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THE POLSINELLI SHUGHART WIND AND RENEWABLE ENERGY group is experienced in the areas of corporate/transactions law, energy, real estate, construction, environmental, land use, zoning, finance, governmental affairs and litigation. With more than 600 attorneys in 16 cities stretching from Los Angeles to Washington, D.C., Polsinelli Shughart is where energy development is occurring. For more information and contacts within the Energy group, see last page.

## Kansas is No. 1 in the Nation for Wind Project Construction

Despite the uncertainty from Washington, D.C., surrounding the Production Tax Credit, 2012 has been a very active year for wind developments in the state of Kansas. With eight significant wind projects currently under construction, Kansas is set to nearly double its installed capacity in the span of a single year and is leading the country in wind project construction by a comfortable margin. These projects, and the jobs that they represent, provide excellent economic opportunities for the state and the surrounding local communities, and the continued support from Topeka is helping Kansas become one of the premier locations for new wind projects in the United States.

Some of the Kansas projects that were recently completed or are currently being constructed are listed on Page 2.

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## Polsinelli Energy Attorneys Write Cover Article in *North American Windpower*

Polsinelli Shughart attorneys Alan Claus Anderson and Britton Gibson recently wrote an article that was published as the cover article in the April 2012 edition of *North American Windpower*, one of the leading publications for the wind energy industry. The article, entitled "Despite Uncertainty, Foreign Investors Eye U.S. Market," provides an overview of the dramatic growth that the American wind industry has experienced in recent years, and explains that this growth provides tremendous investment and diversification opportunities to many international energy companies and investors. Though there are certain cultural, environmental and regulatory differences that need to be accounted for when foreign investors are investing in the U.S. wind market, Alan and Britton explain why the United States likely will prove to be one of the most important renewable energy markets in the world in coming years.

Read the full article at [www.polsinelli.com/renewablenews](http://www.polsinelli.com/renewablenews). ■



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**Caney River.** Developed by TradeWind Energy of Lenexa, Kan., and owned by Enel Green Power North America, the Caney River Wind Project will generate roughly 200 megawatts (MW) in Elk County, Kan. The project entities recently announced the execution of a 200-MW PPA with the Tennessee Valley Authority. The project went into commercial operation in January of 2012.

*Polsinelli Shughart was development counsel for the project and served as local project finance counsel.*

**Post Rock.** St. Louis-based wind energy developer Wind Capital Group is developing the 201-MW Post Rock Wind Energy Facility, located in Ellsworth and Lincoln counties in Kansas. Construction began in the fourth quarter of 2011, and the facility is anticipated to be online in the fourth quarter of 2012. The power purchase agreement for the Post Rock project is with Kansas-based electric utility Westar Energy.

*Polsinelli Shughart served as lender's Kansas counsel on the financing of the Post Rock project.*

**Cimarron I.** CPV Renewable Energy is developing a 165-MW wind project in Gray County, Kan., and recently reached an agreement for the project's \$262.8 million financing. The project is being constructed by Wanzek Construction and will be operated by North American Energy Services. A commercial operation date of November 2012 is expected.

*Polsinelli Shughart served as developer's counsel and provided representation relating to the financing of the project.*

**Cimarron II.** Duke Energy Renewables, a commercial business unit of Duke Energy, announced that it will build, own and operate the 131-MW Cimarron II Windpower Project in Gray County, located approximately 200 miles west of Wichita. Duke Energy Renewables began construction of the Cimarron II Windpower Project in the fall of 2011 and plans to achieve commercial operation by June 2012. Additionally, in the first quarter of 2012, Duke Energy Renewables and Sumitomo Corporation of America finalized a 50-50 ownership agreement for both the Cimarron II and Ironwood projects, securing approximately \$353 million in financing for construction and operating costs.

*Polsinelli Shughart served as lender's Kansas counsel for the project financing on this project.*

**Ironwood.** In a situation very similar to that described for Cimarron II, Duke Energy Renewables announced that it would build, own and operate the 168-MW Ironwood Project in Ford and Hodgeman Counties, Kan. A PPA is currently in place with Westar Energy for the power generated by the project, and construction is expected to be completed by the end of the year. Additionally, in the first quarter of 2012, Duke Energy Renewables and Sumitomo Corporation of America finalized a 50-50 ownership agreement for both the Cimarron II and Ironwood projects, securing approximately \$353 million in financing for construction and operating costs.

