert, 665 S.W.2d 1, 2 (Mo. App. 1983).

utility outweighs the danger."[125] Despite the paucity of nuisance law on the subject of non-electric windmills, this dictum suggests that even courts in the nineteenth century followed the same principles as the Restatement of Torts[126] by weighing the reasonableness or "utility" of a windmill against the harm or interference it might cause to neighbors' property.

II
RECENT NUISANCE LITIGATION AGAINST WIND PROJECTS

In recent years, a number of suits have been filed against wind projects alleging nuisance for noise, vibrations, interference with light, aesthetic concerns, and diminution of property value due to these interferences. While the results of these cases have been mixed, enough have resulted in positive outcomes for the plaintiffs that more are sure to be filed as wind energy development intensifies. Only a few suits have led to a written ruling, and some of these only dealt with small-scale wind developments, so future courts will still have only a few precedents to consider in nuisance suits against large-scale wind power projects.

A. Nuisance Suits Against Small-Scale Wind Projects

The two suits described below involved landowners suing to enjoin the operation of relatively small and isolated wind turbines. As such, while they provide some general guidance, they may not have significant instructive value for courts considering wind developments on a much larger scale. However, these two opinions represent two of the first times that a wind power generator's nuisance potential was considered in court, and as such, they deserve at least cursory treatment.

125. Little v. City of Madison, 42 Wis. 643, 643 (Wis. 1877).
126. Restatement (Second) of Torts § 826 (1979).

1. Rose v. Chaikin*: A Speedy Demise for a Wind Turbine in a Residential Area*

One of the first published wind turbine nuisance suits, *Rose v. Chaikin*, saw a straightforward application of nuisance law by a New Jersey court, which enjoined a wind turbine's operation in 1982.[127] In *Rose*, the defendants constructed a sixty-foot wind generator at a distance of approximately ten feet from their property line with one of the plaintiffs in a "contiguous residential neighborhood" in a coastal area of Brigantine, New Jersey.[128] After the defendants completed construction of the turbine, neighboring plaintiffs experienced "tension" and "stress-related symptoms," including "nervousness, dizziness, loss of sleep and fatigue."[129]

The defendants in *Rose* attempted to have the nuisance suit dismissed on a variety of grounds, claiming that noise could not constitute a private nuisance as a matter of law, that the noise from the windmill did not reach the level of nuisance, and that an injunction was an "extraordinary relief" that should not apply in their circumstances.[130] The court paid little heed to these arguments, quoting a number of cases that clearly established a precedent in New Jersey of enjoining noises that "affect injuriously the health and comfort of ordinary people in the vicinity to an unreasonable extent."[131] Furthermore, the court emphasized that the wind turbine's sound would be loud, constant, and particularly out of place in this residential neighborhood.[132]

Although the *Rose* court ultimately enjoined the operation of the defendants' wind turbine, the court did note the potentially beneficial impacts of wind energy.[133] The defendants had raised the argument that their generator would promote national goals of energy conservation and alternative energy production.[134] While not straying from its decision to enjoin the instant wind tur-bine's operation, the court acknowledged that "[t]he social utility of alternate energy sources cannot be denied; nor should the court ignore the proposition that scientific and social progress sometimes reasonably require a reduction in personal comfort."[135] Ultimately, the court ruled that the positive policy implications of wind turbines should constitute one of the factors to be "weighed against the quantum of harm . . . to others."[136]

Rose saw a victory for an opponent of a wind plant, which seemed reasonable for that case: the facts bore all of the markings of a textbook nuisance suit. The turbine at issue was quite loud, served only to "conserve energy and save on electric bills" for the defendants and therefore had little

127. Rose v. Chaikin, 453 A.2d 1378 (N.J. Super. Ct. Ch. Div. 1982).
128. *Id.* at 1380.
129. *Id.*
130. *Id.* at 1381.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 1382.
136. *Id.*

broader social utility, and was located in a residential area immediately adjacent to the plaintiffs' property.[137] In retrospect, the defendants picked a clearly inappropriate location for a wind turbine, and nuisance doctrine strongly favored an injunction. Yet the *Rose* court also acknowledged the potential utility of wind power projects. On policy grounds, the *Rose* decision thus suggests that wind turbines, if built in a more appropriate and non-residential location, might be found to be "reasonable" uses of land that will not lead to nuisance injunctions.

2. Rassier v. Houim*: An Unconvincing Win for Wind Energy Supporters*

In its 1992 decision in *Rassier v. Houim*, the North Dakota Supreme Court upheld the dismissal of a nuisance suit against a wind power development.[138] In *Rassier*, the facts were relatively straightforward and generally pointed against a nuisance injunction for several reasons. In 1986, Garry Houim constructed a wind turbine on his residential lot in Mandan, North Dakota,[139] a city of approximately sixteen thousand five hundred people.[140] Two years later, in October 1988, Janet Rassier moved into an adjacent lot, where she lived in a mobile home.[141] It was not until more than two years after this, in November 1990, that she finally bring suit against her neighbor for nuisance and violation of their neighborhood's restrictive covenants.[142] Rassier brought her suit due to loud sounds from the turbine, which was forty feet from her house and interfered with her family's use of the yard, and also due to a large piece of ice which she believed was thrown by the wind turbine.[143]

While not eschewing the common law, North Dakota defines nuisance by statute:

> A nuisance consists in unlawfully doing an act or omitting to perform a duty, which act or omission:
>
> > 1. Annoys, injures, or endangers the comfort, repose, health, or safety of others . . . .
> >
> > 4. In any way renders other persons insecure in life or in the use of property.[144]

The *Rassier* court cited this statute, but also acknowledged that the common law doctrine of "coming to the nuisance" could limit nuisance liability: "anyone who comes to a nuisance 'has a heavy burden to establish

137. *Id.*
138. *See* Rassier v. Houim, 488 N.W.2d 635 (N.D. 1992).
139. *Id.* at 636.
140. City of Mandan, North Dakota, http://www.mandannorthdakota.com (last visited Mar. 15, 2008).
141. *Rassier*, 488 N.W.2d at 636.
142. *Id.*
143. *Id.* at 638.
144. N.D. Cent. Code § 42-01-01.

liability.'"[145] Otherwise, *Rassier* followed the basic common law test for nuisance, holding that liability only attaches to a breach of "the absolute duty not to act in a way which unreasonably interferes with other persons' use and enjoyment of their property."[146] Rassier attempted to show such an unreasonable interference due to the sound of the turbine, measured at fifty to sixty-nine decibels, and due to the danger from thrown ice.[147] Houim countered that the Rassier family moved in several years after the turbine began operation, that he had offered to teach the Rassiers how to turn off the turbine when it was noisy, and that safety features removed the dangers of thrown ice or broken blades.[148] Multiple neighbors also testified on the defendant's behalf.[149]

