

Catching Wind

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Stringent Siting Rule Heads to Legislature

Nearly a year after the Wisconsin State Legislature passed a landmark bill (2009 Act 40) to overcome the cumulative effect of local restrictions on wind energy development, the Public Service Commission (PSC) issued a final rule that appears more likely to impede future projects than accommodate them.

The rule (PSC 128), which the PSC approved on August 31st, could still be modified as part of a review conducted by two legislative committees. If adopted as is, Wisconsin would have the distinction of having established, on a statewide basis, the most stringent set of wind permitting standards in the nation. If the rule is not modified, it will become effective November 1st.

The rule will not directly apply to windpower projects themselves, but rather to local governments reviewing applications to them. As specified in 2009 Act 40, local governments will retain permitting authority over windpower systems up to 100 megawatts (MW), but they cannot adopt ordinance provisions or impose permit conditions that are stricter than those specified in the statewide rule.

Compensation to Neighbors

In a first for any statewide windpower permitting rule in the nation, the PSC granted local governments the authority to require developers to offer compensation to nonparticipating neighbors. As formulated in the rule, nonparticipating residents within one-half mile from a wind turbine could be compensated up to 25% of the amount received by turbine hosts.

While the practice of offering easements or "Good Neighbor Payments" to project neighbors has become common in Wisconsin, the issues of compensation levels and appropriate distances from turbines have traditionally been resolved through negotiations between developers and local governments.

A good illustration of current practice can be seen with We Energies' Glacier Hills project now under construction. To secure

local support for the 90-turbine project, We Energies agreed to offer easements to qualifying nonparticipating residents within the project zone. To qualify, a neighbor must live within one-third mile of a wind turbine. Annual compensation is set at either \$500/year or \$750/year, depending on the number of turbines within one-third mile of a particular residence.

In exchange for accepting that compensation, neighbors agree to certain restrictions on their property they own within 1,200 feet of a turbine. The easement terms were agreeable to the Towns of Randolph and Scott, and both governments incorporated that document into their Joint Development Agreements with We Energies.

However, this provision of PSC 128 would explicitly empower local governments to dictate the terms of compensating neighbors, which can be accomplished with a permit condition or under a general ordinance. A local government could decide to set a compensation formula at the maximum allowable level irrespective of its potential impact on a particular project. It is doubtful whether any wind project in Wisconsin could proceed to construction if saddled with the maximum compensation terms allowed under this provision.

Because the issue of appropriate project neighbor compensation is unrelated to public health and safety, this provision appears to conflict with the statute that limits municipal regulation of wind energy systems (§66.0401 Stats.). If a local government imposes a restriction or condition on a wind energy system that increases installation costs or decreases system efficiency, that action must serve to protect public health and safety. If it is intended to address a different concern, however, then that local restriction cannot result in higher costs or decreased operating efficiency.

This question is likely to be reviewed by the Legislative Council in the next 30 days. If it believes that the neighbor compensation provision conflicts with state law, the Legislative Council will advise the reviewing committees of its conclusion. At

that point, the committee chairs could send letters to the PSC requesting modification of that provision or its outright removal.

Summary of Major Provisions

Other major provisions in PSC 128 are summarized below.

Notice requirements: At least 90 days before the filing of an application to construct a wind generation system, a developer of a large wind energy system must provide written notice to all affected political jurisdictions and landowners within one mile of the planned wind system. All political subdivisions within the project's boundaries must be given 90 days' notice as well.

Setbacks: The rule allows local governments to establish a so-called safety setback of 1.1 times maximum blade tip height of a wind turbine. For participating residences, the setback distance cannot be waived. For property lines, the safety setback distance can be waived by the neighboring property owner. For nonparticipating residents and owners of occupied community structures, the rule imposes a setback multiple of 3.1 times maximum blade tip height, which can be waived. For small wind turbines, the safety setback multiple is set at 1.0 times maximum blade tip height.

Sound thresholds: The rule allows local governments to establish a daytime sound threshold of 50 decibels (dBA) and a nighttime sound threshold of 45 dBA at nonparticipating residences and occupied community structures.

Shadow flicker requirements: The rule allows local governments to set a maximum allowable standard of 30 hours

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a year at nonparticipating residences and occupied community structures. Wind turbines that are likely to produce more than the allowable quantity are subject to operational curtailment as a compliance measure. If shadow flicker duration exceeds 20 hours/year, mitigation can be required at the owner's expense.

Comparison with Glacier Hills

The sound and shadow flicker standards in the statewide rule are tighter than the corresponding requirements in the Glacier Hills decision of January 2010. Whereas the shadow flicker mitigation requirement at Glacier Hills starts at 25 hours/year, the statewide rule shaves five hours off that annual number. In the statewide rule, the 50/45 dBA sound standard is effective year-round. At Glacier Hills, the nighttime 45 dBA standard is enforceable from April through October.

