

## ROANOKE TIMES

# Do opponents of Botetourt County wind farm live too far away to sue?

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The site of Apex Clean Energy's proposed Rocky Forge wind farm is near this spot along Blue Grass Trail on the Botetourt County and Rockbridge County line.



This computer simulation from Apex Clean Energy shows what the Rocky Forge Wind Farm would look like from a residence 1.1 miles away.

If gigantic wind turbines are built atop a Botetourt County mountain, the impact will be far more sweeping than the reach of spinning blades nearly the length of a football field.

Supporters of Rocky Forge Wind, which is poised to become the first on-shore wind farm in Virginia, say it will speed a transition to renewable energy needed to combat climate change.

Others see the 612-foot-tall turbines differently. In a lawsuit that seeks to stop the project, about a dozen property owners say it will mar the scenic landscape around North Mountain, create harmful low-frequency noise, devalue their homes and threaten wildlife and other natural resources.

But do they live too far away — the closest home sits about 2 miles from the site and the farthest nearly 23 — to challenge it in court?

Lawyers for Apex Clean Energy, the Charlottesville-based developer of the 13-turbine facility, argue that the Virginia Supreme Court in two past cases has established legal standing of plaintiffs to be no more than 2,000 feet from the subject of their lawsuit.

But those cases involved a river port for municipal waste and a gravel processing plant, not metal structures that would be about twice the height of the Wells Fargo Tower in downtown Roanoke.

“It’s proximate. And proximate is kind of a sliding scale,” Botetourt County Circuit Judge Joel Branscom said at a hearing last year.

Using an example made by a lawyer in the case, Branscom went on to say: “A small cellphone tower is not as proximate to something 2 miles away as a Trump Tower would be to something 2 miles away. Isn’t it a matter of degree?”

Last August, Branscom said he had “serious concerns” about the plaintiffs’ standing and was tempted to dismiss the lawsuit at Rocky Forge’s request. But he allowed the case to move forward so more evidence could be considered.

At a hearing set for Friday morning, he will revisit the standing question.

### **The standard for standing**

So how is standing decided in the context of a wind farm?

“The short answer is that it’s unique to each state,” said Michael Gerrard, a professor of environmental law at Columbia Law School. “There is no uniform national rule, and in fact we have different decisions within the same state.”

Gerrard is director of the school’s Sabin Center for Climate Change Law, which last year completed a study of opposition to renewable energy projects in the United States.

While the report did not take a stand on the various laws, regulations and zoning amendments studied on a state-by-state basis, it found that “local

opposition to renewable energy facilities is widespread and can impede development.”

In general, wind energy developers say a 1,500-foot setback from occupied structures is the upper limit for what they consider reasonable in designing a project, according to the study.

Located about 5 miles northeast of Eagle Rock, Rocky Forge would occupy a nearly 7,000-acre tract of mountainous forestland, most of it buffer land for the ridgetop turbines. The closest home to where the wind farm would be built is about a mile away.

“I certainly think it would be a stretch for someone who lives 23 miles from a proposed facility to have standing to challenge it in court, unless there were very unusual circumstances,” Gerrard wrote in an email.

Wind farms present those circumstances, opponents say.

“They can sit there and talk about feet and miles all day long, but that noise is going to travel,” said Lisa Linowes, president of the Wildlife, Energy and Community Coalition, a New Hampshire-based group that opposes what it calls “irresponsible energy development.”

In support of their lawsuit, landowners in Botetourt and Rockbridge counties have submitted studies about the harmful effects of infrasound, or low-frequency sound waves that are not always audible, on the sleep and health of people living as far as 25 miles from a wind farm.

Other concerns include the turbines’ effect on scenic views, property values and the habitat of wildlife. The fate of golden eagles, which have been spotted soaring above North Mountain in the area of the proposed turbines, is raised in detail.

Rocky Forge argues that a vigorous permitting process, by the Virginia Department of Environmental Quality and other agencies, has found little merit to those concerns.

And even if merit existed, it says, Virginia law on standing requires a showing of harm that is “particularized,” or greater than what would be experienced by the general public.

“The parade of horrors alleged by the plaintiffs (even if they ever come to fruition) — e.g. background noise, light pollution, energy cost increases and disturbance to wildlife, and the viewshed alteration — are all harms that would be suffered by the public at large,” Robert Loftin, a Richmond attorney who represents Rocky Forge, wrote in court documents.

The company is asking Branscom to follow current precedent set by the state’s highest court, find that the petitioners lack standing, and dismiss the lawsuit. That would allow the issue to be decided on an appeal, which could establish new statewide law.

### **DEQ permit challenged**

In December 2020, a group called Virginians for Responsible Energy and 13 individuals — four from Botetourt County and nine from neighboring Rockbridge County — filed suit.

Named as defendants were Rocky Forge and DEQ, which approved the project in 2017 and then granted a modification to its permit in 2020, after the company changed its plans to accommodate fewer turbines but at a greater height.

The lawsuit accuses DEQ of ignoring or downplaying the wind farm’s environmental consequences.