The *Rassier* court did not delve deeply into its rationale for holding that the district court's judgment in favor of the defendant was not "clearly erroneous."[150] Yet the facts in *Rassier* seemed to revolve less around the nuisance issue than around the plaintiff's recalcitrance. If, as apparently was the case, the plaintiff could have turned off the wind turbine at her prerogative, she could hardly complain about an unreasonable interference with her land, no matter how loud the turbine's operation. Moreover, the fact that the plaintiff chose to move next to a forty-foot wind turbine, which she hardly could have missed when surveying the property, surely did not win her much sympathy from the court. *Rassier* cannot therefore be seen as a clear statement of the law of nuisance relating to wind turbines. If anything, a loud, forty-foot-tall turbine in a residential area seems like a good example of when a wind development *should* be a nuisance. Ultimately, *Rassier* provides only a thin reed of support for advocates of wind energy developments; the facts clearly favored the defendant, regardless of the intensity or unreasonableness of the contested interference.

C. Burch v. NedPower Mount Storm, LLC*: A Step Back for Wind Advocates*

After *Rassier*, no written opinions were published on the issue of wind turbines as a nuisance for over a decade until *Burch v. NedPower Mount Storm, LLC*, which overturned a trial court's dismissal of a wind nuisance claim in 2007. In that same time period, installed wind capacity grew exponentially.[151] By the time of *NedPower*, the type of project envisioned was no longer a relatively small windmill in somebody's backyard like the turbines in *Rose* and *Rassier*. Instead, in *NedPower*, the defendant energy company intended to build a huge wind farm on a site fourteen miles long and half mile wide, containing

145. *Rassier*, 488 N.W.2d at 638.
146. *Id.* at 637.
147. *Id.* at 638.
148. *Id.*
149. *Id.*
150. *Id.* at 639.
151. *See, e.g.*, Stalemate, *supra* note 7, at 63.

up to two hundred turbines.[152] Each turbine would be placed on top of a tower that was fifteen feet wide and two hundred ten to four hundred fifty feet tall, with rotor blades approximately one hundred fifteen feet in length.[153] The ruling in *NedPower*, therefore, may be the first published opinion on a nuisance suit against a large-scale modern wind power project, and accordingly, it may come to have a significantly greater precedential impact than either of the *Rose* or *Rassier* decisions.

In July 2003, the West Virginia Public Service Commission (PSC) granted NedPower a certificate of convenience and necessity for the construction of this project in Grant County, on the Allegheny Front, provided that certain environmental conditions were met.[154] The PSC approval of the product was predicated, in part, on its conclusion that "the project will be an economically beneficial, environmentally responsible, windpower facility."[155] Moreover, the PSC found as fact that "[w]ind turbines are very quiet machines, generating less than 30 dBA, comparable to people whispering in a quiet room. If noise will burden any particular residence . . . NedPower will move it."[156] The PSC also noted that the nearest neighborhood of Bismark, West Virginia, was located six-tenths of a mile from the nearest turbine, and that NedPower would relocate any turbine located within eight hundred twenty feet of a permanent residence, at which distance "a turbine would produce noise equivalent to a kitchen refrigerator."[157]

Several years later, in late 2005, seven plaintiffs filed suit against NedPower, seeking a permanent injunction against the facility to prevent the creation of a private nuisance due to noise and vibrations, a "flicker" or "strobe" effect from the turbines; the danger of thrown blades, ice throws, or collapsing towers; and a general reduction in property values.[158] The plaintiffs each lived between a half mile and two miles from the proposed site of the wind project.[159]

The *NedPower* plaintiffs initially saw their suit thrown out at the pleading stage when the Circuit Court of Grant County dismissed the action with prejudice on April 7, 2006.[160] Holding that it lacked jurisdiction to enjoin a project approved by the PSC, that the plaintiffs' assertions suggested a public nuisance rather than a private nuisance, that an injunction would be an

152. Burch v. NedPower Mount Storm, LLC, 647 S.E.2d 879, 885 (W. Va. 2007).

153. *Id.*

154. *See* Public Service Commission of West Virginia, *NedPower Mount Storm LLC*, Commission Order, Case No. 02-1189-E-CN (April 2, 2003) [hereinafter Commission Order], *available at* http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=102728&Source=Archive.

155. *Id.* at 195.

156. *Id.* at 130.

157. *Id.* at 154.

158. *NedPower*, 647 S.E.2d at 885.

159. *Id.*

160. *Id.*

inappropriate remedy, and that the PSC's approval collaterally estopped any further challenges to the project, the circuit court found the plaintiffs' claims to be insufficient as a matter of law.[161]

The West Virginia Supreme Court then stepped into the fray, entertaining an appeal from the plaintiff neighboring landowners.[162] Review of a lower court's judgment on the pleadings is de novo in West Virginia, and the *NedPower* court emphasized at the start of its opinion that motions to dismiss should only bear fruit in "very limited circumstances."[163] The court stated that the West Virginia rule that a judgment on the pleadings should only be granted if when "viewing all the facts in a light most favorable to the nonmoving party . . . it appears beyond doubt that the nonmoving party can prove no set of facts in support of his or her claim or defense."[164]

In analyzing the plaintiffs' nuisance claim, the court first considered noise concerns. West Virginia common law seemed to mimic traditional U.S. law on the issue; *NedPower* reaffirmed the state's rule that "[w]here an unusual and recurring noise is introduced in a residential district, and the noise prevents sleep or otherwise disturbs materially the rest and comfort of the residents, the noise may be inhibited by a court of equity."[165] The court, without substantially considering whether the facts at bar met this standard, held that the plaintiffs' allegation of nuisance due to noise should not have been dismissed.[166]

The court then considered allegations of aesthetic nuisance due to a "flicker" or "strobe" effect from the wind turbines during sunsets. The court cited *Parkersburg Builders* for the general West Virginia rule that "[u]nsightly things are not to be banned solely on that account . . . [b]ut such things should be properly placed, and not so located as to be unduly offensive to neighbors or to the public."[167] The court held that unsightliness alone would rarely justify an injunction, but that "an unsightly activity may be abated when it occurs in a residential area and is accompanied by other nuisances."[168] Finally, the court did not extensively entertain the claim for diminution of property values, saying that diminution in property value without other claims would be "*damnum absque injuria*"[169] (a loss or damage without a wrongful act).[170] Still, the court held that an activity that reduces nearby property values and "also creates interferences to the use and enjoyment" of that property could provide grounds for a nuisance injunction.[171]

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161. *Id.*
162. *Id.*
163. *Id.* at 886.
164. *Id.*
165. *Id.* at 891.
166. *Id.*
167. *Id.*
168. *Id.* at 892.
169. *Id.*
170. Black's Law Dictionary 175 (3d ed. 1996).
171. *NedPower*, 647 S.E.2d at 892.