The PSC's decision to adopt a 3.1 setback distance multiple would place a heavy burden on developers working with very large turbines, such as Emerging Energies. When completed later this year, Emerging Energies' Shirley Wind project will consist of eight Nordex 2.5 MW turbines in the Town of Glenmore in southern Brown County. Using a 3.1 multiple, a Nordex turbine, with its 100-meter tower and its 50-meter long blades, would be subject to a minimum setback distance in excess of 1,500 ft. Such a stringent standard effectively precludes future developments with that and other turbines of similar size in the more densely populated areas of eastern Wisconsin.

In addition to the provisions mentioned above, PSC 128 establishes standards addressing signal interference, stray voltage, decommissioning, emergency procedures, complaint resolution and construction/operation/maintenance standards.

The rule also creates a separate category of regulation for small wind systems, defined as installations up to 300 kilowatts consisting of turbines no larger than 100 kilowatts. Many of the restrictions in PSC 128 will not apply to small turbines.

Though the standards are designed to be uniformly applied, certain types of windpower projects are exempt from the statewide rule. Installations that are already operating or under construction are not subject to PSC 128, as well as those approved by a local government prior to the

rule's effective date. Projects larger than 100 MW, which are reviewed by the PSC, are also not covered under this rule. For those jurisdictions lacking wind energy ordinances, the statewide rule will be the prevailing authority on notice requirements and decommissioning requirements.

Safety Net Proposal

During its deliberations in late August, the PSC entertained a novel proposal to establish a property buyout provision based on documented health effects from living in proximity to a wind turbine. Describing it as a "safety net," Commissioner Lauren Azar proposed a requirement on turbine owners to "purchase, at fair market value, the home of someone who can prove that a nearby wind turbine is directly causing a significant adverse health outcome." Details of the proposal can be found in Commissioner Azar's letter of concurrence dated August 31 (PSC Ref# 137660).

Commissioner Azar's proposal sprang from her belief that turbines can compromise the health of a small percentage of residents living near them. Though the new permitting standards are tighter than those placed on current projects, Azar stated that "we cannot accurately identify the precise line between safe levels of noise from wind turbines and those levels that will negatively affect human health." A buyout provision is necessary, Azar argued, to mitigate adverse health outcomes from a wind turbine owner. As structured, Azar's proposal would have exposed a turbine owner to the possibility of buying a house even if that turbine was operating in full compliance of PSC 128.

Perhaps recognizing that responsible developer behavior offered no protection from this liability, Azar's two colleagues did not go along with this provision. However, the discussion on the safety net proposal may have influenced Commissioner Mark Meyer's decision to support the 3.1 setback distance multiple developed by PSC staff. During the deliberations on setback distances, a split was revealed between Commissioner Azar, who favored the 3.1 formula, and PSC Chair Eric Callisto, who didn't. When it was clear that the safety net proposal lacked the crucial second vote, Commissioner Azar signaled that she could still support the rule if the setback distances from nonparticipating residences and occupied community structures were to her liking. Later in the meeting, Meyer voted for the staff-proposed setback, with Callisto dissenting.

Rulemaking a Two-Track Process

In accordance with 2009 Act 40, the development of the siting rule proceeded along two parallel tracks. One pathway involved the familiar elements of agency rulemaking: a draft rule prepared by staff, followed by a comment period, and a final draft that the PSC reviewed and modified. But that same law also created a 15-member advisory body to consider specific ideas and proposals for improving the permitting landscape in Wisconsin.

Spanning a broad cross-section of interests and opinions on wind generation, the Wind Siting Council dove into the thorny subject matter and produced in mid-August a set of recommendations for the PSC's consideration. Though fashioned as a compromise, not everyone on the council supported the recommendations, an unsurprising result given the deep divisions within that body. Four Council members dissented and instead signed on to a minority report that was attached to the final document. In that document they expressed their preference for one-half mile setbacks and relative sound standards, in keeping with the positions espoused by the windpower opposition lobby.

In the end, the PSC seemed more comfortable with the prescriptions in the Staff rule than with the recommendations in the Wind Siting Council's report. The Council majority, for example, did not support requirements on developers to offer compensation terms to project neighbors. Many on the Council also believed that setback distances should be determined only by sound and shadow flicker standards. As noted earlier, the PSC voted to impose a setback requirement on top of the sound and shadow flicker standards.

Not surprisingly, windpower opponents are critical of the rule's sound and setback requirements. For them, the rule is problematic because it does not incorporate the harshest elements found in local ordinances in place, among them being setback distances of one-half mile from nonparticipating neighbors and 1,000 ft. from property lines. Another fixture of existing wind ordinances is a sound threshold usually pegged no more than no more than five dBA above ambient levels.

Needless to say, windpower opponents are acutely aware that these provisions are project-killers, which is why they steadfastly refuse to accept less onerous standards in the statewide rule. ☼