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Experience is a Dear Teacher--The Texas Wind Decommissioning Statute

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"*Experience is a dear teacher, but fools will learn at no other*" - Benjamin Franklin

I. INTRODUCTION – A NEW PROBLEM

As is well known among both my students and colleagues, my professional life as a lawyer (and later as a law professor) took a monumental turn in 1999 when I reviewed and drafted my first wind lease in Nolan County, Texas.[1] That lease, as well as all of the other wind leases at the time, contained contractional "clean up and restoration" clauses similar to many oil and gas leases then in use. Simply put, the leases provided that upon expiration or termination of the lease (which for a wind lease, unlike an oil and gas lease, might be fifty or more years in the future), the lessee would remove its equipment and restore the surface "to as near as reasonably possible to its original condition" prior to the lease.[2]

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2. I would like to acknowledge the assistance and participation of my former outstanding student and now associate, Laura Bowen, in the research and writing of this article. Without her timeless loyalty and dedication both to me and the field of

Of course, the overlooked issue was the huge difference between wind and oil and gas leases in the work and cost required to remove wind turbines weighing hundreds of tons, along with millions of pounds of concrete, underground and overhead lines, and large access roads as opposed to a few well locations, pump jacks, pipes, and tank batteries. Not surprisingly, before long, Texas landowners (and Texas lawyers) began to recognize the enormity of this problem for future generations. Texas lands have long been haunted by the "boom and bust" cycles of the Texas oil industry with insolvent operators failing to clean up their leases, leaving the landscape cluttered with weed-infested well sites, unused pipe, rusting pump jacks and tank batteries. Clearly, Texas landowners did not want to repeat the experience on a gargantuan scale.

In response, Texas lawyers, like myself, began to develop the concept of a "removal bond" to provide the necessary clean up funds in the far-distant future. As originally conceived, the "removal bond" provision (or decommissioning clause as it would become known), outlined a process in which the wind company was required to put up a bond ten to fifteen years after the project began operation, amounting to the cost of removal of the equipment and restoration of the property, less the salvage value. With the wind boom, leases evolved so that later clauses shortened the time for posting the bond to a maximum of ten years and eliminated the ability to deduct salvage value. So, over the years, the removal bond clause became a standard provision in Texas wind leases (although with sometimes different wording). During the same time, many states passed "Decommissioning Statutes," but Texas did not.[3]

In early 2018, I received a call from Curtis Smith, the Chief of Staff for State Representative Terry Canales of District 40 in South Texas, asking if I would help draft a decommissioning bill. Initially I was reluctant but eventually decided that if someone had to do it, perhaps I should, so that landowners in Texas could have a voice in the creation of such a law.

No doubt, in the years before 2018, Texas legislators were hesitant to regulate wind as the wildly successful new industry in Texas was considered largely successful because it was without

energy law, neither this article or this Texas decommissioning statute would have been written.

3. Elizabeth A. Weis, *Wind Energy Legislation Strategies for the Lone Star State*, 10 INQUIRIES J., no. 05, 2018, http://www.inquiriesjournal.com/a?id=1738 [https://perma.cc/KY7N-64W6].

regulation.[4] The only other existing statute regulating wind was not passed until 2017. It was a controversial bill from Senator Donna Campbell, S.B. 277, which prohibited the granting of wind project tax valuation limitation agreement for school districts within 28.7 miles of a military aviation facility.[5]

Therefore, in April 2018, I testified before the Energy Resources Committee of the Texas House of Representatives. At the hearing, a legion of wind lobbyists met me, urging me not to "open the flood gates for the regulation of the wind industry in Texas." In an effort to work with my wind counterparts, I told the committee that since removal bond clauses were found in almost all, if not all, Texas leases, a statute was probably unnecessary. However, the committee remained unconvinced.

