



WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

2009 Assembly Bill 256

**Assembly Substitute
Amendment 1**

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Contact: John Stolzenberg, Chief of Research Services (266-2988)

Assembly Bill 256 relates to the regulation of wind energy systems. This Amendment Memo summarizes relevant current law and the bill and then identifies the differences between the Assembly Bill 256 and Assembly Substitute Amendment 1 to Assembly Bill 256.

CURRENT LAW

Municipal Regulation

Current law limits the authority of a political subdivision (county, city, town, or village) to regulate the placement of solar and wind energy systems. Specifically, a municipality is prohibited from placing any restriction, either directly or in effect, on the installation of such a 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.

In addition, current law authorizes a political subdivision to adopt an ordinance to require the trimming of vegetation that blocks sunlight or wind from reaching a solar or wind energy system.

As used in these provisions, a “wind energy system” is defined as equipment that converts and then stores or transfers energy from the wind into usable forms of energy.

Public Service Commission Regulation

Current law requires, in general, that a public utility or other person must obtain a certificate of public convenience and necessity (CPCN) from the Public Service Commission (PSC) to construct any electric generating facility, including a wind energy system, with a capacity of at least 100 megawatts (MW). The CPCN statute lists a number of determinations that the PSC must make in order to grant a CPCN. If the installation or utilization of a facility for which a CPCN has been granted is precluded or inhibited by a local ordinance, the CPCN statute overrides the local ordinance and authorizes the installation and utilization of the facility to nevertheless proceed.

ASSEMBLY BILL 256

PSC Regulation

Rules

The bill directs the PSC to promulgate rules relating to both the standards a political subdivision may impose on wind energy systems and the procedures a political subdivision must follow in reviewing approval applications.

The PSC's rules must specify the restrictions a political subdivision may impose on the installation or use of a wind energy system. These restrictions must be consistent with the conditions in current municipal law, described above. The rules may address any of the following:

- Visual appearance and lighting.
- Electrical connections to the power grid.
- Setback distances.
- Maximum audible sound levels and proper means of measuring noise.
- Shadow flicker.
- Interference with radio, telephone, or television signals.
- Decommissioning.
- "Other matters."

The PSC's rules must also specify the following procedural matters relating to an application to a political subdivision for an approval to install a wind energy system and the enforcement of the approval by the political subdivision:

- The information and documentation that must be included in the application to demonstrate that the proposed wind energy system complies with the PSC's rules.

- The information and documentation that must be included in the political subdivision's record of decision regarding the application.
- The procedures the political subdivision must follow in reviewing an application.
- The requirements and procedures the political subdivision must use to enforce the restrictions authorized in the PSC's rules.

Advisory Committee

The bill directs the PSC to establish an advisory committee to advise the commission on the rules, described above. The advisory committee must be composed of representatives of the following: wind energy system developers; political subdivisions; energy groups; environmental groups; realtors; landowners who live adjacent to or in the vicinity of wind energy systems and who have not received compensation by or on behalf of owners, operators, or developers of wind energy systems; and the public.

CPCN Application for a Wind Energy System

The bill requires the PSC, in making a determination on a CPCN for a wind energy system (which is required only if the system has a capacity of at least 100 MW), to consider whether installation or use of the system is consistent with the restrictions specified in the PSC's rules, described above. This provision first applies to applications for CPCNs that the PSC receives after the effective date of its rules.

Municipal Regulation

Authority to Regulate

The bill states that a political subdivision may not regulate wind energy systems, or deny or impose a restriction on an approval to install a wind energy system unless it adopts an ordinance that is no more restrictive than the PSC's rules, described above.

The bill also states that a political subdivision may not place any restriction, either directly or in effect, on the installation or use of a wind energy system that is more restrictive than the PSC's rules described above, or that does not satisfy one of the conditions on such regulations in current law, described in the first section of this memorandum.