*Polsinelli Shughart served as lender's Kansas counsel for the project financing on this project.*

**Flat Ridge 2.** BP Wind Energy North America Inc. (BPWENA) is constructing a 420-MW wind project located in Barber and Kingman Counties, Kan. The new wind project, known as Flat Ridge 2, will be located approximately 60 miles southwest of Wichita, Kan. This will be the largest wind farm in Kansas and the bulk of the power will be sold out of state. Commercial operation of the Project is currently planned for January 1, 2013.

*Polsinelli Shughart served as regulatory counsel for this project. ■*





## So What Does 'All Of The Above' Mean Anyway?

By Andy Wright, Polsinelli Shughart Shareholder and  
Tracy Hammond, Polsinelli Shughart Senior Policy Advisor

The policy platforms adopted by both the Democratic and Republican parties are not binding on their candidates or on the eventual winner. Nonetheless, they offer clues to the next administration's priorities. Now that both conventions have ratified and released their party platforms, one thing is clear: both parties support an "all of the above" energy strategy. Unfortunately, that is where agreement ends and partisan bickering begins.

As in all policy prescriptions, the devil is in the details. Regarding the phrase "all of the above," each party assigns a distinct and very different meaning. Republicans have accused Democrats of supporting all energy sources as long as they come from "above" the ground, thus ignoring coal, oil and natural gas. Democrats, on the other hand, accuse Republicans of exclusively focusing on fossil fuels and ignoring renewables, energy efficiency and global climate change.

The GOP policy document states: "Republicans advocate an all-of-the-above diversified approach, taking advantage of all our American God-given resources. That is the best way to advance North American energy independence."

Democrats claim to support an "all-of-the-above approach to developing America's many energy resources, including wind, solar, biofuels, geothermal, hydropower, nuclear, oil, clean coal, and natural gas."

### Natural Gas and Traditional Energy Sources

The Republican platform calls for more use of coal ("more state-of-the-art facilities") and nuclear power ("through advanced reprocessing technologies") in electricity generation, increased production of oil and natural gas both on and off shore, and approving the Keystone XL pipeline to transport additional Canadian oil sands derived crude to the U.S. Further, the GOP's plan would provide states with more authority to control federal lands located in their borders and reap a larger share of drilling revenues from future production. Specifically, the platform endorsed the Domestic Energy and Jobs Act (H.R. 4480), passed by the House June 21, that would streamline drilling permits on federal lands and would require a review of environmental regulations that may impact fuel prices

The GOP would cede significant power to individual states, proclaiming that "[L]egislation to restore the authority of states in environmental protection is essential." Hydraulic fracturing would be left to the states to regulate as well. Finally, the

platform calls on Congress to return federal land to private ownership for ranching, mining and forestry.

Democrats call for the increased use of natural gas, especially as a transportation fuel, even as the party remains divided on the role natural gas and hydraulic fracturing should play in energy development: "[Democrats] will continue to advocate for the use of this clean fossil fuel, while ensuring that public and environmental health and workers' safety are protected."

### Renewables and Efficiency

The RNC platform does express limited support for renewable energy, but takes a swipe at President Obama by stating "taxpayers should not serve as venture capitalists for risky endeavors which generated bankruptcies rather than kilowatts." Under the Republican vision, renewable energy would be developed in a "market-based approach" leaving the work to partnerships between traditional energy industries and emerging renewable industries. Finally, states' new authority over oil and gas drilling on public lands within their borders would extend to the development of renewable energy.

Democrats have gone further in supporting new, non-traditional forms of energy. The Democratic platform calls for "making America the world's leader in building a clean energy economy by extending clean energy incentives," and by emphasizing that "President Obama has encouraged innovation to reach his goal of generating 80 percent of our electricity from clean energy sources by 2035."

Regarding energy efficiency, and in a break from the past, this year's GOP platform contains no mention of efficiency. The change comes amid a backlash against efficiency measures, such as new light bulb standards.

On the other hand, Democrats maintain some commitment to efficiency by proclaiming, "[w]e can further cut our reliance on oil with increased energy efficiency in buildings, industry, and homes."

