



**WISCONSIN LEGISLATIVE COUNCIL
INFORMATION MEMORANDUM**

**Municipal Regulation of Wind Energy
Systems (2009 Wisconsin Act 40)**

2009 Wisconsin Act 40 creates a framework to allow limited and generally uniform local regulation of the siting and operation of wind energy systems.¹ It directs the Public Service Commission (PSC) to promulgate rules specifying the maximum regulations a municipality (county, town, village, or city) may impose on wind energy systems. It specifies that a municipality may not regulate wind energy systems unless it adopts an ordinance that complies with the PSC rules, and may not impose any restrictions on the siting or operation of a wind energy system that are more restrictive than the maximum regulations specified in those rules.

The Act establishes procedural requirements that apply to a municipality's review of an application for approval to construct a wind energy system. It specifies that a person adversely affected by a municipality's action on an application or to enforce its wind siting ordinance may appeal the decision either within the appeal system of the municipality or directly to the PSC.

In general, a municipality (county, city, town, or village) may not place any restriction, either directly or in effect, on the installation of a solar or wind energy system, unless the restriction satisfies one of the following conditions:

- The restriction serves to preserve or protect the public health or safety.
- The restriction does not significantly increase the cost of the system or significantly decrease its efficiency.
- The restriction allows for an alternative system of comparable cost and efficiency.

2009 Wisconsin Act 40 does not modify this general provision of law, but creates a framework to allow limited and generally uniform local regulation of wind energy systems. Note that, while the prior law addresses both wind and solar energy systems, the framework created by the Act applies only to wind energy systems.

¹ A "wind energy system" is a wind turbine, or what is commonly recognized as a windmill; the term includes an entire "wind farm" of multiple, interconnected turbines.

LIMITATIONS ON MUNICIPAL REGULATION OF WIND ENERGY SYSTEMS

The Act directs the PSC to promulgate rules that specify the maximum restrictions that a municipality may impose on the installation or use of a wind energy system. It specifies that the subject matter of the rules **must** include the following:

1. Setback requirements that provide reasonable protection from health effects of wind energy systems, including health effects from noise and shadow flicker (the flickering effect of a rotating blade in direct sunlight).
2. The decommissioning of wind energy systems (removal of towers, turbines, and ancillary facilities) when taken out of service.

The Act specifies that the subject matter of the rules **may** also include the following:

1. Visual appearance.
2. Lighting.
3. Electrical connections to the power grid.
4. Setback distances (in addition to the required setback distances based on health effects).
5. Maximum audible sound levels.
6. Shadow flicker (in addition to the required setback distances related to health effects of shadow flicker).
7. Proper means of measuring noise.
8. Interference with radio, television, and telephone signals.
9. Other matters.

Two key provisions of the Act establish the link between the PSC rules and municipal regulation. These provisions specify that a municipality may not do either of the following:

1. Regulate wind energy systems unless it adopts an ordinance that is no more restrictive than the PSC rules.
2. Impose any restriction on a wind energy system that is more restrictive than the PSC rules.

In addition, the Act 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 to, or require approvals under that ordinance for, 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.

The Act specifies that a municipality *may* deny an application for approval to construct a wind energy system if the proposed site is in an area the municipality has designated as primarily for future residential or commercial development under the comprehensive planning (“smart growth”) law. However, it specifies that the PSC, on appeal, may reverse such a denial if it finds that approving the application is consistent with the public interest. This provision does not apply to small wind energy systems, i.e., those with a nominal operating capacity of less than one megawatt (MW).

The Act 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.

MUNICIPAL PROCEDURES

The Act specifies procedures that a municipality must follow in reviewing an application for a permit to install a wind energy system. When a municipality receives an application, it must publish a Class 1 notice that it has received the application. At the same time, the applicant is required to provide written notice to all owners of land adjoining the project that it has filed the application.

The 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 request additional information any number of times. However, if the PSC determines, as part of an appeal, that the municipality has unreasonably withheld a determination that an application is complete, it may treat the municipality’s determination that the application is incomplete as a denial of the application. The Act also specifies that a municipality may not consider an applicant’s minor modification to an application to constitute a new application, starting the review process over.