As a result, the idea of a Texas Wind Decommissioning statute was born. After much drafting and compromise with wind companies and opponents alike, H.B. 2845 passed both houses of the Texas legislature and became law on September 1, 2019.[6]

II. SHOW ME THE NUMBERS

To best understand why the legislature pushed for a mandatory decommissioning clause, it is important to understand the logistics of removing a wind farm from the land. At the end of a wind turbine's useful life, which is typically twenty to thirty years, the turbine must either be repowered or decommissioned.[7] Repowering typically requires replacing the nacelle and blades while preserving the original tower, a process required as frequently as every ten years, depending on the pace of technology improvement. Decommissioning a wind turbine calls for the removal of everything above and below the ground, including the concrete footing buried around the turbine.[8]

When a turbine is completely decommissioned, all components of the turbine are cut into pieces for transportation and

4. *Id.*

5. TEX. TAX CODE ANN. § 312.0021 (West Supp. 2018).

6. H.B. 2845, 86th Leg., R.S. (2019). Full text of the bill is available at https://capitol.texas.gov/tlodocs/86R/billtext/html/HB02845I.htm.

7. *Decommissioning*, APEX CLEAN ENERGY, https://www.cottonplainswind.com/decommissioning (last visited Nov. 1, 2019), [https://perma.cc/PKGR-46YN].

8. Kalina Oroschakoff, *Small old wind towers make for big new problems*, POLITICO (Feb. 23, 2018), https://www.politico.eu/article/small-old-wind-towers-make-for-big-new-problems/, [https://perma.cc/PU94-STR4].

stored until such time as valuable components such as copper can be extracted and resold. There is no industry standard for recycling other parts of the turbines, causing some panic as to where the industrial waste will go once decommissioned. While many of the parts of a turbine are recyclable, the fiber glass composite blades had no successful use until very recently.

As a result, the blades were often buried in landfills. The actual scrap value of decommissioned turbine components is unknown, making the valuation of decommissioning difficult. Scrap value depends largely on the secondary market for recycled parts. No such market currently exists, so the "salvage value" language in HB 2845 is speculative at best.[9] From the beginning, I expressed concern over the salvage value subtraction, as a dip in the value of copper could result in an undervalued bond leaving the landowner to rely on revaluation of the bond every five years.

Again, the costs associated with dismantling a turbine are largely unknown. So far in Texas, only two wind farms have been decommissioned. Since both were decommissioned at the expense of the wind energy company, the costs associated with the decommissioning were not publicized. One estimate valued the removal cost as high as $200,000 per turbine, making the total cost of decommissioning the over 13,000 turbines in Texas approximately $2.3 billion.[10]

Of the few other decommissioned projects from other states, the price for actual removal per turbine ranged from $27,285 to $651,725.[11] When scrap value is subtracted from cost, an average estimate of unrecovered dollars spent on decommissioning is about $25,500 per turbine.[12] The original estimate of $200,000 per turbine was calculated without scrap value deducted, and aligns with the

9. Molly Carroll, *Global Fiberglass Solutions Becomes the First US-Based Company to Commercially Recycle Wind Turbine Blades into Viable Products*, Global Fiberglass Solutions (January 29, 2019) http://blog.global-fiberglass.com/blog/global-fiberglass-solutions-becomes-the-first-us-based-company-to-commercially-recycle-wind-turbine-blades-into-viable-products [https://perma.cc/4EZQ-7WL6].

10. *See supra* note 2; *see U.S. Wind Industry Fourth Quarter 2018 Market Report*, AM. WIND ENERGY ASS'N (Jan. 30, 2019), https://www.awea.org/getattachment/Resources/Publications-and-Reports/Market-Reports/2018-U-S-Wind-Industry-Market-Reports/4Q2018_public/U-S-Wind-Industry-third-Quarter-2018-Market-Repor/4Q-2018-AWEA-Market-Report-Public-Version.pdf.aspx?lang=en-US, [https://perma.cc/G4PG-LKF4].

