2009 ACT 40

A Description of Wisconsin's Law Creating Statewide Standards for Permitting Wind Energy Systems

The enactment of 2009 Act 40 (Act 40) does not establish rules for permitting a wind energy system, but rather requires the Public Service Commission (PSC) to establish those rules within two years. Current law (ss. 66.0401) states that wind energy projects can be stopped if the restriction does the one or more of the following:

- Serves to preserve or protect the public health or safety.
- Does not significantly increase the cost of the system or significantly decrease its efficiency.
- Can prove that a system of comparable cost and efficiency is possible.

Under current law, a political subdivision has permitting authority over wind energy facilities up to 100 megawatts (MW) in total capacity. Wind energy facilities that are 100 MW or larger must be reviewed and approved by the PSC.

Overview

While not modifying that specific provision of ss. 66.0401 cited above, Act 40 creates a framework to allow limited and generally uniform local regulation of wind energy systems. Note that, while the current law addresses both wind and solar energy systems, the framework created by Act 40 applies only to wind energy systems.

Under Act 40, the PSC is granted authority to set standards for the subdivisions to use when regulating the wind systems in their area. If a local political subdivision chooses to write its own ordinance, the provisions contained therein cannot be more restrictive than those the PSC determines. For example, Act 40 states that a local government cannot prohibit a company from testing a site to see if it is a good place for turbines, or the opposite, to make them test so much that the goal is to effectively delay or run up costs. Any currently permitted projects will not have to repeat the process with the new guidelines and are effectively grandfathered under Act 40.

Legal challenges to wind energy facilities have typically centered on public health and safety issues. With this in mind, the PSC is required to establish minimum setback distances that provide reasonable protection against health effects, such as sound emissions and moving shadows associated with wind energy facilities. The agency must also set rules on decommissioning turbines, addressing both removal of the physical infrastructure and site restoration. In addition to the above, the PSC is authorized to establish rules on various contentious subjects including visual appearance, lighting,

electrical connections to the power grid, maximum audible sound levels, proper means of measuring sound, and signal interference.

Limitations on Municipal Regulation of Wind Energy Systems

Act 40 directs the PSC to promulgate rules that specify the maximum restrictions that a municipality (referred to as a "political subdivision" in the law) may impose on the installation or use of a wind energy system. It specifies that the subject matter of the rules ***must*** include setback requirements that provide reasonable protection from health effects of wind energy systems and decommissioning; it specifies that the subject matter ***may*** also include visual appearance, lighting, electrical connections to the power grid, setback distances, maximum audible sound levels, shadow flicker, proper means of measuring noise, interference with radio, television, and telephone signals, or other matters.

Act 40 specifies that a municipality: (1) may not regulate wind energy systems unless it adopts an ordinance that is no more restrictive than the PSC rules; and (2) may not impose any restriction on a wind energy system that is more restrictive than the PSC rules.

Act 40 essentially "grandfathers" previously approved wind energy systems. It specifies that, if a municipality adopts an ordinance in conformance with the PSC rules, it may not apply that ordinance, or require approvals under that ordinance, to a wind energy system that it had already approved under a previous ordinance or under a development agreement. This language appears to apply to an amendment to a previous ordinance, as well as to a totally new ordinance, as that amendment itself is an ordinance.

Act 40 also specifies that a municipality may not prohibit or restrict testing activities to determine whether a site is suitable for the placement of a wind energy system. It provides that a municipality objecting to such testing may petition the PSC to impose reasonable restrictions on the testing.

Smart Growth Law

Act 40 authorizes a municipality to deny an application for approval of a wind energy system with an operating capacity of at least one megawatt if the proposed site of the system is in an area primarily designated for future residential or commercial development, as shown in a map that is adopted as part of a comprehensive plan under the Smart Growth law before June 2, 2009, or as shown in such maps after December 31, 2015, as part of a comprehensive plan that is updated as required under the Smart Growth law. An applicant whose application is denied under this provision may appeal the denial to the PSC, which may grant the appeal, notwithstanding the inconsistency of the application with the planned residential or commercial development, if the PSC determines that granting the appeal is consistent with the public interest.

Municipal Procedures

Act 40 specifies procedures that a municipality must follow in reviewing an application for a permit to install a wind energy system. In brief, a municipality must determine whether an application is complete within 45 days of receiving it and must take final action on the application within 90 days of determining that it is complete. A municipality may request additional information from an applicant, and is allowed 45 days from the receipt of that information to determine whether the application is then complete. A municipality may extend its 90-day review period for any of several specified reasons, but not for more than a total of 90 days. If a municipality does not have an ordinance in effect when it receives an application, the deadlines are delayed by approximately three months. If a municipality fails to make a determination of the completeness of an application within the 45-day limit, the application is considered to be complete; if it fails to take final action within the 90-day review period, the application is considered to be approved.