The bill specifies that a county ordinance to regulate wind energy systems applies only in the unincorporated parts of the county. If a town enacts an ordinance, either before or after the county enacts an ordinance, the more restrictive terms of the two ordinances will apply within that town.

Procedures and Time Limits

The bill prescribes the following procedures and time limits for a political subdivision's review and public notice of an application for an approval to install a wind energy system:

- Within 45 days of receipt of an application, the political subdivision must determine whether the application is complete. If the political subdivision does not meet this deadline, the application is considered to be complete. If the political subdivision does not have an ordinance regulating wind energy systems, this 45-day review period does not begin until the first day of the fourth month beginning after the political subdivision receives the application.
- If the political subdivision determines that the application is incomplete, it must notify the applicant of the specific deficiencies in the application; and the applicant may supplement and resubmit the application.
- On the same day that an applicant submits an application to a political subdivision, the applicant must mail or deliver written notice of the application to the owners of land adjoining the site of the wind energy system.
- Within 90 days of determining that an application is complete, the political subdivision must approve or disapprove the application. If the political subdivision fails to meet this deadline, or an extended deadline summarized in the next bullet point, the application is considered to be approved.
- Within this 90-day review period, a political subdivision may extend the review period by up to an aggregate total of 90 days by any combination of the following:
 - An extension of up to 45 days if the political subdivision needs additional information.
 - An extension of up to 90 days if the applicant makes a material modification to the application.
 - An extension of up to 90 days for other good cause specified in writing by the political subdivision.
- If an application is approved, considered to be approved, or is not subject to regulation because the political subdivision did not enact an ordinance in a timely manner, a political subdivision may not consider an applicant's minor modification to the application to constitute a new application.
- If an application is considered to be approved or is not subject to regulation because the political subdivision did not enact an ordinance in a timely manner, a political subdivision may not regulate the wind energy system that is the subject of the application.

Approval; Record of Decision

The bill requires that a political subdivision make a record of its decision-making in conformance with the PSC's rules, including all of the following:

- A recording of any public hearing.
- Copies of documents submitted at any public hearing.

- Copies of any other documents provided to the political subdivision in connection with the application.

The bill requires that the political subdivision base its decision to approve or disapprove an application on findings of fact that are supported by the record, in a procedure that conforms with the PSC's rules.

Review of Municipal Permit Decisions

In general, any decision of a political subdivision may be reviewed by an appeal to circuit court. However, such an appeal usually is not allowed until the person making the appeal has exhausted all opportunities for review or appeal within the political subdivision. Under the bill, these standard appeals procedures apply to any decision relating to a wind energy system with a generation capacity of less than one MW.

The bill creates a separate and exclusive appeals procedure applicable to a political subdivision's decisions and enforcement actions relating to a "large wind energy system," defined as a system with a generation capacity of at least one MW, as follows:

- Any person aggrieved by the political subdivision's decision or enforcement action relating to a large wind energy system may seek review of the decision or action within the political subdivision. If the person is still aggrieved after the political subdivision's review is completed, the person may file an appeal with the PSC within 30 days of the completion of the political subdivision's review. If the political subdivision fails to complete its review within 90 days after the aggrieved person begins the review, the political subdivision is considered to have completed its review on the 90th day after the person began the review.
- Rather than beginning a review of a decision or enforcement action by the political subdivision within the political subdivision, the aggrieved person may file an appeal directly with the PSC, provided that this filing is made no later than 30 days after the decision or initiation of the enforcement action.
- Upon receiving an appeal under either of the procedures described above, the PSC must notify the political subdivision. Within 30 days of receiving the PSC's notification, the political subdivision must provide a certified copy of its record upon which it based its decision or enforcement action. The PSC may request other relevant governmental records, and, if requested, the political subdivision must provide the records within 30 days of receiving the request.
- The PSC may confine its review to the political subdivision's records or may expand the record if it determines that additional information would be relevant to its decision.
- The PSC must issue a decision on the appeal within 90 days of receipt of all records it requests from the political subdivision, except that it may extend this deadline for good cause. The bill does not limit the amount of time by which the PSC may extend its review period.

