



WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

2009 Senate Bill 185

**Senate Substitute
Amendment 2**

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Senate Bill 185 relates to the regulation of wind energy systems. This Amendment Memo provides an overview of current law and the substitute amendment and then identifies the differences between the substitute amendment and the bill.

CURRENT LAW

Current law prohibits a municipality (county, city, town, or village) from placing 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.

THE SUBSTITUTE AMENDMENT

The substitute amendment does not modify the provision of current law cited above, but creates a framework to allow limited and generally uniform local regulation of wind energy systems. Note that, while the current law addresses both wind and solar energy system, the framework created by the substitute amendment applies only to wind energy systems.

Limitations on Municipal Regulation of Wind Energy Systems

The substitute amendment directs the Public Service Commission (PSC) to promulgate rules that specify the maximum restrictions that a municipality (“political subdivision” in the substitute

amendment) may impose on the installation or use of a wind energy system. It specifies that the subject matter of the rules *must* include setback requirements that provide reasonable protection from health effects of wind energy systems and decommissioning; it specifies that the subject matter *may* also include 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, television, and telephone signals, or other matters.

The substitute amendment specifies that a municipality: (1) may not regulate wind energy systems unless it adopts an ordinance that is no more restrictive than the PSC rules; and (2) may not impose any restriction on a wind energy system that is more restrictive than the PSC rules.

The substitute amendment 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, or require approvals under that ordinance, to 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 substitute amendment 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 substitute amendment specifies procedures that a municipality must follow in reviewing an application for a permit to install a wind energy system. In brief, a 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 extend its 90-day review period for any of several specified reasons, but not for more than a total of 90 days. If a municipality does not have an ordinance in effect when it receives an application, the deadlines are delayed by approximately three months. 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.

The substitute amendment 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 substitute amendment directs the PSC to promulgate rules further elaborating these and other procedural requirements and requires municipalities to conform their procedures to the PSC rules.

Review of Municipal Actions

The substitute amendment 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 in 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.

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 substitute amendment requires the PSC to complete its review in 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 substitute amendment 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 substitute amendment directs the court to review the PSC's decision, rather than that of the municipality.

Applicability

The substitute amendment applies to all wind energy systems, regardless of size (as does current law). Note, however, that a person who proposes to build an electric generating facility with an operating capacity of at least 100 megawatts, including a wind farm with this collective capacity, must first apply to the PSC for, and receive, a certificate of public convenience and necessity (CPCN). Under current law, municipal ordinances may not preclude or impede the construction of an electric generating facility for which the PSC has issued a CPCN. Thus, effectively, the substitute amendment applies to wind energy systems with an operating capacity less than 100 megawatts.

Other Provisions

Decommissioning

The substitute amendment directs the PSC to promulgate rules that require the owner of a wind energy system with an operating capacity of at least one megawatt 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 substitute amendment creates a Wind Siting Council in the PSC. The membership of the council consists of representatives of wind energy developers and the broader energy industry, municipalities, environmental groups, realtors, and neighbors of wind energy systems, and includes two

unspecified public members and a member of the University of Wisconsin System faculty with expertise in the health impacts of wind energy systems.

The substitute amendment directs the PSC to consult with the council in developing the various rules required under the substitute amendment. 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 and any recommendations of the council for legislation based on those developments.

Department of Natural Resources Duties

The substitute amendment 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 substitute amendment 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.

COMPARISON OF THE SUBSTITUTE AMENDMENT TO THE BILL

The substitute amendment consists of Senate Substitute Amendment 1 to Senate Bill 185, as amended by Senate Amendments 1, 2, and 3 to Senate Substitute Amendment 1 (the form in which the bill was recommended for passage by the Senate Committee on Commerce, Utilities, Energy, and Rail), with certain additional modifications. This part of the memorandum identifies the differences between the substitute amendment and the bill. Except as otherwise indicated, the changes described in this section reflect the substance of Senate Substitute Amendment 1.