Ultimately, the *NedPower* court not only held that the plaintiffs' claims for nuisance due to noise, unsightliness, and reduced neighboring property value should not have been dismissed at the pleading stage, but that an injunction—and not damage liability—could have been the proper form of relief.[172] The court set out the general West Virginia rule that injunctive relief against a nuisance requires "danger of injury from [the nuisance to be] impending and imminent, and the effect certain."[173] Applying this rule, the court held that the plaintiffs had alleged certain injury due to "constant loud noise" from the wind turbines, the "turbines' unsightliness," and reduction in property values, and that therefore injunctive relief could be appropriate if the allegations were proven.[174]

The court went further, however, by dismissing one of its own precedents, which suggested that damages would be appropriate instead of an injunction when damages constituted an "adequate remedy at law."[175] Such a precedent, the court held, "is inconsistent with this Court's line of nuisance cases which clearly hold that . . . interferences . . . can best be abated by courts applying equitable principles . . . money damages alone are an insufficient remedy."[176] The court, remanding the suit to the circuit court, stressed that while the lower court had the power to enjoin the entire wind project, it should only grant relief that would "cause the defendant no more injury than is necessary to protect the plaintiff's rights."[177]

The aftermath of *NedPower* has yet to come to fruition, and perhaps it will ultimately have little impact on future nuisance suits against wind projects in West Virginia and across the United States. However, *NedPower* appears to have set a much lower bar for nuisance suits against wind farms than prior nuisance law might have allowed in most U.S. jurisdictions. Unsightliness, reduction of property values, and noise at a great distance may now all be possible grounds in West Virginia not only for a nuisance suit, but for an equitable injunction against proposed wind developments.

D. Rankin v. FPL Energy, LLC*: A Defeated Nuisance Claim in Texas*

A nuisance suit reached a very different outcome in *Rankin v. FPL Energy, LLC* in 2008, in which a state court of appeals upheld a partial motion for summary judgment and a jury verdict in favor of a large wind development in Taylor County, Texas.[178] The appeal centered on a few procedural issues and the trial court's decision to dismiss nuisance claims based on the development's

172. *See id.* at 894.
173. *Id.* at 893.
174. *Id.* at 893–94.
175. *Id.* at 894 (contrasting Severt v. Beckley Coals, Inc., 170 S.E.2d 577 (W. Va. 1969)).
176. *Id.* (arguing that "[c]onstant loud noise and unsightliness that interferes with the use and enjoyment of property simply are not susceptible to computation").
177. *Id.* at 895.
178. Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 513 (Tex. App. 2008).

alleged aesthetic impact.[179] Although the plaintiffs had raised other nuisance claims relating to the noise level produced by the wind turbines and the amount of property devaluation near the wind farm,[180] the plaintiffs lost on these issues after a jury trial and did not raise them on appeal.[181]

The plaintiffs' primary substantive legal concern with the outcome of the trial court proceeding was that the trial judge had both dismissed any nuisance claims based "in whole or in part on the basis of any alleged aesthetic impact" of the wind development on a summary judgment basis and explicitly excluded any consideration of aesthetic issues in the jury instructions.[182] The appeals court reconsidered the summary judgment decision on a de novo basis, allowing it to fully expound on the Texas standard on aesthetic nuisance claims.[183] The court defined nuisance much as the Restatement does:[184] a nuisance is "a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities."[185] The court noted that successful nuisance claims typically involve unreasonable lights, sounds, odors, or foreign substances.[186]

On the specific issue of aesthetic nuisance, the court found that Texas courts have not previously held in favor of a nuisance claim "because of aesthetical-based complaints."[187] After setting forth a number of cases that bolstered this rule,[188] the court turned to the plaintiffs' arguments that their

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179. *Id.* at 508.

180. *See* Doug Myers, *Wind Farm Opponents Plan Appeal*, Abilene Rep.-News Online, Aug. 25, 2008, http://www.reporternews.com/news/2008/aug/25/wind-farm-opponents-plan-appeal/.

181. *Rankin*, 266 S.W.3d at 508.

182. *Id.* at 508 n.3. The full text of the contested jury instructions read as follows:

> In determining whether the Defendant(s) have substantially interfered with the Plaintiffs' use and enjoyment of their property, you may not consider whether the Plaintiffs are offended, disturbed, or annoyed because of the way the wind turbine project has affected their landscape, scenery, or the beauty of the area. Under the laws of the State of Texas, a condition that causes aesthetic changes to the view, scenery, landscape, or beauty of an area is not a nuisance. The Plaintiffs' feelings and beliefs about the turbines' impact on the aesthetic character of the area, including any impact on the beauty, scenery, landscape, view, or appearance of the area may not be considered a substantial interference with the use and enjoyment of the Plaintiffs' property. Therefore, any emotional or physical damage to Plaintiffs or any diminished market value caused by aesthetic or sight-based objections to the condition, if they exist, cannot be a basis for economic or non-economic damage.

Id.

183. *Id.* at 509.

184. Restatement (Second) of Torts §§ 822, 826 (1979).

185. *Rankin*, 266 S.W.3d at 509.

