

Wisconsin Legislative Council Rules Clearinghouse

Ronald Sklansky
Clearinghouse Director

Terry C. Anderson
Legislative Council Director

Richard Sweet
Clearinghouse Assistant Director

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 10-057

AN ORDER to create chapter PSC 128, relating to the siting of wind energy systems.

Submitted by PUBLIC SERVICE COMMISSION
05-17-2010 RECEIVED BY LEGISLATIVE COUNCIL.
06-14-2010 REPORT SENT TO AGENCY.

RS:REL

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]
Comment Attached YES ✓ NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]
Comment Attached YES ✓ NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]
Comment Attached YES NO ✓

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]
Comment Attached YES NO ✓

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]
Comment Attached YES ✓ NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]
Comment Attached YES NO ✓

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]
Comment Attached YES NO ✓

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Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated September 2008.]

1. Statutory Authority

a. Section 66.0401, Stats., as affected by 2009 Wisconsin Act 40, provides in part that: (1) a political subdivision choosing to regulate wind energy systems must enact an ordinance that is no more restrictive than the applicable standards established by the commission by rule; and (2) the political subdivision may not deny or impose a restriction on an application for approval unless it enacts such an ordinance. Section 196.378 (4g) (b), Stats., created by Act 40, in turn directs the commission to promulgate rules specifying the restrictions a political subdivision may impose on the installation or use of a wind energy system. The commission nominally addresses the requirements in s. PSC 128.13 (2) (a) by stating that a political subdivision may not establish distance or height requirements different than those in ch. PSC 128.

However, the extent of the applicability of ch. PSC 128 is unclear. Section PSC 128.02 (1) (a) provides that the chapter applies to wind energy systems, but there is no indication of whether the rule is meant to regulate only the approval process engaged in by political subdivisions, as mandated by Act 40, or whether the standards in subch. II of ch. PSC 128 are also meant to apply directly to developers, owners, and operators of wind energy systems that operate at a capacity of less than 100 megawatts in a political subdivision without an appropriate ordinance. [See also s. 196.491, Stats.] If the rule is intended to apply to developers, owners, and operators of wind energy systems throughout the state in political subdivisions without an appropriate ordinance, the rule should clearly state this and the commission should clearly and carefully explain its statutory authority. If the rule is intended merely to comply with Act 40, the text of the rule should state clearly that the standards contained in the rule are those that must be contained in a

political subdivision ordinance that imposes an approval process on developers, owners, and operators of wind energy systems.

b. Section 66.0401 (4) (a) 3., Stats., as created by Act 40, provides that on the same day that an applicant makes an application for approval of a wind energy system, the applicant must mail or deliver written notice of the application to the owners of land adjoining the site of the wind energy system. Sections PSC 128.10 and 128.30 (5) contain additional notice requirements. What is the statutory authority for the additional requirements? [Arguably, the notice requirement in s. PSC 128.18 (5) is part of the enforcement process that the commission is required to regulate under s. 196.378 (4g) (c) 4., Stats.]

2. Form, Style and Placement in Administrative Code

a. The rule preface compares the rule to the law in the State of Ohio. While an agency may compare a rule to any state in the country, s. 227.14 (2) (a) 4., Stats., requires a comparison with similar rules in Illinois, Iowa, Michigan, and Minnesota. The rule preface should include information about Iowa law.

b. Section PSC 128.02 (2) is a broad grant of authority to the commission to take any action it desires without regard to ch. PSC 128. If the commission's intent is to create a system by which a variance may be obtained, some standards for granting a variance should be stated in the rule.

c. In s. PSC 128.10 (3) (a) and (b), "Department of Transportation" should be changed to the lowercase. It appears that s. "PSC 128.10 (5)" should be changed to s. "PSC 128.10 (4)."

d. Section PSC 128.14 (3) (f) provides that the commission must establish a noise measurement protocol that will be revised as necessary and made available to the public on the commission's website. It appears that the noise measurement protocol, or at least a reference to a recognized standard, should be incorporated into the text of the rule.

e. In s. PSC 128.17 (1), the sentence should begin with the phrase "A developer." [See also sub. (3).]

f. In s. PSC 128.18 (2) (a), the notation "Wis. Adm. Code" is unnecessary and should be deleted.

g. In s. PSC 128.31 (1), the notation "s." should be inserted before the reference to "PSC 128.40."

h. Section PSC 128.40 requires the commission to establish detailed application filing requirements for applications filed for political subdivision review of a wind energy system. The commission may revise these requirements and place the requirements on the commission's website. It appears that the filing requirements should be placed in the text of the rule.