11. Shannon L. Ferrell & Eric A. DeVuyst, *Decommissioning Wind Energy Projects: An Economic and Political Analysis*, ENERGY POL'Y 105, 110 (Feb. 2013).

12. *Id.* at 111.

national average cost of removal.[13] When you consider the uncertainty of the removal cost with the reality that our state has over 13,000 turbines that will someday need to be removed if not repowered, the problem of decommissioning is pushed into the spotlight.

The certainty is that decommissioning will come at a high cost and the landowner will likely not be equipped to bear the cost of turbine removal. Even renting the specialized equipment necessary would be next to impossible for a landowner; likewise, only trained professionals understand how to remove the equipment in such a way as to not cause harm to the underlying land. As you can imagine, landowners after years of bad experiences with oil and gas industries, were insistent that the wind companies be responsible for decommissioning.

III. BOOM AND BUST: LESSONS FROM THE OIL AND GAS INDUSTRY

Proponents of decommissioning regulation often point to the Texas problem of orphan oil and gas wells. Such wells are defined as wells not operational for more than twelve months. However, in reality, they are are more often old, abandoned wells left by financially distressed operators. These wells can create significant problems for a landowner, since they often leach toxic byproducts into the surrounding biosphere.[14] In Texas, the Railroad Commission operates a fund from taxpayer dollars that allows for the plugging of orphan wells, a program which is notoriously underfunded.[15] The Texas legislature and landowners are worried about similar decommissioning issues with wind turbines. Arguments for

13. Rick Kelley, *Retiring worn-out turbines could cost billions that nobody has*, VALLEY STAR (Feb. 18, 2017), https://valleymorningstar.com/news/local_news/article_3a81176e-f65d-11e6-b1bb-b70957ccb19f.html?mode=jqm, [https://perma.cc/AM9Y-QR76].

14. Sophie Quinton, *Why 'Orphan' Oil and Gas Wells Are a Growing Problem for States*, PEW CHARITABLE TRUSTS (July 9, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/09/why-orphan-oil-and-gas-wells-are-a-growing-problem-for-states; [https://perma.cc/4XKD-WNQH].

15. *See generally, Commissioner State Managed Plugging Monthly Reports*, RAILROAD COMM'N OF TEX., https://www.rrc.texas.gov/oil-gas/environmental-cleanup-programs/oil-gas-regulation-and-cleanup-fund/ogrc-plugging-monthly-reports/ (last visited Mar. 20, 2019), [https://perma.cc/TME4-FLGM]. (Well plugging data for 2016 to 2019).

decommissioning bonds are generated, in part, by this fear, addressing the issue of cleanup years before the issue actually arises.[16]

The Texas Utilities Code contains the equivalent of a decommissioning clause for oil and gas operators without requiring the operators to be backed by any financial obligation.[17] As a result, the boom and bust cycle, ever present in oil and gas production, has left thousands of wells abandoned and polluting the environment.[18] The Railroad Commission continues to levy taxes against operators to raise the money for plugging abandoned wells, but projected fund estimates fall well short of the needed capital.[19]

Since there is no requirement for oil and gas companies to set aside money or provide money upfront for plugging, the Texas treasury pays for plugging orphan wells. Orphan wells can create an even greater problem if they leach any byproducts into the surface, often leaving the landowner financially responsible for land remediation.[20] The resulting crisis has fueled the wind decommissioning debate from the beginning with many supporters of a decommissioning statute claiming the wind industry will eventually boom and bust like the oil and gas industry has historically done.

IV. ENTER THE BOND

Soon after the advent of the wind boom in Texas, lawyers began adding a provision to landowner leases stating that a wind company must post a bond to cover the cost of complete restoration of the property in the event the company is no longer financially able to remove the turbines. There is no set standard for removal, so the specifications for removal can be very specific, down to the exact reseeding schedule for reclaiming the land. The sophistication of the removal bond typically depends on the particular lawyer and landowner negotiating the lease.