186. *Id.*

187. *Id.*

188. *See, e.g.*, *id.* at 510 (quoting Jones v. Highland Mem'l Park, 242 S.W.2d 250, 253 (Tex. Civ. App. 1951)) ("However cheerless or disagreeable the view of the cemetery in question may be to appellees, and no matter what unpleasant or melancholy thoughts the same may awaken, no reason is thereby shown why appellants should be restrained from making such use of their property.").

claim should nevertheless be permitted.[189] The plaintiffs argued that even if aesthetics alone could not be considered in a nuisance claim, aesthetics could still play a role in establishing an enjoinable nuisance in conjunction with other factors like noise and excessive light.[190] One plaintiff also contended that the impact of the wind turbines had been greater than mere aesthetics.[191] Her plans for building and operating a small bed and breakfast on her land had been cancelled, leading her to call the wind farm's construction "the death of hope."[192]

The court refused to give weight to either type of claim. With regard to the alleged "death of hope," the court found that "merely characterizing the wind farm as abnormal and out of place in its surroundings [does not allow] a nuisance claim based on an emotional reaction to the sight of FPL's wind turbines," based on Texas law requiring a more tangible interference with the plaintiff's property.[193] Moreover, in consideration of Texas' sparse restrictions on lawful property use, the court concluded that finding for the plaintiff in a nuisance lawsuit over changed aesthetics would give the plaintiff, "in effect, the right to zone the surrounding property."[194] The court therefore found that neither aesthetics nor the emotional impact of aesthetics provided grounds for a nuisance suit. [195] Also, in a notable contrast with *NedPower*,[196] the court went a step further, holding that "aesthetics as a condition in connection with other forms of interference is a distinction without a difference" and that "[a]esthetical impact either is or is not a substantial interference with the use and enjoyment of land."[197] Accordingly, the court declined to reverse the trial court's summary judgment order or jury instructions with regards to aesthetics.[198]

The court of appeals made one other interesting observation, although it did not fully flesh out the idea. After acknowledging that Texas case law does not provide a remedy for aesthetic nuisance claims, the court suggested that creating such a remedy would be outside of its authority.[199] Texas common law had carefully balanced the defendant landowner's rights to be free from interference with the plaintiff's rights to use their land lawfully, and "[a]ltering this balance by recognizing a new cause of action for aesthetical impact causing an emotional injury is beyond the purview of an intermediate appellate court."[200] Much like the *Boomer* court's refusal to act as the primary regulator

189. *Id.*
190. *Id.*
191. *Id.* at 511.
192. *Id.*
193. *Id.* at 512.
194. *Id.*
195. *Id.*
196. Burch v. NedPower Mount Storm, LLC, 647 S.E.2d 879, 892 (W. Va. 2007).
197. *Rankin*, 266 S.W.3d at 512.
198. *Id.*
199. *Id.*
200. *Id.* at 511.

of air pollution,[201] the *Rankin* court was unwilling to disturb the carefully balanced common law of nuisance. While this decision may have been motivated in part by the *Rankin* court's status as an appellate court, subject to review by the Texas Supreme Court, it nevertheless exhibits the same general pattern of judicial restraint that was seen in *Boomer*. Rather than make sweeping changes to public policy in Texas, the *Rankin* court instead attempted to accommodate the reasonable interests of both sides while working within the constraints of existing law.

The Supreme Court of Texas denied the *Rankin* plaintiffs' petition for review on April 17, 2009.[202]

E. Ongoing Nuisance Litigation Against Wind Projects

In addition, at the time this Comment went to print, several other nuisance lawsuits against wind power developments were at various stages of litigation or had reached settlement. Several suits have been filed in Texas, including another against FPL Energy which was filed in Cooke County in 2006 but has since settled.[203] Another suit, which sought to enjoin the construction of a wind farm by Gamesa Wind USA in Jack County, Texas, saw the court grant partial summary judgment in favor of defendants.[204] In the suit against Gamesa, the court's order removed aesthetics from consideration as a nuisance and also precluded evidence and arguments that wind energy developments would be misguided public policy.[205] The plaintiffs in the *Gamesa* suit subsequently filed a motion for nonsuit,[206] effectively dismissing their own claims.[207] Nuisance lawsuits have also been filed against wind farms in other states, but none have yet resulted in a written opinion.[208]

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201. Boomer v. Atl. Cement Co., 257 N.E.2d 870, 871 (N.Y. 1970).

202. *See* Texas Courts Online, http://www.supreme.courts.state.tx.us/historical/2009/apr/041709.htm.

203. *See* Steven Baron, *New Meets Old: Wind Turbines and the Common Law of Nuisance* 2, The University of Texas at Austin, School of Law, Wind Energy Institute 2008 (Feb. 19–20, 2008).

204. *Id.*

205. *Id.*

206. *Id.*

207. Tex. R. Civ. P. 162 ("At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes.").

208. *See, e.g.*, Phil Ray, *Couple Files Lawsuit Against Wind Company*, Altoona Mirror Online, Dec. 8, 2008, http://www.altoonamirror.com/page/content.detail/id/513950.html.

III
ANALYSIS: *NEDPOWER*, *RANKIN*, AND PROPOSALS FOR NEW STANDARDS IN NUISANCE SUITS AGAINST WIND DEVELOPMENTS

Considering that *Rassier*'s verdict did not deeply engage with the issue of wind turbines as a nuisance and that both *Rassier* and *Rose* dealt with isolated wind turbines on a small scale, *NedPower* and *Rankin* provide the only substantive case law on the issue of nuisance suits against large-scale wind power projects. This leaves advocates of expanded wind energy with unsettled precedent. While *Rankin* represents a clear victory for wind advocates, *NedPower* appears to present potential plaintiffs with a number of avenues for successful nuisance suits against proposed wind power projects. The appeals court in *Rankin* did not have the opportunity to consider the full spectrum of nuisance claims raised against the wind development because the appeal focused primarily on the aesthetics issue, but the court wrote a well-reasoned opinion that properly applied nuisance law and public policy to this claim. *NedPower*, on the other hand, is a difficult decision to reconcile with the black letter rules of nuisance law, the rationales underlying nuisance law's current formulation, and public policy favoring increased development of wind and other renewable energy projects. Accordingly, as discussed in the sections below, the *NedPower* decision should be overturned.

A. The NedPower *and* Rankin *Courts' Applications of Nuisance Law*

Both the *NedPower* and *Rankin* courts had the opportunity to apply nuisance doctrine to the claims they faced, yet only the *Rankin* court dealt with those claims appropriately. While the *NedPower* decision cites all the standard rules of nuisance law, it completely fails to apply these rules to the context of the case. The decision in *Rankin* was more limited, as the only substantive issue on appeal was the aesthetic nuisance claim. The plaintiffs in *NedPower* complained about aesthetics, noise, and reductions in property value. The following subsections will consider the arguments raised by the plaintiffs in *Rankin* and *NedPower* before synthesizing a proposed nuisance standard that courts should apply in similar situations in the future. In short, the court in *NedPower* seriously misunderstood the policies underlying the law of nuisance, particularly with regard to aesthetics issues, while the *Rankin* court approached these issues in a more reasoned manner. Future courts should take heed of the more nuanced approach in *Rankin* when deciding future nuisance lawsuits against wind projects.