Many of the studies that Apex Clean Energy submitted to the state in 2020 were more than five years old and failed to include required materials, the lawsuit alleged.

“Any of these shortcomings should have scuttled the project; considered together they make a powerful case that a well-funded energy company leaned on a state agency to push an error filled, out of date and fundamentally incomplete application through a unrefined DEQ fast-track process,” read the lawsuit, which was filed by Charlottesville attorney Evan Mayo.

In a written response filed in January, DEQ said the modified permit it approved in 2020 dealt only with changes to the number and design of turbines — for which Apex submitted new documents.

Other requirements, such as studies that demonstrated the wind farm’s ability to connect to the electric grid, were not repeated because those circumstances had not changed, DEQ argued.

Many of the issues raised in the lawsuit go to requirements for the original permit. Because Virginians for Responsible Energy and the landowners never challenged that permit in court, the state maintains, they should not be allowed to do so now.

DEQ also disputes allegations that it failed to ensure that higher turbines would not endanger golden eagles.

After a review in 2020 by the Virginia Department of Wildlife Resources, officials determined that the eagle population and site studies submitted by Apex in its original application remained valid, the agency says.

But DWR decided to study the possible risk to eagles that could be posed by future wind farms. Apex agreed to pay for the independent analysis. DEQ

then approved the company's permit before the study was completed, which the lawsuit cites as proof that the agency cut corners to benefit Apex.

DEQ contends that it was simply following the lead of state wildlife experts, who suggested additional research for future planning.

To oppose that, as the lawsuit does, "harms vulnerable wildlife populations such as golden eagles, rather than helping them, because it prevents DWR from conducting research," Assistant Attorney General Jerald Hess wrote on behalf of DEQ.

### **'So many false starts'**

On the issue of standing, members of Virginians for Responsible Energy declined to comment, saying they did not have the legal expertise to discuss the issue. Their attorney did not respond to a call from The Roanoke Times last week; in the past he has referred questions back to his clients.

Several of the petitioners also declined a request from the newspaper to visit their property and hear their concerns.

Melissa Hundley, who owns an 850-acre farm that abuts the wind farm parcel, expressed frustration with the news media's failure to share her story in the past.

"I feel I have been totally ignored, silenced really," she wrote in an email. Another petitioner, Eric Claunch, said the newspaper's prior coverage made him and others skeptical.

When the wind farm was first proposed in 2015, vocal supporters outnumbered opponents. The following year, the Botetourt County Board of Supervisors voted unanimously to approve a special exception permit after speakers backed the project by a ratio of about 3 to 1.

Since then, approval has slipped.

Apex failed to find a buyer for its electricity, and the site sat dormant. After signing a contract in 2019 with Dominion Energy, which planned to purchase the renewable power and sell it to Virginia's state government, the company restarted its plans with a proposal to build fewer turbines than the 25 first proposed, but at a height of up to 680 feet.

The number and height has changed multiple times, as recently as last month. Current configurations are for 13 turbines 612 feet tall.

In early 2020, an online survey by the county showed public sentiment was evenly split. The board of supervisors approved the project a second time later that year, but this time the vote was 3-2.

Steve Clinton, who was elected to the board after its first vote, opposed the wind farm. "There were so many false starts" in the plans, he said, and the company was unable to timely deliver on many of its promises.

Clinton also questioned the benefits of the wind farm, noting that its relatively small maximum output of about 75 megawatts would do little to advance the renewable energy movement — other than to perhaps encourage similar projects.

"As a county, we discourage ridge line development, and yet here you have a very visible case of marring the landscape, which is really one of our greatest assets," he said.

### **Wind 'picking up speed'**

Late last year, a power purchase agreement between Rocky Forge and Dominion expired. Patrick Chilton, a spokesman for Apex, said the company expects to find a new partner and start construction by year's end.



“We feel very confident in our case and expect to be successful in that legal challenge,” he wrote in an email when asked about the lawsuit by Virginians for Responsible Energy.

“We have been proceeding on many of the necessary tasks for completing this project in our expected timeline, including the county review of our site plans and financing of the project,” the email read. Apex hopes to have the wind farm in operation next year.

Some concerns about the wind farm — such as construction causing erosion that would pollute streams and its operation endangering wildlife — are similar to those voiced by opponents of the Mountain Valley Pipeline, which passes one county to the south and has been more widely resisted.

The Sierra Club is one of many organizations to file legal challenges of the permits issued to the natural gas pipeline.

Yet the Sierra Club has joined other groups, such as the Virginia Conservation Legacy Fund, the Roanoke Valley Cool Cities Coalition and Conservatives for Clean Energy, in supporting the wind farm.

“Renewables are picking up speed in Virginia,” said Dan Crawford, chair of the Sierra Club’s Roanoke Group.

“Rocky Forge Wind is well on its way to construction,” he said, “so soon we could be celebrating Virginia’s first wind farm, drawing visitors to the area and enhancing our image as progressive proponents of a cleaner environment.”