Act 40 specifies that, when reviewing an application for approval of a wind energy system, a municipality must create a record of its proceedings, including recordings of public hearings and copies of all related documents. The municipality must base its decision on an application on written findings of fact supported by evidence in the record. The Act 40 directs the PSC to promulgate rules further elaborating these and other procedural requirements and requires municipalities to conform their procedures to the PSC rules.

Review of Municipal Actions

The Act 40 specifies two options that an aggrieved party may use to appeal a municipality's actions on an application for approval to construct a wind energy system or to appeal a municipality's enforcement action relative to a wind energy system. Under the first option, the party may appeal the decision or action in the municipality's administrative review process. If still aggrieved following this review, the party may then appeal to the PSC. The further appeal must be made within 30 days of completion of the municipal review. If a municipality has not completed its review within 90 days, the party may then appeal to the PSC. Under the second option, an aggrieved party may appeal directly to the PSC.

When a case is appealed to the PSC, the municipality is required to provide the complete record of its proceeding to the PSC. The PSC may confine its review to the record developed or it may expand the record it reviews. Act 40 requires the PSC to complete its review in 90 days, but allows the PSC to extend that time for good cause. If the PSC determines that the municipality's action did not comply with the PSC's rules or is otherwise unreasonable, the PSC's decision supersedes that of the municipality and the PSC may order an appropriate remedy.

Act 40 specifies that these are the only options allowed for review of a municipality's actions. Under either option, judicial review is not available until the PSC has completed a review of the case. Upon appeal to circuit court, Act 40 directs the court to review the PSC's decision, rather than that of the municipality.

Applicability

Act 40 applies to all wind energy systems, regardless of size (as does current law). Note, however, that a person who proposes to build an electric generating facility with an operating capacity of at least 100 megawatts, including a wind farm with this collective capacity, must first apply to the PSC for, and receive, a certificate of public convenience and necessity (CPCN). Act 40 specifies that, in reviewing a CPCN application for a wind energy system, the PSC must consider whether installation or use of the system is consistent with the standards specified in the PSC's rules.

Under current law, municipal ordinances may not preclude or impede the construction of an electric generating facility for which the PSC has issued a CPCN. Thus, effectively, Act 40 applies to wind energy systems with an operating capacity less than 100 megawatts.

Public Hearings

Act 40 directs the PSC to hold at least two public hearings prior to promulgating its rules on wind energy systems. At least one of the hearings must be held in Monroe County and at least one must be held in an area outside of Dane County and Monroe County in which developers have proposed wind energy systems.

Decommissioning

Act 40 directs the PSC to promulgate rules that require the owner of a wind energy system with an operating capacity of at least one megawatt to maintain proof of financial responsibility ensuring the availability of funds for decommissioning of the system upon discontinuance of its use.

Wind Siting Council

Under the auspices of the PSC, a wind siting council will be formed to survey peer-reviewed scientific research on the health impacts of windpower facilities as well as national and state regulations affecting their siting. The council is directed to submit a report to the Legislature addressing health-related research and related regulatory developments. This report may include recommendations for legislative actions based on

the research and regulations surveyed. The initial report is to be submitted within five years of the law's effective date, and every five years thereafter.

The council will also advise the Commission on such matters as completeness of application and the record of decision, review procedure, and enforcement procedures.

The wind siting council will consist of 15 members representing various interests and perspectives. The breakdown of membership in this body will be as follows:

- Two members representing windpower developers;
- One member representing towns
- One member representing counties;
- Two members representing the energy industry;
- Two members representing environmental groups;
- Two members representing realtors;
- Two members who are landowners living adjacent to or in the vicinity of a windpower facility and who have not received compensation by or on behalf of the facility's owners, operators or developers;
- Two public members; and
- One member who is a University of Wisconsin System faculty member with expertise regarding the health impacts of wind energy systems.

Department of Natural Resources Duties

Act 40 directs the Department of Natural Resources (DNR) to identify areas in the state where wind turbines, if placed in those areas, may have a significant adverse effect on bat and migratory bird populations. The DNR must maintain an Internet website that provides this information to the public and includes a map of the identified areas.

Act 40 directs the DNR to prepare a study to determine whether the agency has sufficient legal authority to protect the environment, including wildlife, from the physical impacts of wind generating systems. The report is to be submitted to the Legislature no later than 13 months after the law takes effect. If the DNR concludes that it lacks sufficient authority to adequately protect the environment from the adverse impacts of wind generating systems, the report must also contain recommendations for a legislative remedy.

Prepared RENEW Wisconsin
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Sources: Wisconsin Legislative Council, Wind for Wisconsin