1. Noise

In the *Rankin* decision, the court did not have the opportunity to consider nuisance claims based on noise, as these had already been decided at the trial

court level.[209] The *NedPower* court, however, failed to correctly apply the nuisance doctrine to the facts of the case. The *NedPower* court seemed to accept implicitly that the plaintiffs' allegations of "constant loud noise" had merit.[210] Yet the facts alleged showed a marginal risk of any noise whatsoever, and the allegations of nuisance due to noise should have been dismissed as a matter of law. The court noted that, at the closest, the plaintiffs lived a half mile from the proposed turbines, while some lived as far as two miles away.[211] The issue of noise should not have been a factual debate at that point. The West Virginia Public Service Commission, as discussed previously, had noted in issuing its citing certificate that NedPower would relocate any turbine located within eight hundred twenty feet of a permanent residence, a distance at which "a turbine would produce noise equivalent to a kitchen refrigerator."[212] Moreover, the PSC noted that the nearest neighborhood was six-tenths of a mile (approximately 3170 feet) from the development.[213] Although establishing the exact decibel level of audible noise at the plaintiffs' residences would have been a question of fact, no conceivable set of facts could have shown that the noise from these distant turbines would "unreasonably interfere with the comfort and enjoyment of private property."[214]

In West Virginia, a motion for judgment on the pleadings such as the one reviewed by the *NedPower* court should only be granted when "viewing all the facts in a light most favorable to the nonmoving party . . . it appears beyond doubt that the nonmoving party can prove no set of facts in support of his or her claim or defense."[215] West Virginia law permits injunctions of noise claims, "depending on time, locality and degree," such as "where an unusual and recurring noise is introduced in a residential district, and the noise prevents sleep or otherwise disturbs materially the rest and comfort of the residents."[216] In *NedPower*, the plaintiffs simply lived too far from the proposed wind development for noise to ever constitute an actionable nuisance, and the court should have upheld the dismissal of their claims.

Nuisance suits over noise have proven most successful, as in *Rose*, where the noise emanated from a source in close proximity to a residential neighborhood where the residents could reasonably expect quiet and privacy.[217]

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209. Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 508 (Tex. App. 2008).
210. *See* Burch v. NedPower Mount Storm, LLC, 647 S.E.2d 879, 893 (W. Va. 2007).
211. *Id.* at 885.
212. *See* Commission Order, *supra* note 154, at 154.
213. *Id.*
214. Miss. Power Co. v. Ballard, 153 So. 874, 875 (Miss. 1934).
215. *NedPower*, 647 S.E.2d at 886.
216. *Id.* at 891.
217. *See, e.g.*, Rose v. Chaikin, 453 A.2d 1378, 1382 (N.J. Super. Ct. Ch. Div. 1982) ("Plaintiffs specifically chose the area because of these qualities and the proximity to the ocean. Sounds which are natural to this area—the sea, the shore birds, the ocean breeze—are soothing and welcome. The noise of the windmill, which would be unwelcome in most neighborhoods, is particularly alien here.").

The cases cited in *NedPower* all involve the rights of "nearby residents."[218] As a more general national rule, "[a] noise becomes an actionable nuisance only when it passes the limits of reasonable adjustment to the conditions of the locality and of the needs of the maker when considered against the needs of the listener."[219] The plaintiffs here, as already discussed, cannot be said to have been nearby.

Additionally, the proposed project site can hardly be called a "residential" area, despite the *NedPower* court's use of the term to justify its noise and aesthetic nuisance holdings.[220] The proposed wind development would stretch for a length of fourteen miles, with an average width of a half mile.[221] This statement of facts by the court speaks for itself; no neighborhood would include a vast empty tract of land like the proposed wind plant site in *NedPower*. Indeed, the PSC's ruling recognized that the closest house was over half a mile away.[222] There was thus was no residential area nearby with which the court should have concerned itself. Beyond the size of the wind farm, the great distances between the plaintiffs and the wind site, as well as the sparse population of the entire county,[223] show that this was not a densely populated residential area.

Noise can and should provide grounds for a nuisance suit against an interfering neighbor in a residential area, and cases like *Rose* have correctly sustained this cause of action. In *NedPower*, however, the large distances between the plaintiffs' properties and the wind turbines should have led the West Virginia Supreme Court to find that no set of facts could be pled in support of a noise nuisance claim. Since the turbines were not being built in a residential neighborhood, and since any noise would have dissipated well below the threshold of unreasonableness by the time it reached the plaintiffs' properties, any allegations of nuisance due to noise from the wind turbines should have been dismissed as a matter of law.

Rather than force every wind developer facing a wind suit to go to trial over noise concerns, future courts should consider a standard for noise claims that allows the dismissal of claims that clearly lack merit. The Restatement emphasizes factors such as the "extent" and "character" of harm to a plaintiff, and "the suitability of the particular use or enjoyment invaded to the character of the locality."[224] In a case like this, where the wind development was located a significant distance from any residences and where it seemed particularly well-suited to the location, this noise complaint should not have survived the pleading stage.

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218. *NedPower*, 647 S.E.2d at 891.

219. 58 Am. Jur. 2d *Nuisances* § 139 (2009).

220. *NedPower*, 647 S.E.2d at 891–92.

221. *Id.* at 884.

222. *See* Commission Order, *supra* note 154, at 154.

223. Grant County Development Authority, Statistical Data, http://www.grantcounty-wv.com/data.htm (last visited Apr. 11, 2009).

224. Restatement (Second) of Torts § 827 (1979).

A jury should have the chance to make the final determination if there appears to be a chance that the wind development would be close enough to a residential area to cause substantial amounts of noise. Rather than following *NedPower*'s lead, however, in situations where wind turbines have been built relatively far from population centers or residential neighborhoods, future courts should dismiss the case. Individuals have the right to peace in their homes, but this should not entitle every American to an enormous buffer zone between their house and the gentle hum of a refrigerator.[225]

2. Aesthetics

As a general principle, "a thing is not a nuisance merely because it is unsightly, offends the aesthetic sense, makes the vicinity less attractive, or creates mental discomfort,"[226] and the *Rankin* court upheld this traditional standard in its ruling.[227] The *NedPower* court, on the other hand, veered away from the traditional rule, finding that although "unsightliness alone rarely justifies interference by a circuit court applying equitable principles, an unsightly activity may be abated when it occurs in a residential area and is accompanied by other nuisances."[228] Future courts should disregard *NedPower* and continue to follow the traditional rule that aesthetic impact does not give rise to a nuisance.

As an initial matter, the *NedPower* court conditioned any finding of nuisance based on aesthetics or reduction in property value on the presence of "other nuisances."[229] Since, as discussed in the previous subsection, the court should have dismissed the allegation of nuisance-causing noise, any allegations of aesthetic nuisance should also have been dismissed.[230] Yet the court's ruling on aesthetic nuisance merits its own consideration.