Limitations on Municipal Regulation of Wind Energy Systems

The **bill** lists a number of topics that the PSC rules **may** address. The **substitute amendment** specifies that the rules **shall** include setback requirements that provide reasonable protection from any health effects, including health effects from noise and shadow flicker, associated with wind energy systems. (This provision reflects the substance of Senate Amendment 2 to Senate Substitute Amendment 1 to Senate Bill 185.)

The **substitute amendment** adds the "grandfathering" of previously approved wind energy systems, described earlier. (This provision was not a part of any of the amendments recommended by the Senate Committee on Commerce, Utilities, Energy, and Rail.)

Municipal Procedures

The *substitute amendment* specifies that a municipality, as soon as possible after receiving an application for approval of a wind energy system, must publish a Class 1 notice stating that the application has been filed with the municipality. The *bill* has no provision on this subject.

The *substitute amendment* authorizes a municipality to deny an application for approval of a wind energy system with an operating capacity of at least one megawatt 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, which 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. The *bill* has no provision on this subject.

The *bill* specifies that, if an application is approved or considered to be approved because the municipality did not make a timely determination as to the completeness of the application (sic) or is not subject to regulation because the municipality did not enact an ordinance in a timely manner, a municipality may not consider an applicant's minor modification to the application to constitute a new application. The *substitute amendment* reduces this provision to a simple statement that a municipality may not consider an applicant's minor modification to the application to constitute a new application.

The *bill* specifies that, if an application is considered to be approved because the municipality did not make a timely determination as to the completeness of the application (sic) or is not subject to regulation as described in the preceding paragraph, the municipality may not regulate the wind energy system to which the application applies. The *substitute amendment* deletes this provision.

Review of a Municipal Action

The *bill* applies the PSC review process only to wind energy systems with an operating capacity of one megawatt or more, allowing appeals of a municipality's action relating to smaller systems to be appealed into circuit court following any municipal review process. The *substitute amendment* applies the PSC process to all wind energy systems.

The *bill* specifies that the PSC may treat a municipality's determination that an application is incomplete as a decision to disapprove the application. The *substitute amendment* limits this to cases in which the PSC determines that the municipality has unreasonably withheld its determination that an application is complete.

Other Provisions

The *substitute amendment* adds the provision regarding proof of financial responsibility for decommissioning of wind energy systems, described earlier. (This provision reflects the substance of Senate Amendment 3 to Senate Substitute Amendment 1 to Senate Bill 185, except that that amendment applied the requirement prospectively but without regard to the size of the wind energy system.)

The *substitute amendment* adds the two duties of the DNR, described earlier.

The *bill* directs the PSC to establish an advisory committee with specified membership to advise it in the development of the rules the bill requires the PSC to promulgate. The *substitute amendment* replaces the advisory committee with the Wind Siting Council described earlier, and assigns to it the expanded duties also described earlier. (This provision largely reflects the substance of Senate Amendment 1 to Senate Substitute Amendment 1 to Senate Bill 185.)

The *substitute amendment* 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. The *bill* has no provision on this subject.

Under *current law*, before a person may construct a large electric generating facility (a facility with an operating capacity of 100 megawatts or more), the person must obtain a CPCN from the PSC. The *bill* specifies that, in reviewing a CPCN application for a wind energy system, the PSC must consider whether installation or use of the system is consistent with the restrictions specified in the PSC's rules. The *substitute amendment* replaces the word "restrictions" with "standards."

LEGISLATIVE HISTORY

On August 4, 2009, the Senate Committee on Commerce, Utilities, Energy, and Rail introduced and recommended adoption of Senate Amendments 1, 2, and 3 to Senate Substitute Amendment 1 by votes of Ayes, 7; Noes, 0; recommended adoption of Senate Substitute Amendment 1, as amended, by a vote of Ayes, 7; Noes, 0; and recommended passage of Senate Bill 185, as amended, by a vote of Ayes, 6; Noes, 1.

On September 15, 2009, the Senate adopted Senate Substitute Amendment 2 on a voice vote and passed Senate Bill 185, as amended, by a vote of Ayes, 23; Noes, 9.

On September 16, 2009, the Assembly concurred in the bill by a vote of Ayes, 65; Noes, 31; Paired, 2.

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