### Climate Change

After 20 years of at least some recognition of global climate concerns, the GOP platform now opposes any government action aimed at addressing the issue. "[Republicans] also call on Congress to take quick action to prohibit the EPA from moving forward with new greenhouse gas regulations that will harm the nation's economy and threaten millions of jobs over the next quarter century," the document states. Gov. Romney has also called for stripping EPA's power to regulate greenhouse gas emissions from power plants, factories and other sources. The party even takes aim at the Obama administration's inclusion



of climate change in the 2010 National Security Strategy, a key military strategy document, contending that it is pulling attention away from more important defense issues.

The Democratic platform maintains strong support for government action to address climate change. The Democratic platform states: “The national security threat from climate change is real, urgent, and severe. We know that global climate change is one of the biggest threats of this generation – an economic, environmental, and national security catastrophe in the making. We affirm the science of climate change, [and] commit to significantly reducing the pollution that causes climate change.”

### Looking Ahead

Four years after promising to reboot America’s approach to energy issues, the Obama administration has failed to enact cap and trade, isn’t likely to create five million new jobs in clean energy in a decade, and won’t get one million plug-in hybrid cars on the road by 2015. But by several key measures – raising fuel economy standards, boosting electricity from renewable sources and investing in energy R&D, the “smart” electric grid and a more efficient federal auto fleet – President Obama has met his goals.

Republicans have seized on energy policy as a clear way to distinguish themselves from this Administration, and their party platform reflects sharp contrasts that would certainly mark a decidedly different approach and reshuffle the federal government’s focus on many energy issues. ■

## New Wind Turbine Guidelines Released by USFWS

On March 23, 2012, the Interior Department’s U.S. Fish and Wildlife Service (Service), working with the Wind Turbine Guidelines Advisory Committee, released guidelines designed to help wind energy project developers avoid and minimize impacts of land-based wind projects on wildlife and their habitats. These voluntary Guidelines, which take effect immediately, are designed to provide Best Management Practices for site development, construction, retrofitting, repowering, and decommissioning for wind projects across the country.

A significant portion of the Guidelines is dedicated to providing advice to developers regarding the identification of species of concern that may potentially be affected by the proposed project, as well as the potential impacts that the project may have on those species, including:

- Collisions with wind turbines and associated infrastructure; loss and degradation of habitat from turbines and infrastructure;
- Fragmentation of large habitat blocks into smaller segments that may not support sensitive species;
- Displacement and behavioral changes; and indirect effects such as increased predator populations or introduction of invasive plants.
- Additionally, the Guidelines recommend a “tiered approach” for assessing potential impact of a wind project on species of concern and their habitats. As described in the Guidelines:

“The tiered approach is an iterative decision-making process for collecting information in increasing detail; quantifying the possible risks of proposed wind energy projects to species of concern and habitats; and evaluating those risks to make siting, construction, and operation decisions. [ ... ] Briefly, the tiers address:

- Tier 1 – Preliminary site evaluation (landscape-scale screening of possible project sites)
- Tier 2 – Site characterization (broad characterization of one or more potential project sites)
- Tier 3 – Field studies to document site wildlife and habitat and predict project impacts
- Tier 4 – Post-construction studies to estimate impacts
- Tier 5 – Other post-construction studies and research”

Under the Guidelines, developers will work with the Service to identify, avoid and minimize risks to species of concern during the pre-construction phases of the project (Tiers 1, 2, and 3), and then assess the effectiveness of those conservation measures and take additional actions as necessary during post-construction phases (Tiers 4 and 5).

Though adherence to the Guidelines is voluntary and does not relieve any individual, company, or agency of the responsibility to comply with laws and regulations, adherence may be beneficial to developers if a violation occurs. FWS is permitted to take a developer’s action to comply with the Guidelines into consideration when determining whether a violation has occurred, as well as the severity of any penalties.

A copy of the Guidelines is available on the U.S. Fish and Wildlife Service’s website. Additional information on these Guidelines can be found in the cover article drafted by Alan C. Anderson and Luke Hagedorn for the September issue of *Windpower Engineering and Development*. ■



## USFWS Submits Draft Indiana Bat Survey Guidelines for Peer Review and Comment

Over the past year, the U.S. Fish and Wildlife Service has led a multi-agency team in the development of these protocols in response to several things: (1) the Indiana bat survey protocols released in 2007 recognized the potential role that acoustic monitoring can play, but did not define the methods; (2) USFWS is in the process of developing other Indiana bat regional guidance, but needs a standardized approach; (3) acoustic monitoring is being used more frequently at wind projects without standard protocols; and (4) there are documented declines in mist-netting capture rates and detection probability of Indiana bats in areas with population declines due to white-nose syndrome.