5. Clarity, Grammar, Punctuation and Use of Plain Language

- a. The rule makes frequent use of the phrase “developer, owner, or operator.” When the disjunctive word “or” is used, and the rule imposes a mandate, is it clear who is required to comply with the rule? Will this be a matter typically settled by contract?
- b. In s. PSC 128.13 Table 1, should “participating residences” be changed to “participating properties,” which is a defined term under s. PSC 128.01 (13)? See also sub. (1) (d) and s. PSC 128.15 (1).
- c. In s. PSC 128.14 (3) (a), what does “seasonally-reduced” mean? In sub. (3) (d), “nighttime hours” should be defined. In sub. (3) (e), “under par. (f)” should be added after “noise measurement protocol.”

RESPONSES TO LEGISLATIVE COUNCIL REPORT**1. Statutory Authority**

- a. Changes have been made to clarify that the majority of the rule involves what provisions a political subdivision may choose to include in an ordinance, should it choose to enact one. However, the choice of whether to enact an ordinance, and what provisions to include, remain with the political subdivision.

Portions of the rule are intended to apply even when a political subdivision does not have a wind siting ordinance. The statute, as affected by 2009 Wisconsin Act 40, shows that this was intended. For example, "application" is defined in s. 66.0401 (1e) (a), Stats., as "an application for approval of a wind energy system under rules promulgated by the commission...." Yet an application must be filed whether or not a political subdivision has an ordinance. In s. 66.0401(4) (a) 2., Stats., a deadline is set for an application's completeness determination when a political subdivision does not have a wind siting ordinance. Section 66.0401(4) (a) 3., Stats., requires notice to landowners on the same day that an application is filed with the political subdivision. In addition, s. 196.378 (4g) (c) 1., Stats., states that the commission must promulgate rules that specify what information and documentation must be in a wind energy system application. Thus, whether or not a political subdivision has an ordinance, the PSC rules about filing an application and the political subdivision review process apply. Decommissioning rules also always apply. Procedural rules for complaints, as well as procedural rules for appeals to the Commission, always apply.

- b. Section 196.378 (4g) (b), Stats., allows the commission to develop rules about matters other than those listed in the statute. Section 66.0401 (4) (a) 3., Stats., deals with notice that a wind energy system application has been filed. Section PSC 128.105 deals with a notice before the application is filed. It serves a different purpose than the notice that an application has actually been filed in that it is intended to aid the political subdivision in enforcing or enacting an ordinance and to better understand the application that will be filed. Section PSC 128.30 (5) deals with information that must be included with the notice that an application has been filed.

2. Form, Style and Placement in Administrative Code

- a. Agree. Change made.

- b. Disagree. This provision appears in multiple commission rules, and has done so dating back to the 1950s. This flexibility is important given the very quick changes that can occur in the industries regulated by the commission, especially in a developing area such as wind energy. Further, this rule is unique in its inter-relationship between political subdivisions and the commission. Unusual complications may arise as a result of this. The provision is not totally open-ended. The commission must examine the facts and circumstances of an individual case and can only change requirements if there is an unusual or exceptional circumstance.
- c. Agree with both suggestions. Changes made. Reference to the Department of Transportation has been removed from the rule.
- d. Disagree. This protocol is posted to the commission's website where it is widely available but can be changed as necessary. The issues of noise and noise measurement are quickly evolving and the protocol may need changing more frequently than rules would allow.
- e. Agree. Changes made.
- f. Agree. Change made.
- g. Agree. Change made.
- h. Disagree. Consistent with the commission's prior practice with filing requirements, the requirements are posted to the website where they are widely available but can be changed as necessary. The requirements may need to be revised more often than rules would allow, especially since this is the beginning of a new process.

