Writing An Effective Regulatory Wind Ordinance

One of the most frequent requests we get at Alliance for Wise Energy Decisions (AWED), is for help in writing a local industrial wind energy ordinance. Here we describe the **Regulatory** approach. Go here to see the **Prohibition** options.

Even assuming that the community has conscientious representatives, an industrial Wind Energy Facility (WEF) is a unique, highly technical area that local legislators rarely have expertise with. [*Read this about how easy it is for legislators to get off track.*]

A primary reason the **WiseEnergy.org** website was created was to educate citizens and their representatives on wind energy. When one researches the conclusions of communities that have thoroughly and objectively investigated WEFs, some **forty (40)** different areas of concern have been identified!

[E.g. Bethany (NY) citizens wrote a **superior report** on most of these.]

This document is to assist citizen-oriented legislators in doing a responsible, competent job in writing a quality wind ordinance. (Note: this material is our opinion — so do your own research and arrive at your own conclusions. We aren't lawyers, so have your attorney carefully review any proposed law.)

To begin with, the fundamental premise behind our proposed law, is the local legislators have an obligation to protect the health, safety and welfare of their constituents, as well as local businesses and ecosystems. So, in all planning regulations, the net social good produced from the activity, needs to be accurately weighed against any local detriments. The reality is that there are **no scientifically proven net societal benefits from industrial wind energy**.

Lastly we believe in the **KISS philosophy**. A key question: *is it better for a law to cover a lot of issues superficially, **or** a few done really well?*

We advocate the latter, and in our view, there are **five** KEY issues (out of the 40±) that a wind law needs to properly address. These are:

1) Property Value Guarantee
2) Turbine Setbacks
3) Noise Standards
4) Environmental Assessment and Protections
5) Decommissioning

We know that circumstances and state/provincial/etc. laws vary, so this is a *general* set of suggestions. We also realize that it isn't difficult to make a case for addressing several other of the 40± issues in a wind law. If others are important to your community, and they can be properly covered, great!

Is there an ideal wind law that you can simply copy and edit for your locale? Yes: we have put together a **Model Wind Law** (which is derived from some very good ordinances, like Carteret County (NC), Newport (NC: Article IX), Sumner (Maine), etc.).

The **WiseEnergy.org** website has *hundreds* of applicable scientific studies to support proper regulations. Additionally, on the **Legal Matters page** it lists the wind ordinances of several communities that are worth reviewing.

If you are aware of a local or state ordinance that is very good, please pass it on and we will put it on that page. Here is a brief discussion of the main five items:

1) Property Value Guarantee —
AWED has a **whole document** of real estate reports and articles, conclusively demonstrating that there will likely be property value losses in the proximity of most wind projects. (Even a court ruled that **property values did decline**.)

On the real estate page we have listed several examples of Property Value Guarantees. Although each of these has some merit, none fit our KISS criteria — so we've put together a simple, effective and reasonable **Property Value Guarantee**. *Please look it over and send any suggestions for improvements.*

Note: in some locales there may be a legal hurdle to pass a proper PVG. In most cases communities do have authority to enact regulations to protect property values. As a PVG alternative consider increasing the property line setbacks to **2 miles**. A clever option would be to include both of these in a law and let the developer choose: 1 Mile Setback+PVG ***or*** 2 Mile Setbacks.

2) Turbine Setbacks —
There are several reasons to specify setbacks from turbines, and the most important reasons pertain to human health and safety. Three points to note:

a) The definition of "non-participants" is important. Non-participants are any nearby property owners *who do not have turbines on their property*. If this is not spelled out, some neighbors might be considered as having been converted to "participants" just because they receive a payoff.

b) Non-participating property setbacks should be from the *property line*, not a building. One of the reasons for this is that if it is only from an existing building, then it effectively prevents a non-participating owner from using (or building on) some portions of their property. This (using legal terms) amounts to a "taking" of the property owner's rights.

c) A fixed setback distance makes more sense than does a variable distance (e.g. dependent on the turbine height). One reason for this is that the noise impact area is not directly proportional to the turbine height. Appropriate ordinances have a fixed setback distance of at least **one mile** from any industrial turbines.

[Several studies and independent experts support a mile (or more) setback. This **study** concluded: "**there is a significant probability of adverse health effects for human beings living within 1.25 miles of wind turbines**". **See this list of some FIFTY locations that presently have a mile or more setbacks, or studies that recommend such a distance**.]

3) Noise Standards —
Acoustical testing is intended to eliminate some proven human health issues. Unfortunately this is a very technically complicated area, so just specifying noise limits like 45 dBA is inadequate.

> Regarding the best simple number, the consensus is that it should be no more than 35, specifically: "Sound levels from the WEF shall not exceed LAeq 35 dB at the WEF property." However, there is much more to this than just a number, so please review the two sets of words we're proposing.

A significant matter to understand (**read this**) is that audible noise is actually a secondary concern, as infrasound (inaudible) can be much worse. The World Health Organization states: "*Health effects due to low frequency components in noise are estimated to be more severe than for community noise in general.*"

AWED's recommended acoustical terms and conditions are **here**. To support the 35 dBA number we put together a **document** with 30+ citations, *plus* numerous studies done by independent medical and/or acoustical experts.