16. Quinton, *supra* note 14, at 5.

17. 16 TEX. ADMIN. CODE §3.14(b)(2) (West 2007).

18. Brandon Mulder, *Old oil wells pose problem for Pecos County*, MRT (Aug. 22, 2015), https://www.mrt.com/business/energy/article/Old-oil-wells-pose-problem-for-Pecos-County-7413749.php, [https://perma.cc/VW2K-DWT2].

19. The Railroad Commission is estimated to have raised about $1,700,000 of the approximately $53,202,000 needed to plug about 8,400 abandoned wells throughout the state. *See* Kate Galbraith, *In Texas, Abandoned Oil Equipment Spurs Pollution Fears*, TEX. TRIB. (June 9, 2013), https://www.texastribune.org/2013/06/09/texas-abandoned-oil-equipment-spurs-pollution-fear/ [https://perma.cc/T552-VYM3].

20. Mulder, *supra* note 18.

Presently, most bonds are posted at or around year ten of the lease term, leading to one of the most frequently asked questions: why wait until year ten? When a bond was first contemplated, companies found the concept more palatable if the bond could be postponed until year ten—when the majority of companies were operating in the black (i.e. the cost of construction was paid through operation revenues). Additionally, before year ten, any lender with an outstanding interest in the project could sell the wind project to another management company and would be motivated to do so in order to avoid a massive loss in investment capital.

Bonds range in sophistication based on the landowners wishes and can be as exacting as which kind of seed mix will be used to reclaim the property or as transversely broad as to say that the company has to restore the property to as close to the condition it was before (which can leave much open for debate). Some leases and bonds include an agreement to leave the wind company roads, while some bonds will specify that all roads must be removed. It has been my experience that besides the financial aspects of a lease, decommissioning is often one of the most heavily negotiated aspects of a lease.

In fact, it is now rare to get a form lease without a decommissioning bond. This reality leaves one asking—if the decommissioning bond is already addressed by existing lease arrangements, what was the need for a Texas policy on decommissioning? The real concerns for policy makers are landowners who sign a wind lease without consulting reputable sources, and landowners who are willing to accept a lease form prepared solely by the company. Considering that there can be hundreds of landowners in a wind project, it may only be that a few owners consult a lawyer to add a bond.[21] For example, if only half of the landowners have adequate bonds for removal, only half of the turbines might be removed. Again, there is precedential fear from the oil and gas industry that insolvent companies will abandon wind farms, leaving landowners to deal with removing these large turbines.[22]

21. Wind leases contain confidentiality clauses so particular language is either confidential or protected by attorney/client privilege. *See* Roderick E. Wetsel & Lisa Chavarria, *Anatomy of a Wind Energy Lease*, ST. B. TEX.: 21ST ANN. ADVANCED OIL, GAS & ENERGY RES. L. COURSE, 1, 13 (Oct. 16–17, 2003).

22. Quinton, *supra* note 14.

V. DECOMMISSIONING WIND IN OTHER STATES

There are states that have currently abandoned wind projects giving decommissioning proponents rightful fear that Texas could go the wrong way. As a good example, Hawaii and California both have early wind projects which were subsequently abandoned by companies and left as the landowner's problem.[23] Some have estimated that as many as 4,500 turbines await removal in California alone. In Hawaii, private operator money removed 37 turbines for approximately $1 million dollars, recovering only $300,000 after scrapping the turbines for parts.[24]

Since California was an early proponent of wind power, its legislature was one of the first to address decommissioning. The California Natural Resources Code contains a blanket removal requirement for energy production facilities, requiring that the land be restored to pre-construction conditions, but provides no guidance as to how such restoration will take place.[25] The regulation was passed in 1975, before the influx in wind production, leaving California with no mechanism to enforce companies to remove turbines.[26] As mentioned above, California has thousands of turbines awaiting removal, highlighting that without a financial mechanism to ensure removal, there is no guarantee that turbines will be removed.[27]