West Virginia has historically shown more willingness than other states to break with the common law rule and consider the aesthetic qualities of an alleged interference.[231] Presumably, therefore, other states would be hesitant to adopt *NedPower*'s reasoning on aesthetic concerns. Before, *NedPower*, however, even West Virginia's courts tempered this new cause of action with a strict insistence that "[u]nsightly things are not to be banned solely on that account . . . such things should be properly placed, and not so located as to be unduly offensive to neighbors or to the public."[232] In *NedPower*, the language subtly shifted so that now unsightliness alone "rarely" justifies interference.[233] Otherwise, the court said unsightly activities should only be enjoined when

225. *See* Commission Order, *supra* note 154, at 154.
226. 58 Am. Jur. 2d *Nuisances* § 85 (2009).
227. Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 512 (Tex. App. 2008).
228. Burch v. NedPower Mount Storm, LLC, 647 S.E.2d 879, 892 (W. Va. 2007).
229. *Id.*
230. *Id.*
231. Martin v. Williams, 93 S.E.2d 835, 843 (W. Va. 1956).
232. *Id.*
233. *NedPower*, 647 S.E.2d at 892.

occurring in a residential area and when accompanied by other nuisances.[234]

While *NedPower* emphasizes the fact that an aesthetic nuisance claim will typically only succeed in tandem with other nuisances, the court's opinion nevertheless puts a crack in the dike of the previous standard by allowing consideration of aesthetics in future suits.[235] The *Rankin* court seemed to recognize this danger when it refused to allow consideration of aesthetics even "as a condition in connection with other forms of interference."[236] The *Rankin* court explained its refusal to give cognizance to this "distinction without a difference" by arguing that "[i]f a jury can consider aesthetics as a condition, then it can find nuisance because of aesthetics."[237] In view of this argument, it becomes difficult to comprehend *NedPower*'s modified standard for aesthetic nuisances.

The underlying policy behind limiting aesthetic nuisance suits is that such complaints cannot be quantified due to their inherent "subjectivity" and "courts have no inclination to knowingly infuse the law with such rampant uncertainty."[238] These principles should apply whether aesthetics are a direct cause of action or a mere element of a nuisance claim. *NedPower* claimed to limit aesthetic nuisance suits primarily to situations where other nuisances were also claimed, yet the effect of the court's ruling would be to allow subjective judgments of taste to enter the calculus of future courts in some degree. If the entire point of the traditional policy was to segregate personal biases on aesthetics from the legal system, then allowing aesthetics to be considered as a factor in a nuisance claim is as much of an affront to the general policy as a suit based on aesthetics alone. The *Rankin* court clearly stated the superior and long-standing rule, and future courts should not hesitate to follow *Rankin*'s lead.

Moreover, as stated *supra*, U.S. courts have never guaranteed a right to the unimpeded flow of sunlight across neighboring property.[239] Since the only aesthetic concern alleged in *NedPower* was this "strobe" or "flicker" effect, the plaintiffs seemed to be suing over the occasional impedance to the light shining onto their properties. If U.S. courts have regularly dismissed nuisance suits against permanent obstructions of sunlight, *NedPower*'s creation of a cause of action for temporary, short-lived interferences with sunlight "when the sun is near the horizon"[240] marks a drastic shift away from the common law of aesthetic nuisance.

Based on the *NedPower* court's own standard for aesthetic nuisance, aesthetic concerns should only lead to a nuisance injunction in extremely rare

234. *Id.*
235. *Id.*
236. Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 512 (Tex. App. 2008).
237. *Id.* at 513.
238. 58 Am. Jur. 2d *Nuisances* § 87 (2009).
239. *See* Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959).
240. Burch v. NedPower Mount Storm, LLC, 647 S.E.2d 879, 892 (W. Va. 2007).

circumstances, most likely when the offensive conduct occurred in a residential area, and otherwise only while accompanied by other nuisances. Here, the other nuisance allegations should fail as a matter of law, and, as explained *supra* Part III.A.1, the proposed development was in a sparsely populated county, not in a residential neighborhood. Without these crutches to lean on, the plaintiffs could plead no set of facts that would establish the rare circumstances meriting a judgment against an aesthetic nuisance. The West Virginia Supreme Court should have recognized this as a matter of law, and, accordingly, the allegations in *NedPower* of nuisance due to aesthetic concerns should have been dismissed.

Future courts should not be tempted to follow the *NedPower* court's example and recognize aesthetic concerns as either a stand-alone nuisance claim or as a factor in a complaint alleging multiple nuisances. Consideration of aesthetics at any level represents the type of "[j]udicial forage into . . . a nebulous area" that courts should avoid.[241] Some wind turbines, such as the one at issue in *Rose*,[242] clearly will be nuisances due to their noises, vibrations, or placement in inappropriate locations. But complaints that a wind turbine is ugly or blocks light should not be considered, even in connection with these other more common nuisance claims. To do otherwise would be to give personal taste priority over property rights, and courts should avoid such an outcome.

3. Injunctions Should Not Be the Sole Remedy

The *NedPower* court also should have balanced the equities to weigh the societal benefits of a nuisance-causing activity with the harm caused by the nuisance itself. The beauty of *Boomer* and its progeny was a solution that balanced the interests of both sides: the cement plant was allowed to continue operating, and the employees and investors were thereby appeased, but the nearby landowners were compensated for the ensuing vibrations and pollution.[243] This logic was really only a new spin on the same basic rationale underlying Bartolus' writings centuries before: reasonable uses of property should be allowed to continue, but property owners should receive relief from unreasonable interferences.[244] That is, if a cement plant was a reasonable use of property with significant economic benefits for the surrounding community but caused unreasonable harms to its neighbors, then a balance had to be struck which properly weighed the interests of both sides.

241. Ness v. Albert, 665 S.W.2d 1, 2 (Mo. App. 1983).
242. Rose v. Chaikin, 453 A.2d 1378, 1380 (N.J. Super. Ct. Ch. Div. 1982).
243. Boomer v. Atl. Cement Co., 257 N.E.2d 870, 875 (N.Y. 1970).
244. *See* Gordley & von Mehren, *supra* note 42, at 169.