4) Environmental Assessment and Protection —
This is about evaluating adverse environmental impacts. One would hope that environmental organizations would be leading the way here, but that has not been the case. The *American Bird Conservancy* (ABC) has been one of the most objective, but even their "**Bird Smart**" standards fall short of the mark.

One of the most problematic aspects of this issue, is that many state and local regulations leave it up to the wind developer to:
a) hire their own experts,
b) determine what environmental assessments are applicable,
c) be honest enough to report the unvarnished results,
d) mitigate the problems they have created,
e) all with minimal independent monitoring and followup.

Such terms and conditions are only a superficial feel-good solution that is a recipe for environmental disaster.

The simplest and most effective modification is to have the developer give the money they'd have spent anyway, to the Community — which would then do the hiring and supervision of the experts of their choosing. Note that this alternative is **no cost to the community**, and imposes **no additional costs to the developer** — but the results will likely be *dramatically different*.

Here are our recommended **Environmental Protection Terms**.

5) Decommissioning —
Decommissioning payments and arrangements must be established before the project is approved for a variety of reasons. The reality is that the initial developer is not who the Community will be dealing with at the end of the turbines lives (15± years) — as they will likely be long gone.

What frequently happens is that after the developer reaps the major taxpayer funded benefits, they will sell their interest to another corporation. That process may repeat itself several times during the lifetime of the WEF. Typically the Owner/Operator will be a LLC (Limited Liability Corporation) with few, if any assets — so suing for any funds can be a futile exercise.

Here are our recommended **Decommissioning Terms and Conditions**.

Some Questions and Answers —

1 - How does the community recoup its costs (which can easily be over a hundred thousand dollars) for dealing with a WEF, over its lifetime?

We strongly recommend requiring an **Escrow Account** (suggested words are **here**). This is a much better arrangement than a fixed application fee (which can't hope to adequately cover all expenses). Keep in mind that the wind energy business is *extremely* profitable. **Here** is strong justification how a WEF is **very** different from other commercial businesses.

2 - When is the best time to write effective wind legislation?

The earlier the better, because an ounce of prevention is far better than a pound of cure. Also, writing a quality wind law *after* a project has been built, would not legally bind a pre-existing project. [The best recourse for fighting an existing wind operation is to sue. Here is an **example** where citizens were successful in having a court dismantle a wind project.]

3 - How do we know the experts hired by our community will be objective?

Look carefully at their past work. Feel free to contact AWED for names, as we have some 700 independent experts (mostly PhDs) in our network.

4 - What if our community already has a so-so wind law, is it too late to fix it?

No. The fact is that *any* law can be modified. Review this document for parts that are applicable for your situation, and then convince your local representatives to upgrade your community's wind legislation.

5 - What if our community doesn't have existing zoning laws, can a specific zoning law for wind energy be enforceable?

Not likely. To single out one problem area would probably be considered to be legally "arbitrary." The solution is to institute a more comprehensive zoning law, including wind energy.

6 - Why not just zone out wind energy?

We don't advocate this tactic, although it may work under very special circumstances — that are quite complicated and time-consuming. See this discussion for the pros and cons of regulation *vs* a ban. *See next item.*

7 - How about an outright wind prohibition?

When the whole wind energy matter is looked at objectively, a prohibition can seem like the best choice — as there are no proven NET benefits from industrial wind energy. The town of New Hartford (NY) passed such a 2013 **law**. [Note their detailed reasons as to why they did it.] However this law has not been legally challenged, so it might very well be an illusion.

8 - Is there any merit to having a community-wise noise ordinance?

Yes, if it is well-written. Such a law could defuse the objection that there are special WEF rules. Here is an **example** of such an ordinance.

9 - How about a wind moratorium?

There can be some merit for that. The advantage of a town passing a six month (for example) wind energy moratorium, would be to give the town more time to study the issue closer, and to write up a meaningful law. Here is a **story** about a community doing that.

10- What if a provision in our wind law is ruled to be illegal, etc?

Many laws have a **severability** clause in them. This means that if one provision is determined to be inappropriate, the remaining are still valid.

11- What if the state (like NY) has onerous regulations that obstruct effective local legislation?

The fact is that **most states** are Home-Rule. Start by passing an appropriate local wind law. If state legislators then take away that right (for local control), a lawsuit is probably applicable.

12- What if the initial assumption about us having conscientious representatives is not true?

In that unfortunate situation citizens have three basic options:
a) use political pressure to encourage them to behave responsibly,
b) **sue them**, and/or **c)** elect someone else.

13- How does our Utility Commission fit in here?

In the US, most states have a public Utility Commission that oversees the energy business. This ought to be looked at as a second line of defense — after you have focused on writing a superior local wind law. [Note that some of these have special Consumer Advocate employees. They ought to be reached out to, as they could be valuable allies.]

Again, remember that this is our opinions, and we are not lawyers so none of the forgoing should be considered legal advice. Please consult with a qualified attorney before writing or modifying any laws, or taking any legal action.

*We would appreciate **feedback** as to any improvements to this document.*

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