5. Clarity, Grammar, Punctuation and Use of Plain Language

- a. Agree in part. Requirements and those responsible for meeting those requirements will change during the life of a wind energy system. The language "developer, owner or operator" was used in an attempt to prevent a responsible party from claiming it was not the party named in the rule. The intent in using this language was to convey that the person responsible for the wind energy facility at the time in question is responsible for meeting the requirement at that point in time. However, the language has been changed to clarify this matter. The term operator has been removed from the rules. The definitions of "owner" and "developer" have been merged into the definition of "owner" and language has been added stating that a developer is no longer considered an owner, and so liable, once the development stage is complete.

- b. Disagree. In s. PSC 128.13 Table 1, “participating residences” should not be changed to “participating properties” because there are setback requirements from residences and separate setback requirements from property lines.

Agree. In ss. PSC 128.13(1)(d), the language was intended to include both “participating residences” and “participating properties.” Changes made.

Disagree. In s. 128.15 (1), the language is intentionally limited to residences.

- c. Agree. Changes made. References to seasonally-reduced have been removed from the rule.

2009-2010 Session

LRB or Bill No./Adm. Rule No.

PSC 128

Amendment No. if Applicable

FISCAL ESTIMATE

DOA-2048 N(R10/96)

- ORIGINAL UPDATED
 CORRECTED SUPPLEMENTAL

Subject

Wind Energy Systems Siting Administrative Rule Implementing 2009 Wisconsin Act 40

Fiscal Effect

State: No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

Increase Costs - May be possible to Absorb Within Agency's Budget Yes No

- Increase Existing Appropriation Increase Existing Revenues
 Decrease Existing Appropriation Decrease Existing Revenues
 Create New Appropriation

Decrease Costs

Local: No local government costs

1. Increase Costs
 Permissive Mandatory
2. Decrease Costs
 Permissive Mandatory

3. Increase Revenues
 Permissive Mandatory
4. Decrease Revenues
 Permissive Mandatory

5. Types of Local Governmental Units Affected:
 Towns Villages Cities
 Counties Others _____
 School Districts WTCS Districts

Fund Sources Affected

- GPR FED PRO PRS SEG SEG-S

Affected Ch. 20 Appropriations

20.155 (1) (g) and 20.155 (1) (j)

Assumptions Used in Arriving at Fiscal Estimate

State Fiscal Effects

There are potential costs to the Public Service Commission (PSC) under PSC 128. However, these costs are indeterminate and will be absorbed within existing resources.

Potential staff and Intervenor Compensation costs under PSC 128 are related to the potential number of petitions filed with the Commission to appeal a political subdivision's decision approving or denying construction of a wind energy system or decommissioning a wind energy system.

As drafted, PSC 128 minimizes the potential costs per appeal under 2009 Wisconsin Act 40. PSC 128 does not require the Commission to open a docket or hold a hearing to decide an appeal. However, PSC 128 could increase rather than decrease the potential number of appeals.

Under 2009 Wisconsin Act 40, local governments may not be more restrictive in their wind energy system siting regulations than the statewide set of siting requirements to be established under PSC 128. PSC 128 may result in an increased number appeals from residents because it excludes local governments from considering certain factors in siting decisions, but allows the PSC to make exceptions to the Rule. PSC 128 could also increase the potential number of appeals from owners if a local government enacts more restrictive siting permit and application requirements, than the political subdivision had previously enacted or considered enacting, because PSC 128 allows the more restrictive approach.

Costs from the potential increase in appeals could be offset by the reduced cost per appeal from the rule's more flexible approach to dockets and hearings. However, the total fiscal effect cannot be accurately projected at this time.

PSC 128 as currently drafted does not increase costs to other state agencies. PSC 128 allows political subdivisions flexibility to maintain current levels of consultation and involvement with state agencies (if the overall consultation is allowable under PSC 128).

Local Fiscal Effects

PSC 128 may increase local governments' permitting process and record retention costs, but it allows local governments to cover these costs with wind siting application fees from owners of wind energy systems. Therefore, PSC 128 does not have a significant local fiscal effect.

Long-Range Fiscal Implications

Indeterminate

Agency/Prepared by: (Name and Phone No.)
Anne Olson 267-9086

Authorized Signature/Telephone No.
Anne Olson 267-9086

Date
5/10/2010