To address these issues, USFWS created a set of standardized protocols to determine whether Indiana bats (*Myotis sodalis*) are present or likely absent at a given site during the summer months. The protocols incorporate USFWS' best information about the Indiana bat's life history and their habitat, and incorporate a number of strategies for its detection including acoustic surveys, mist-netting, radio-tracking, and emergence surveys.

Ultimately, these draft protocols are intended to replace the current 2007 Indiana bat survey protocols. Final survey protocols are anticipated by mid- to late-winter 2012-2013 with full implementation of the protocols in summer 2013. ■

## State Updates

### Colorado

The legislature of the state of Colorado has been very active on renewable energy issues over the last few months. Three bills were introduced in either the House or Senate in Denver to varying levels of success, each of which could have had a noticeable effect on the renewable industries in the state.

#### *Coal-Mine Methane as a Renewable Energy Source*

House Bill 1160 seeks to amend Colorado's renewable energy standard to include electricity generated by burning captured coal-mine methane. The legislation has passed in the House, and is now being considered by the Senate Local Government Committee. The bill faces strong opposition by many environmental and renewable energy advocacy groups, including Western Resource Advocates

(WRA), based in Boulder, Colo. In a March 23, 2012, guest commentary in the Denver Post, John Nielsen, the energy program director at WRA, stated as follows:

"By allowing coal-mine methane to qualify as "renewable energy," something it is not, HB 1160 would diminish further investments in Colorado's wind and solar resources. Those resources are sustainable, emission-free, use little or no water, provide important health and economic development benefits, and reduce greenhouse gases."

This legislation has passed the House and, as of this writing, has been reengrossed for the 2012 session.

#### *Prohibition on Severance of Wind Rights*

House Bill 12-1105 seeks to establish a nonseverable wind energy right in real property. Essentially, under this proposal a landowner would not be able to sell fee simple title to the wind rights on his or her property, but must instead execute a lease, license, easement or other agreement to develop or participate in the income from or the development of a wind project on the property. The legislation has passed in the House, and is now being considered by the Senate Local Government Committee. This proposal law is in line with a national trend against severance of wind and solar rights, and effectively prohibits a landowner from selling the wind or solar rights to a project developer while retaining the ownership of the underlying property. Interestingly, however, this legislation seems to expressly contemplate and allow for the transfer of the rights to receive the income from the wind project to a third party, which could potentially lead to many of the same downstream ownership concerns that commonly give rise to severance restrictions in the first place. K.K. DuVivier, professor of law at the University of Denver Sturm College of Law and author of the excellent resource "The Renewable Energy Reader," was recently interviewed by Colorado Public Radio about this legislation.

This legislation passed the House and Senate, and was signed into law on May 29, 2012.

#### *Ending PUC's Authority Over Transmission Siting Issues*

House Bill 12-1312 seeks to modify the Colorado Public Utilities Commission's approval process for transmission line certificates of convenience and necessity, so that the PUC no longer has jurisdiction over the land use rights or siting issues related to the location or alignment of the proposed transmission lines. Instead, those issues would be left to the discretion of the county and local governments. Ms. Becky Quintana, a representative of the PUC, recently testified before



the House Committee on Transportation about this legislation and stated that the PUC neither supported nor opposed the legislation. From the PUC's perspective, the legislation does not restrict the authority of the PUC, but rather more clearly defines the jurisdiction of the PUC and local governments, though she noted that, under the proposal, any transmission project that spanned multiple counties would require intergovernmental agreements as each county's jurisdiction would end at the county line.

The legislation has passed both the House and Senate and was signed into law on April 12, 2012.

## *Arizona*

Capping off what has been a tumultuous history, Arizona House Bill 2789 appears to have stalled in the State Senate. The legislation, which began its life as an attempt to provide the legislature veto authority over decisions by the Arizona Corporation Commission and ultimately was amended into a mandate against increasing the state RES beyond its current level, has not made any positive headway in the Senate since March and appears less and less likely to gain serious traction.