- If the PSC determines that the political subdivision's decision or enforcement action does not comply with its rules or is otherwise unreasonable, the PSC's decision supersedes the political subdivision's decision, and the PSC may order an appropriate remedy.
- In conducting a review, the PSC may treat a political subdivision's determination that an application is incomplete as a decision to disapprove the application.
- An aggrieved person may not seek judicial review of the PSC's decision until the PSC's review has been completed.
- A judicial review is of the PSC's decision, not of the political subdivision's decision or enforcement action.
- Injunctive relief is available only if certain conditions, which also apply to injunctive relief from the PSC's decisions in general, are met.

The PSC's review process first applies to the decision of a political subdivision that is made after the effective date of the PSC's rules.

Definition of "Wind Energy System"

The bill modifies the definition of "wind energy system" to include not only equipment that converts and then stores or transfers energy from wind into usable forms of energy but also "associated facilities" that serve these purposes.

Other Provisions

Testing Activities

The bill provides that a political subdivision may not prohibit or restrict any person from conducting tests to determine the suitability of a site for wind energy generation. Instead, it allows a political subdivision that objects to such testing to petition the PSC to impose reasonable restrictions on the testing.

Municipal Ordinances to Require Trimming of Vegetation

The bill does not modify a political subdivision's authority to enact an ordinance to require the trimming of vegetation that blocks sunlight or wind from reaching a solar or wind energy system. However, it clarifies that a county ordinance for this purpose applies only in towns that have not enacted such an ordinance.

ASSEMBLY SUBSTITUTE AMENDMENT I

PSC Regulation

The substitute amendment makes the following changes in the bill's provisions relating to PSC regulations:

- 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.
- Adds to the required membership of the PSC advisory committee on its rules on wind energy systems a member of the University of Wisconsin faculty who offers expertise in the issues to be addressed by the committee.
- Clarifies in the provision on a CPCN application for a wind energy system that the PSC must consider whether installation or use of the system is consistent with the standards, rather than the restrictions, specified in the PSC's rules.

Municipal Regulation

The substitute amendment makes the following changes in the bill's provisions relating to municipal regulations:

- Authorizes a political subdivision to deny an application for approval of a large wind energy system (this item is not defined in the substitute amendment) 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.
 - The PSC 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.
- In the procedures and time limits for a political subdivision's review of an application for an approval to install a wind energy system:
 - Requires a political subdivision, as soon as possible after receiving an application for approval of a wind energy system, to publish a Class 1 notice stating that the application has been filed with the political subdivision.
 - Establishes that under any condition, rather than under the conditions specified in the bill, a political subdivision may not consider an applicant's minor modification to the application to constitute a new application for the purposes of these procedures.
 - Excludes the provision in the bill that, if an application is considered to be approved or is not subject to regulation because the political subdivision did not enact an ordinance in a timely manner, a political subdivision may not regulate the wind energy system that is the subject of the application.

- In the procedure for appealing a political subdivision's decision or enforcement action on a wind energy system to the PSC:
 - Applies the procedure to all sizes of wind energy systems subject to regulation by political subdivisions rather than only those with a capacity of at least one MW.
 - Qualifies the provision, that authorizes the PSC to treat a political subdivision's determination that an application is incomplete as a decision to disapprove the application, to apply only if the PSC determines that the political subdivision has unreasonably withheld its determination that an application is incomplete.

Other Provisions

The substitute amendment creates the following provisions that are not contained in the bill:

- 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.
- 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 political subdivisions 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.

Legislative History

On June 17, 2009, the Assembly Committee on Energy and Utilities offered Assembly Substitute Amendment 1 by unanimous consent; recommended adoption of Assembly Substitute Amendment 1 by a vote of Ayes, 11; Noes, 1; and recommended passage of Assembly Bill 256, as amended, by a vote of Ayes, 10; Noes, 2.

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