In *NedPower*, there is no doubt that both sides had reasonable concerns. Yet the court seemed to consider only the interests of the adjoining landowners in holding that injunctive relief was the only appropriate relief. Surely, if a massive wind power development were planned for a quiet residential subdivision or in the middle of a busy shopping district, an injunction should and would be issued. Yet the defendant developers in *NedPower* had chosen a remote site that was ideal for wind power and where little impact could be expected on the few residents of the scarcely-populated county.[245] In such a situation, surely the court could have "balanced the equities." The benefits of the project would have included new jobs in construction and operation of the turbine project, an increased energy supply for the area, and the development of new renewable resources for the local energy portfolio. Indeed, the state PSC explicitly found that the project would be an "economically beneficial, environmentally responsible, windpower facility."[246]

Boomer's solution seems entirely *à propos* here: any damage to the neighboring landowners (which seems far less severe than vibrations and pollution from a cement plant) could have been compensated, and the plant would have been allowed to continue operating and providing benefits to the community. Future courts should follow the precedent of *Boomer* instead of *NedPower*. In some situations, such as the fact pattern in *Rose*, a permanent and immediate injunction would be entirely appropriate. Yet in the future, in gray cases such as *NedPower* and *Rankin*—where there was both a clear public benefit and also alleged harm to neighboring landowners—an all-or-nothing approach makes less sense.

The Restatement of Torts explicitly authorizes a cost-benefit analysis in nuisance suits: an interference is unreasonable if "the gravity of the harm outweighs the utility of the actor's conduct."[247] The *NedPower* court should have considered the utility of the wind development's activities and weighed it against the potential harm to landowners. Future courts hearing nuisance suits against wind developments should weigh harm to the plaintiffs against the aggregate social value of the wind turbines and strongly consider remedies, such as damages, that take both sides' interests into account.

4. Public Service Commission Authorization

The *NedPower* court also should have given greater deference to the judgment of the PSC, which had granted a siting certificate to the planned wind power project. After surveying the West Virginia statutes granting the PSC limited jurisdiction over the siting of energy plants in the state, the *NedPower* court found "no specific language indicating the Legislature's intent to

245. Grant County Development Authority, Statistical Data, http://www.grantcounty-wv.com/data.htm (last visited Apr. 11, 2009).

246. *See* Commission Order, *supra* note 154, at 195.

247. Restatement (Second) of Torts § 826 (1979).

disregard or abrogate the common law doctrine of nuisance."[248] While this may have been true, the *NedPower* court failed to further consider the traditional common law requirements for a nuisance suit: a "substantial" and "unreasonable" interference with a person's use and enjoyment of his property.[249] The PSC specifically called the wind project "environmentally responsible" and "economically beneficial" in its order.[250] Moreover, the PSC noted both that the closest neighborhood was found six-tenths of a mile from the nearest turbine and that NedPower would relocate any turbine located within eight hundred twenty feet of a permanent residence, at which distance "a turbine would produce noise equivalent to a kitchen refrigerator."[251]

The text of the PSC ruling strongly suggested that the project would have only a minimal and not substantial impact on neighbors. Additionally, the PSC's finding that the development would be economically beneficial suggests that its utility may have outweighed any harm it caused, thereby precluding a finding that it caused an "unreasonable" and actionable interference.[252] Accordingly, the *NedPower* court should have considered the PSC's ruling as an additional factor undermining the plaintiffs' attempt to establish a successful nuisance suit. Indeed, the *NedPower* court did acknowledge that the PSC's siting certificate was "persuasive evidence of the reasonableness and social utility of the appellees' use of the property to operate a wind power facility."[253] Yet the court failed to pursue this logic far enough to realize that, even if PSC authorization did not foreclose nuisance liability, its findings at the very least should have been balanced against any alleged harm to the plaintiffs.

In future nuisance claims against wind developments, courts should not feel beholden to decisions by state agencies like the PSC, but they should nevertheless be careful to weigh all relevant information in their calculation of an alleged nuisance's unreasonableness. In at least one state, authorization of electric infrastructure by a state public utility commission has been held to preclude certain types of lawsuits against the operator of that infrastructure.[254] This does not mean that all nuisance suits against wind developments should be barred if the turbines have received some form of state sanction. However, when a state administrative agency grants permission for a project to be built, the findings of that agency should be considered among the factors pointing toward or against unreasonableness. The court in *NedPower* certainly did not have to dismiss the nuisance suit purely because the state PSC had authorized

248. Burch v. NedPower Mount Storm, LLC, 647 S.E.2d 879, 889 (W. Va. 2007).
249. WECS, *supra* note 77, at 169.
250. *See* Commission Order, *supra* note 154, at 195.
251. *Id.* at 154.
252. Restatement (Second) of Torts § 826 (1979).
253. *NedPower*, 647 S.E.2d at 895.
254. *See, e.g.*, S.D. Gas & Elec. Co v. Super. Ct., 920 P.2d 669 (Cal. 1996) (dismissing suit for personal injury and injunctive relief due to alleged radiation from high-voltage power lines, where state PUC had adopted policy on electromagnetic fields and relief sought would interfere with state's regulatory powers).

the project, since "[t]he PSC did not specifically decide the issue of whether the social utility of the wind power facility outweigh[ed] any interference."[255] Nevertheless, the *NedPower* court should have taken heed of the extensive fact-finding and conclusions contained in the state PSC order, and future courts should do likewise.

B. Policy Considerations in Wind Nuisance Suits

This Comment has already identified a number of important legal considerations in future nuisance suits against wind energy. However, the success or failure of suits like *NedPower* and *Rankin* has broader implications for state, federal, and international energy policy.

If the country is to make a successful transition to an energy portfolio where a significant portion of its electricity comes from renewable sources, areas with wind energy potential should be encouraging development rather than threatening to shut down enormous investments because of distant noise and aesthetic concerns. The nuisance lawsuit mechanism has allowed for an equilibration between the needs of industry and the needs of neighboring property owners for decades by allowing industry to continue operating if it pays sufficient compensation. There is no reason why this mechanism should work for dirty cement plants and noxious fossil-fuel power plants but not for emission-free wind turbines, which produce *less* noise, *fewer* emissions, and are arguably *less* unsightly. West Virginia's new, unyielding stance in favor of neighboring property owners could ultimately threaten not only wind projects but any new economic development in the second-poorest state in the nation.[256]

Fundamentally, suits such as *NedPower* and *Rankin* raise basic questions about whether the nuisance mechanism, once the "most common method of asserting an environmental right"[257] in U.S. private law, is now being used to undermine environmental progress. Clearly in a case like *Boomer* or in many of the other aforementioned cases that involved a polluting factory, a nuisance injunction would have been beneficial both to the individual plaintiffs, who bore the brunt of pollution emissions, and to society as a whole, which would (assuming the plant did not relocate elsewhere) see a reduction in aggregate pollution. In cases such as *NedPower*, however, we see the broader societal benefits of renewable energy lost to the "not in my backyard" mentality of the neighboring landowners. Clean energy sources such as wind turbines should be encouraged as a source of electricity that does not release air pollution, deplete a limited resource, or increase U.S. dependence on fossil fuel imports. From an environmental standpoint, a future powered exclusively by renewable sources such as wind power sounds like a utopia. How strange, then, that a fundamental

255. *NedPower*, 647 S.E.2d at 895.