## *Missouri*

### *RES Ballot Initiative Falters*

A ballot initiative that would have sought to increase Missouri Renewable Energy Standard to 25 percent by 2025 failed to collect enough signatures to be placed before voters in the fall. Renew Missouri, the Columbia-based group behind this initiative as well as Proposition C, the initiative that gave rise to Missouri's current RES, released a letter to supporters stating that "[w]e had tremendous support from volunteers, but ultimately collecting 180,000 signatures in three months is something that can't be done with volunteers alone."

### *Save the Date: 2012 Midwest Energy Policy Conference*

The Missouri Energy Initiative will be holding its sixth annual Midwest Energy Policy Conference on Oct. 23-25, 2012 at Kansas City's Bartle Hall. The conference, held in conjunction with the Clean Transportation Expo on Oct. 23, will bring together leaders in the fields of energy and energy policy for a comprehensive examination of federal, state and local energy priorities. MEI is a nonprofit association of public and private sector entities united together with the sole purpose of enhancing and improving energy-related activities in the state of Missouri. Both Frank Caro, Chair of the Polsinelli Shughart Energy Group, and Alan C. Anderson, Vice-Chair of the Polsinelli Shughart Energy Group, will be speaking at this event.

## *Nebraska*

### *New Legislation Clarifies Nebraska Wind and Solar Requirements*

Recently enacted legislation in Nebraska, LB 828 clarifies the existing statutory requirements that govern agreements between landowners and developers pertaining to solar and wind energy facilities. In order to correct inconsistencies between various statutory provisions relating to these wind and solar energy agreements, LB 828 centralizes the main statutory provisions, which were previously scattered in a number of locations throughout the statutes, into Chapter 66. Additionally, LB 828 clarifies that severance of wind and solar rights from the ownership of the underlying property is prohibited, sets forth specific terms that must be included in an abstract for recording purposes, and clarifies that landowners and developers may renew agreements beyond an initial 40-year term.

### *Nebraska Public Power District Issues Quasi-Moratorium on Wind Projects Until 2017*

The Nebraska Public Power District ("NPPD"), the state's largest public utility and a political subdivision of the state, has passed a resolution stating that after the completion of two wind farm projects currently being developed, it does not plan to add more wind generation until 2017. This decision appears to be largely driven by the fact that NPPD currently has 232 megawatts of wind generation in its portfolio, which is well ahead of schedule for meeting its state-mandated goal of 430 megawatts by 2020. ■

## *Office Update*

### *Veteran Energy and Environmental Public Policy Advisors Join Polsinelli Shughart's Washington, D.C. Office*

Polsinelli Shughart welcomes veteran energy policy consultants Andy Wright, as shareholder, and Tracy Hammond, as a senior policy advisor, to the firm's national Public Policy group. Highly experienced in their field, Wright and Hammond will lobby and provide consulting and strategic advice on behalf of firm clients, including those within the energy and environment industries.

"This was a great opportunity for both Tracy and me to provide energy and environmental clients with the support and professional services that only a national energy practice and firm like Polsinelli Shughart can provide," Wright said. "The firm's growth in recent years has been phenomenal. The firm is a natural fit for me and offers an outstanding opportunity to further develop my practice." Wright provides leadership and direction to the firm's Energy and Environmental and Natural Resources practices. In that capacity, he lobbies and provides consulting and strategic advice on behalf of energy and environment clients.



“Polsinelli Shughart offers me an outstanding opportunity to further develop my practice while working with some of the most seasoned energy attorneys and public policy practitioners in the business,” Hammond said. “The firm has a rich, enviable reputation for energy public policy advocacy and I am pleased

to be a part of that national team.” Prior to joining Polsinelli Shughart, Hammond worked extensively with individual clients and coalitions on energy, environment and sustainability issues, including smart grid deployment, traditional and renewable energy development and tax policy. ■

## About Polsinelli Shughart’s Renewable Energy Development Group

Polsinelli Shughart is a recognized leader in renewable energy. Our lawyers have broad experience in all aspects of the development, financing, operation and purchase and sale of renewable energy assets, including experience in the wind, solar, biomass, geothermal, biofuels and other renewable energy sectors. We represent developers, utilities, investors, owners and lenders in connection with projects at all stages, from investment and tax structuring, through development,

construction, financing and operations. We draw on our historical experience in the energy industry in representing our renewable energy clients with respect to strategic transactions and litigation. Polsinelli Shughart has more than 600 attorneys in 16 cities from Los Angeles to Washington, D.C., including offices in Dallas, Denver, Kansas City, Chicago, New York and St. Louis. ■

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