Some states, such as Oklahoma and Indiana, have passed more exacting decommissioning bills.[28] Similar to Texas, people opposed a decommissioning statute in Oklahoma, claiming that the majority of leases already had decommissioning language in place.[29] Despite the arguments, Oklahoma passed decommissioning legislation to provide a sense of security for landowners. Oklahoma requires a removal

23. William S. Stripling, *Wind Energy's Dirty Word: Decommissioning,* 95 TEX. L. REV. 123, 124 (2016).

24. Duane Shimogawa, *Apollo Energy Removing Old Wind Turbines on Big Island*, PAC. BUS. NEWS (Mar. 29, 2012), http://www.bizjournals.com/pacific/blog/2012/03/apollo-energy-removing-old-wind.html [https://perma.cc/S8BS-EM65].

25. Stripling, *supra* note 23, at 136.

26. *Id.* at 136.

27. Bill Gunderson, GUNDERSON: *Some Basic Facts About Wind Energy*, WASH. TIMES (Mar. 16, 2013), http://www.washingtontimes.com/news/2013/mar/16/gunderson-some-basicfacts-about-wind-energy/?page=all [https://perma.cc/888V-4Y3D].

28. Stripling, *supra* note 23, at 141.

29. Shannon L. Ferrell & Eric A. DeVuyst, *Decommissioning Wind Energy Projects: An Economic and Political Analysis*, ENERGY POL'Y, 105–113 (Feb. 2013).

security of 125% of cost, estimated by an engineer, to be posted after a project is commissioned.[30] By requiring a decommissioning bill, Oklahoma legislators theorized that landowners are more likely to enter into a wind lease, boosting the Oklahoma economy associated with wind energy generation.[31] The 2017 Oklahoma decommissioning bill is one of the most recently passed laws, and largely the most influential on the Texas bill. However, it is difficult to determine the impact of such legislation at this time as these states also have newer wind facilities, and there are no known examples of any landowner having to rely on the bond for wind facility removal.

VI. HOUSE BILL 2845

In light of all the concerns about decommissioning, the Texas Legislature has attempted to pass a decommissioning bill for the last several sessions. In 2019, House Representative Terry Canales filed H.B. 2845 as a follow-up to his previously rejected decommissioning bill, H.B. 1717.[32] Representative Canales represents South Texas, an emerging new area for wind development. The region has become a new frontier for wind companies trying to take advantage of tropic winds, which blow during the afternoon at peak demand times for the use of electricity.[33] Canales had a tenacious desire to pass decommissioning assurances for future wind development, and as many of his constituents were former wind clients, his staff sought me out to consult and draft a decommissioning standard for the state.

In 2017, Canales made his first attempt to pass a decommissioning clause. H.B. 1717 reached far beyond decommissioning wind turbines and included a broad set of regulations for all wind companies: including auditing, record keeping, and plans to allow additional rulemaking authority for the

30. OKLA. STAT. ANN. tit. 17, § 160.15(B)(2) (2016).

31. Ferrell, *supra* note 29, at 105–106.

32. *See generally* HB 1717, TEX. LEG. ONLINE, https://capitol.texas.gov/BillLookup/History.aspx?LegSess=85R&Bill=HB1717 [https://perma.cc/G2LV-RB3N] (see for H.B. 1717 bill overview, language, and action history); HB 2845, TEX. LEG. ONLINE, https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB2845 [https://perma.cc/Q2KW-SE3F] (see for H.B. 2845 bill overview, language, and action history).

33. Sergio Contreras, *Contreras: Wind Energy Booming in South Texas*, RIO GRANDE GUARDIAN (Feb. 20, 2019), https://riograndeguardian.com/contreras-wind-energy-booming-in-south-texas/ [https://perma.cc/WWB7-TZY5].

