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Chapter 2

Renewable Energy – the Increasing Role of Wind Power: Incentives, Mandates, Siting, and Leasing

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Synopsis

§ 2.01. Introduction.

In some ways the wind-energy industry of today is analogous to the oil industry of 80 or 100 years ago. Just as oil provided an alternative to coal, which was the then dominant energy source, wind has been hailed as a cleaner, cheaper and far more widely available energy source than any

hydrocarbon. Like the oil industry before it, wind energy is growing at a rapid rate, which has been estimated to be as high as 20 percent annually.[1] The kilowatt hours from new wind installations doubled between 1999 and 2001, and by 2002 accounted for approximately 10.5 billion kWhs. According to the Department of Energy that amount will increase over the next two decades to 230 billion kWhs, and by 2025 wind energy will account for roughly four percent of total U.S. electricity production.

In the early stages of the oil industry there was little or no regulation of where oil wells could be located or how they should be spaced. Similarly, state regulation of the siting and location of wind farms is, at best, erratic, with state statutes typically more focused on encouraging development than guiding it. Hence wind turbines, like oil derricks at Spindletop, may spring up virtually anywhere and, as some fear, leave environmental havoc in their wake. The pre-1920s oil industry is also partially replicated in private wind energy transactions. There is little standardization of the basic instruments used in the industry, including wind leases—and virtually no legal guidance for landowners who are now increasingly seeking to sell or devise "wind rights" apart from surface ownership.

In spite of these parallels, however, an attorney involved with a wind-energy transaction should be fully aware of the fundamental differences between the two resources, their economics, the applicable tax and regulatory regimes, and the equipment and structures that are required to "extract" and transmit them. The minimum essential requirements for an industrial-grade wind-energy site are (1) a location that is of adequate size and has a sufficient wind resource to support utility-level wind turbine development; (2) legal authority of the owner of the location to grant a wind lease; (3) near-by electric lines with unused transmission capacity; (4) a power-purchase agreement, and (5) a regulatory and tax system that encourages the creation of wind-generated electricity. This chapter will provide an overview of some of the legal issues connected with the first, second and fifth requirements.

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1 American Wind Energy Association, *Wind Industry Statistics*, http://www.awea.org/faq/tutorial/wwt_ statistics.html (last visited Apr. 13, 2005).