



WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: SENATOR FRANK LASEE

FROM: Jessica Karls-Ruplinger, Senior Staff Attorney

RE: Promulgation of an Emergency Rule to Amend or Repeal Administrative Rules in Chapter PSC 128, Wis. Adm. Code

DATE: August 27, 2012

This memorandum, prepared at the request of your office, responds to your question about whether the Public Service Commission (PSC) may promulgate an emergency rule to amend or repeal the administrative rules that the PSC promulgated under s. 196.378 (4g) (b), Stats., relating to wind energy systems. An agency may temporarily amend or repeal permanent rules using an emergency rule, provided that the agency can demonstrate that the emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and the agency follows the procedures for the promulgation of emergency rules in ch. 227, Stats. To permanently amend or repeal permanent rules, the agency must follow the general rule-making process prescribed by ch. 227, Stats.

This memorandum describes s. 196.378 (4g) (b), Stats., and the procedures under which emergency rules are promulgated. Although this memorandum describes major procedures that apply to the promulgation of emergency rules, the promulgation of an emergency rule generally requires compliance with additional requirements in ch. 227, Stats.

RULES PROMULGATED UNDER SECTION 196.378 (4G) (B), STATS.

Under s. 196.378 (4g) (b), Stats., the PSC is required to, with the advice of the wind siting council,¹ promulgate rules that specify the restrictions that a county, city, village, or town (political

¹ The wind siting council consists of the following members appointed by the PSC: (1) two members representing wind energy system developers; (2) one member representing towns and one member representing counties; (3) two members representing the energy industry; (4) two members representing environmental groups; (5) two members representing realtors; (6) two members who are landowners living adjacent to or in the vicinity of a wind energy system and who have not received compensation by or on behalf of owners, operators, or developers of wind energy systems; (7) two public members; and (8) one member who is a University of Wisconsin System faculty member with expertise regarding the health impacts of wind energy systems. [s. 15.797 (1) (b), Stats.]

subdivision) may impose on the installation or use of a wind energy system² consistent with the following conditions: (1) serving to preserve or protect the public health or safety; (2) not significantly increasing the cost of the system or significantly decreasing its efficiency; and (3) allowing for an alternative system of comparable cost and efficiency. A political subdivision may not place a restriction on the installation or use of a wind energy system that is more restrictive than the rules promulgated by the PSC.

The statute requires that the subject matter of the rules include setback requirements that provide reasonable protection from any health effects associated with wind energy systems, including health effects from noise and shadow flicker; and decommissioning requirements. In addition, the rules may include requirements for 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, telephone, or television signals, or other matters.

The PSC promulgated the rules required under s. 196.378 (4g) (b), Stats., as Clearinghouse Rule 10-057, which became effective on March 1, 2011. The rules were codified in ch. PSC 128, Wis. Adm. Code. On March 1, 2011, the Joint Committee for Review of Administrative Rules (JCRAR) suspended ch. PSC 128, Wis. Adm. Code, and, on March 29, 2011, JCRAR voted to introduce 2011 Senate Bill 50 and 2011 Assembly Bill 72 to support the suspension. Because both bills failed to be enacted, ch. PSC 128, Wis. Adm. Code, remains in effect.

PROMULGATION OF EMERGENCY RULES

An agency may promulgate a rule as an emergency rule without complying with the notice, hearing, legislative review, and publication requirements under ch. 227, Stats., if preservation of the public peace, health, safety, or welfare necessitates putting the rule into effect prior to the time that the rule would take effect if the agency complied with the procedures. [s. 227.24 (1) (a), Stats.]

An agency may promulgate an emergency rule to temporarily amend or repeal existing permanent rules, such as those in ch. PSC 128, Wis. Adm. Code. Because the PSC is required to seek the advice of the wind siting council in promulgating rules under s. 196.378 (4g) (b), Stats., it is likely that the PSC is also required to seek the advice of the council in promulgating an emergency rule to amend or repeal the rules in ch. PSC 128, Wis. Adm. Code.

An agency that promulgates an emergency rule must first prepare a scope statement of the proposed emergency rule, as provided in s. 227.135, Stats. The scope statement must be approved by the Governor and the individual or body with policy-making powers over the subject matter of the proposed emergency rule. No state employee or official may perform any activity in connection with the drafting of a proposed emergency rule, except for an activity necessary to prepare the scope statement of the proposed emergency rule, until the Governor and the individual or body with policy-making powers over the subject matter of the proposed emergency rule approve the statement. [s. 227.24 (1) (e) 1d., Stats.]

² “Wind energy system” means equipment and associated facilities that convert and then store or transfer energy from the wind into usable forms of energy. [s. 66.0403 (1) (m), Stats.]

In addition, an agency must submit the proposed emergency rule in final draft form to the Governor for approval. An agency may not file an emergency rule with the Legislative Reference Bureau and an emergency rule may not be published until the Governor approves the emergency rule in writing. [s. 227.24 (1) (e) 1g., Stats.]

An emergency rule takes effect upon publication in the official state newspaper or on any later date specified in the rule and remains in effect for 150 days, unless the effective period of the emergency rule is extended by JCRAR. At the request of an agency, JCRAR may, at any time prior to the expiration of emergency rule, extend the effective period of the emergency rule, or part of the emergency rule, for a period not to exceed 60 days. JCRAR may grant any number of extensions, but the total period for all extensions may not exceed 120 days. [s. 227.24 (1) (c) and (2), Stats.] If an agency wishes to make the contents of an emergency rule permanent, the agency must promulgate a permanent rule with the same contents as the emergency rule.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

JKR:ksm