A municipality may extend its 90-day review period for any of several specified reasons, but not for more than a total of 90 additional days. 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.

If a municipality does not have an ordinance in effect when it receives an application for approval to construct a wind energy system, the deadlines for municipal action are delayed by approximately three months. This pause allows the municipality to enact an ordinance, which it can then apply in reviewing the application.

The Act 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 directs the PSC to promulgate rules further elaborating these procedural requirements and requires municipalities to conform their procedures to the PSC rules. The Act requires that the rules specify all of the following:

1. Information and documentation to be provided in an application for approval to construct a wind energy system.
2. Information and documentation to be included in a municipality's record of decision.
3. Procedures a municipality must follow in reviewing an application.
4. Requirements and procedures for a municipality to enforce limits it imposes on a wind energy system.

REVIEW OF MUNICIPAL ACTIONS

The Act 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 through 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, bypassing the municipality's administrative process.

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 base its review on that record or it may expand the record it reviews. The Act requires the PSC to complete its review within 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.

The Act 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, the Act directs the court to review the PSC's decision, rather than that of the municipality.

APPLICABILITY

While the Act is written broadly such that its provisions apply to wind energy systems of all sizes (with two specific exceptions), its practical effect is limited to systems smaller than 100 MW. This is a result of the law regulating the construction of large power plants. A person that proposes to build an electric generating facility with an operating capacity of at least 100 MW,

including a wind farm with this capacity, must first apply to the PSC for, and receive, a certificate of public convenience and necessity (CPCN). Under the CPCN law, municipal ordinances may not preclude or inhibit the construction of an electric generating facility for which the PSC has issued a CPCN. Thus, practically, the Act affects only wind energy systems with an operating capacity of less than 100 MW.

While the CPCN law prevents municipalities from regulating large wind farms, the Act requires the PSC, in reviewing a CPCN application for a wind energy system, to consider whether installation or use of the system is consistent with the standards specified in the PSC rules that lay out the extent to which municipalities may regulate wind energy systems. It is not clear what the practical effect of this requirement will be.

OTHER PROVISIONS

Decommissioning

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

Wind Siting Council

The Act creates a Wind Siting Council in the PSC. The membership of the council includes representatives of wind energy developers and the broader energy industry, municipalities, environmental groups, and realtors; it also includes neighbors of wind energy systems who do not receive compensation related to the systems, a member of the University of Wisconsin System faculty with expertise in the health impacts of wind energy systems, and unspecified public members. The members are appointed by the PSC.

The Act directs the PSC to consult with the council in developing the various rules required under the Act. It also directs the council to survey the peer-reviewed scientific literature relating to the health effects of wind energy systems and to study state and national regulatory developments with regard to wind energy systems. The council must submit a report to the Legislature every five years describing the research and regulatory developments it has reviewed and presenting any recommendations of the council for legislation based on that research and those developments.

Department of Natural Resources Duties

The Act 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.

The Act also directs the DNR to study whether the department's statutory authority is sufficient to adequately protect wildlife and the environment from any adverse effect from the siting, construction, or operation of wind energy systems. In conducting the study, the DNR

must consider the authority of other state agencies and municipalities to regulate the environmental impact of wind energy systems. The DNR must submit its report on the study to the Legislature within 13 months after the provision's effective date. If the study concludes that the DNR's authority is not sufficient, the report must include recommendations for a bill that provides DNR with such authority.

Effective Date

2009 Act 40 took effect on October 15, 2009.

This memorandum is not a policy statement of the Joint Legislative Council or its staff. The memorandum was prepared by David L. Lovell, Senior Analyst, on October 27, 2009.

WISCONSIN LEGISLATIVE COUNCIL

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536

Telephone: (608) 266-1304 • Fax: (608) 266-3830

Email: leg.council@legis.state.wi.us

<http://www.legis.state.wi.us/lc>