Railroad Commission to begin overseeing wind companies.[34] The bill was not well received in the industry and ultimately, H.B. 1717 failed in calendars with many citing the argument that such oversight of wind companies was unnecessary since the industry has not created any significant problems calling for regulation.

The 2019 bill attempted to gain traction by becoming a separate act under the Utilities Code rather than an amendment to the Natural Resources Code. This change was significant because the Railroad Commission would not have enforcement of breaches of H.B. 2845. Wind energy regulation by the Railroad Commission has been met with opposition since many fear that any regulation will slow the explosive growth within the industry. Rather than oversight by a state agency, the bill provides for injunctive relief in the event of a breach, allowing landowners to seek recourse in local courts where the land is located.[35]

With some amendment from my previous proposal, H.B. 2845 was signed into law on August 14th, 2019 and became Title 6 of the Texas Utilities Code. Section 301.0001[36] defines which wind facilities are subject to the new act as being all "Wind power facility" including wind turbines and support facilities.[37] Section 301.0002 provides that all agreements to waive the rights under the Act will be void, that relief sought will be injunctive and will not be deemed to waive other remedies under law.[38] Skipping ahead to § 301.004, the act requires that a decommissioning clause be placed in every new Texas wind lease, making the operating company responsible for financial assurances for removal of all wind facilities by the 10th anniversary of the project coming online.[39] The value of the financial assurance to be determined by an independent third party, which will include a reduction for any appraised scrap value of removed facilities.

34. Lisa Linowes, *The Texas Wind Power Story, Part 2: The Impacts of Texas Wind Power Siting*, TEX. PUB. POL'Y FOUND. (July 2018), https://files.texaspolicy.com/uploads/2018/07/07172726/2018-06-RR-TexasWindPowerStoryPart2-ACEE-LisaLinowes.pdf [https://perma.cc/T8MC-6W9N].

35. S.B. 1372, 86th Cong. (Tex. 2019).

36. TEX. UTIL. CODE ANN. § 301.0001 (West Supp. 2019).

37. Author Note: Already in practice, we have encountered solar leases using language similar to that of Title 6, Section 301. The act was authored as to only apply to wind turbines, leaving out other important consideration in the removal of solar panels. Considering the tenacity with which the people wanted decommissioning standards for wind, I suspect that a solar decommissioning bill will be proposed in the next few sessions.

38. TEX. UTIL. CODE ANN. § 301.0002 (West Supp. 2019).

39. TEX. UTIL. CODE ANN. § 301.0004 (West Supp. 2019).

The most important part of the bill, § 301.0003, provides specific requirements for removal of the wind turbines.[40] Aside from scrap value, these provisions are the most heavily negotiated items in a removal bond, since many landowners have exacting requirements for how their land should be restored. One should still bear in mind that the requirements under § 301.0003 are minimum standards, not a ceiling, and can be changed according to the needs of the landowner. However, with the passage of this bill, it has become increasingly difficult to convince companies to increase any of the bonding requirements. Companies are now copying § 301.0003 and stating in effect that they only have to do what is required by law.

VII. CONCLUSION

Similar to the early days of oil exploration, the wind industry in Texas boomed in the absence of regulation. I was among those Texans who first worried that any regulation would take the proverbial "wind out of the sails" of the booming wind industry. However, thinking also as a Texas landowner, there is no denying that all our farmers and ranchers will benefit from an assurance that turbines can be decommissioned at the end of the wind lease, particularly if the wind company (like so many oil and gas companies) are then insolvent.

Thankfully since enactment of H.B. 2845 on September 1, 2019, the Texas wind industry has continued to flourish. In fact, in many desolate and windy areas of the state, the economic future for landowners has never looked brighter. The additional good news for such landowners is that their children and grandchildren will not suffer if a future project owner lacks the funds to remove its equipment and clean up the family's land.

40. TEX. UTIL. CODE ANN. § 301.0003 (West Supp. 2019).