256. U.S. Census Bureau, State Rankings: Personal Income Per Capita (2007), http://www.census.gov/statab/ranks/rank29.html (West Virginia is the second-poorest state in terms of per capita income).

257. *Aesthetic Nuisance*, *supra* note 57, at 1077.

environmental legal tool could potentially be used to undermine a longer-term vision of environmental sustainability.

In short, courts must carefully consider the broader utility of wind turbines before they allow nuisance suits to halt their construction. Of course, in textbook noise or other disturbance nuisance cases such as *Rose*, "the fact that a device . . . has social utility does not mean that it is permissible at any cost."[258] But, when the turbines are more carefully placed, the impact on neighbors is minimized by distance or terrain, and the location is better suited to a large-scale wind development, courts should fully weigh wind turbines' importance at a policy level before finding them to be unreasonable.

CONCLUSION

Rankin and *NedPower* leave future courts with significant guidance on how to treat nuisance claims against wind power developments. On the issue of noise, a jury trial will sometimes be appropriate. Where a wind development is built particularly close to a community, is particularly noisy and intrusive, or is some combination of these factors, a jury would be needed to weigh the precise extent of the harm. Yet in cases such as *NedPower* and *Rankin*, where a wind project is built at a substantial distance from any residential areas and in a sparsely populated region, a jury trial may not be appropriate. Without some clear quantum of harm to an individual above and beyond the noise of a refrigerator[259] a balance must be struck so that not every proposed wind development in rural America has to survive a jury trial as a precondition to construction. Courts should not hesitate to dismiss nuisance claims based on the noise from wind developments when the pleadings show that the turbines have been reasonably sited.

The issue of aesthetics should present an easier question for courts: they should simply ignore it, whether raised as a part or as the entirety of a nuisance claim. Aesthetics should not be ignored solely because courts have traditionally excluded them from nuisance suits. Instead, courts should defer to the policy rationale that aesthetics are far too subjective, absent some substantial additional interference, to be a basis for a nuisance suit that abrogates a defendant's property rights.

Courts must also be careful to balance the harm of the alleged nuisance against its societal benefits before acting rashly to enjoin or otherwise impede the development of a wind project that might have substantial societal benefits. In this regard, courts should take heed of the nuanced approach followed by *Boomer*, where the court held that it was beyond the scope of its powers to craft a remedy for air pollution in the context of a lawsuit against an individual cement plant:

A court should not try to do this on its own as a by-product of private

258. Rose v. Chaikin, 453 A.2d 1378, 1382 (N.J. Super. Ct. Ch. Div. 1982).
259. *See* Commission Order, *supra* note 154, at 154.

> litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant–one of many—in the Hudson River valley.[260]

The same logic applies to the increasingly sensitive issue of the siting of renewable energy projects. Invariably, neighbors will oppose almost any type of development adjacent to their property. Yet, in the field of energy production, an area that is now assuming increasing importance for the economic well-being and national security of the United States,[261] property owners and local courts should not have free rein—and if they have it, they should decline to exercise it—to halt construction of wind or other renewable energy projects over concerns about flicker effects and faint humming noises. At the very least, courts should consider whether monetary damages or other compensation to the plaintiff neighboring landowners might best ameliorate the plaintiffs' alleged harm while also preserving the social utility of a wind project.

Courts should also give due attention to the findings of state agencies and public service commissions that may have previously examined wind developments. Some states, such as Texas, do not require siting certificates for wind farms,[262] so this consideration will not always be relevant. But in cases such as *NedPower* where there has already been some form of state approval of a wind project, courts hearing nuisance claims against wind farms should ensure that any findings of state agencies are included in the final analysis of unreasonableness.

Ultimately, if a court exercises its jurisdiction over such a sensitive and important topic, it should ensure that it carefully weighs the consequences of every element of its decision. "Balancing the equities" should take on a new importance if the equities include not only neighboring property interests and community interests but the state's, nation's, and world's interests in a diversified, secure, and sustainable energy supply. While it is important that nuisance law be properly applied, it is important to recognize the policies underlying nuisance law as well. From the time of Bartolus until now, courts have focused on whether an alleged nuisance is reasonable or not. Some of the

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260. Boomer v. Atl. Cement Co., 257 N.E.2d 870, 871 (N.Y. 1970).

261. *See, e.g.*, James L. Jones, *Energy: An Economic and National Security Challenge*, Politico, Mar. 20, 2007, http://www.politico.com/news/stories/0307/3185.html (arguing that "energy is the physical resource underpinning America's economy, national security, global competitiveness and way of life").

262. *See* Baron, *supra* note 203, at 14 ("Unlike the Texas Public Utility Commission, West Virginia's commission issues siting certificates to wind farms and other electric generating facilities.").

same considerations will always be present in the reasonableness calculation, such as the intensity and nature of the interference and the character of the neighborhood. But if the United States is to take seriously its need to diversify its energy supply, courts must fully consider the policy implications of their decisions.

Wind turbines may never be completely silent—and some people may always find them unattractive—but they have become an increasingly vital part of America's national energy strategy.[263] Nuisance suits have long been judged on the criteria of whether an alleged interference is unreasonable. If decisions such as *NedPower* come to slow the development of wind projects across the country, then the nuisance mechanism itself may come to be seen as unreasonable. Nuisance cases have always involved the delicate balancing of two property rights: the right of the defendant to use his land as she pleases, and the right of the plaintiff to be free of disturbances on his land. Future courts must remember the delicate balancing involved in the most successful nuisance decisions. State and federal legislation could also be passed to limit nuisance liability and protect society's interests in wind energy projects. If the rights of neighbors are enforced too strictly, or if the public policies in favor of wind turbine development are neglected, then the nuisance mechanism will cease to be a protector of environmental rights and will become an impediment to environmental progress.

263. *See, e.g.*, Bob Keefe, *Obama Pushes Wind Power on Coast Line*, Atlanta J.-Const., Apr. 3, 2009, at 10A.