

Texas Legislature Tilts Against Windmills: Is This the End of Wind Energy on the Texas Coast?

WRITTEN BY

M. Benjamin Cowan

Much has been written in recent weeks about how the renewable energy industry in Texas dodged a bullet — several bullets actually — when three high-profile bills targeting the industry failed to pass in the recent legislative session that ended June 2. Indeed, each of those bills, S.B. 819, S.B. 388, and S.B. 715, would have had a substantial negative impact on renewable energy projects in Texas. For all the attention those bills garnered, however, and the justifiable relief felt by the industry after all three failed to pass, seemingly little attention has been paid to another bill, H.B. 3556, that did pass and was signed into law by Governor Abbot on June 22. This new law poses a serious threat to the prospects for future wind projects along the Texas coast.

H.B. 3556 is a very brief bill that seems innocuous on its face, perhaps explaining the lack of concern it has attracted. The new law requires persons proposing to build a structure taller than 575 feet along the Texas coast[1] to notify the Texas Parks and Wildlife Department (TPWD) at least 90 days before beginning construction. The TPWD is then afforded 45 days to recommend in writing measures to minimize the impact of the structure on migratory birds. The project proponent has 45 days to accept the recommendations in writing or propose alternative minimization measures. The TPWD then has another 45 days to issue a final decision on the measures that must be adopted. If the project proponent objects to the final measures imposed by the TPWD, it can seek an administrative hearing before the State Office of Administrative Hearings — a trial-like process that can take the better part of a year or more.

The new law may not seem unreasonable at first glance — after all, migratory bird conservation is a laudable objective that even the wind industry itself supports with extensive research and minimization efforts. Upon closer consideration, however, the bill grants stunningly broad regulatory authority and discretion to the TPWD, which could allow it to effectively block a wind farm almost anywhere on the Texas coast with little or no scientific justification. Consider:

- There is no requirement that TPWD base its recommendations on the best available science, or even on any science at all. This is comparable to granting EPA the discretion to impose conditions in an air permit without having to provide or defend the scientific basis for those conditions.
- There is no requirement that the measures TPWD recommends or mandates be cost-effective or even economically practicable. This is comparable to allowing EPA to require pollution control equipment in air permits without regard to the cost, commercial availability, or proven effectiveness of the required measures.
- The timelines in the law create significant uncertainty regarding the minimization measures that the project will need to employ up until at least 45 days prior to construction, and potentially past the planned start of construction if the measures proposed by TPWD are not acceptable. This creates substantial uncertainty for

project financing, assuming projects can even clear investment committee review without knowing what minimization measures will be required and what the impact of those measures will be. While nothing in the law precludes a developer from commencing the approval process more than 90 days in advance, and most developers almost certainly will do so, there are limits as to how early in the process that can happen as the TPWD will likely want to know the specific number and size of the turbines that will be used and see a final or near-final project layout.

The law authorizes, but does not require, TPWD to adopt rules to implement the new requirement. Industry's best hope may be to lobby TPWD to do so and establish reasonable standards for its recommendations based on sound science and economic practicability. Otherwise, it is easy to imagine that the anti-renewables tide in the state that almost led to passage of the other bills could result in the TPWD being pressured to kill projects with poison pill requirements by coastal landowners and/or state legislators opposed to projects being developed in their backyard. Of course, if TPWD does promulgate regulations there is no guarantee that those regulations will be workable for the industry, particularly since that would require TPWD to limit the almost unprecedented discretion delegated to it by the statute. Thus, it bears watching whether this new law will simply add one more step in the development process or spell the end of new wind development on the Texas coast.

[1] Specifically, the new law applies in any county with a population of less than 500,000 that (1) borders the Gulf of Mexico, and (2) contains all or part of a national wildlife refuge, or in any county adjacent to such a county which does not contain a municipality with a population greater than 300,000. This appears to cover every coastal county in Texas with the exception of Galveston and Nueces (Corpus Christi).

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