

# Seeking Standards For U.S. Siting And Approvals

*The relationship between state and federal governments seems to weigh heavily against prospects for a unified national system of siting regulations.*

BY LEWIS T. PUTMAN

The development, construction and operation of wind energy projects in the U.S. are subject to a variety of federal, state and local permitting and approval requirements relating to land use, wildlife and other concerns. Within a single state, each of the federal, local and state governments may have separate and, in some cases, overlapping, jurisdiction for the siting and permitting of wind energy projects.

The difficulty wind power developers face in obtaining approvals for wind energy projects under the current regulatory environment is that there is a patchwork of different regulatory and permitting requirements that vary from state to state and even from local jurisdiction to local jurisdiction within a state. The siting and permitting challenges faced by wind energy developers are further complicated by the lack, in most cases, of state-level agencies with specific jurisdiction over the siting of wind energy projects.

Total onshore wind power capacity is expected to grow to 13,900 MW by 2010 and to 41,700 MW by 2015. The rapid growth of wind power in the U.S. has given rise to discussions at the state and federal levels about a more consistent and standardized set of siting and approval requirements

for wind power projects. States with existing, new or planned wind power projects are showing interest in learning about the approaches for siting projects used in other states.

In response to this interest, in April 2006, the National Wind Coordinating Committee (NWCC) partnered with the National Conference of State Legislatures (NCSL) to prepare a compilation of sample approaches that certain states, municipalities and other jurisdictional entities follow for wind energy project siting. In April 2007, the U.S. Fish and Wildlife Service (USFWS) and the Association of Fish and Wildlife Agencies published "Wind Power Siting Regulations and Wildlife Guidelines in the United States," which compiles the various approaches taken by all 50 states for the siting and permitting of wind energy projects.

These compilations highlight the differences in approaches to project approvals across the various states and underscore the need for a more consistent set of permitting and siting guidelines for wind energy projects.

## **Siting jurisdiction**

In some way, federal, state and local governments each govern the siting and permitting of energy projects

in the U.S. The growth of wind energy projects within the power sector has highlighted the unique attributes of wind energy technology – attributes that are not considered in existing energy regulatory, siting and permitting programs. For instance, the height, motion and often remote location of wind turbines create potential natural resource and environmental impacts that are not normally presented by non-renewable power projects.

Further, the absence of air emissions from wind energy projects eliminates air permitting considerations, which are a large part of traditional energy project permitting. As a result, states are beginning to develop and adopt statutes, model ordinances and guidelines that specifically address issues raised in the siting and permitting of wind energy projects.

## **State and local jurisdiction**

Jurisdiction over the siting of wind energy projects at the state level takes two primary forms. The most common approach establishes siting authority with local governments. Siting approvals for wind energy projects issued at the local level typically consist of conditional-use permits or special wind energy zoning designations. These approvals are is-

sued by county commissions, planning and zoning boards, or other branches of local governments. Even in states where the state Public Service Commission (PSC) retains jurisdiction over the siting of energy projects, smaller energy projects (or renewable energy projects specifically) are exempt from PSC jurisdiction and are only subject to local zoning and land-use approval requirements.

In another common state jurisdictional approach, the state government retains primary siting authority over wind energy projects. In this case, various state environmental and energy agencies and departments are responsible for project siting and permitting. Most states have no specific siting authority for wind energy projects.

Instead, wind energy projects that exceed minimum capacity applicability thresholds are regulated in the same way as any other energy project by the state PSC through state siting board review and issuance of a siting approval. At present, only Colorado, Minnesota, North Dakota, South Dakota, Oregon and Vermont have state agencies with specific wind power siting authority.

For example, in Colorado, the state PSC has specific statutory authority to regulate the siting of wind energy projects larger than 2 MW. In Minnesota, the siting of wind energy projects greater than 5 MW is governed by the state Environmental Quality Board.

In North and South Dakota, the respective state PSCs regulate the siting of wind energy facilities greater than 100 MW. The Oregon Energy Facility Siting Council regulates the siting of wind energy projects exceeding 105 MW. The Vermont PSC regulates all wind energy projects except those where the power is used for consumption by the owner. Kansas and Massachusetts have taken a different approach by adopting voluntary guidelines and model zoning laws, respectively, for local governments to use in the siting of wind power projects.

Other state regulatory agencies often are involved in wind energy permitting processes even for cases in which local governments are primarily responsible for project siting and land use. For example, when wildlife or other environmental issues arise, a state environmental protection agency may become involved.

### ***Federal jurisdiction***

In addition to state and local governmental jurisdiction, the federal government sometimes has jurisdiction over the siting and permitting of wind energy projects. Federal agencies exercise their authority when projects are located on or may affect federal lands or when federally regulated natural resources or endangered species may be affected. In addition, Federal Aviation Administration determination of hazards to air navigation and lighting and safety regulations apply to utility-scale wind energy sites with towers that are 200 feet or taller. The federal Migratory Bird Treaty Act, the Endangered Species Act and the Bald Eagle Protection Act may also apply to the protection of federal endangered or threatened species and their habitats.

### ***Siting guidelines***

Within a particular state, the processes for permitting and siting wind energy projects can be specified by statutes and regulations, model local government rules developed at the state level, local ordinances and guidelines that do not have the force or effect of law. Most often, a wind energy project is subject to all of these various types of regulatory mechanisms. For example, a local ordinance may apply to site use and approval whereas state laws and guidelines may apply to environmental issues and protection of biological and cultural resources.

Many states have developed or are in the process of developing specific guidelines for the siting and approval of wind energy projects. The typical wind power siting guidelines call for designated state agencies to consult

with local authorities on planning, zoning and land use. This is not universally the case, however, particularly in states where siting authority is more limited at the local level in favor of a larger state agency role.

Most state guidelines for wind project siting make specific reference to post-construction monitoring to insure that no threatened or endangered species or their habitats are affected by the development of wind energy. In most cases, state guidelines call for projects to consult with agencies charged with implementing the federal Endangered Species Act and other habitat protection requirements. Other state guidelines mandate consideration of non-wildlife environmental issues, such as visual, noise, safety and construction-related effects.

How a state approaches siting wind projects can have an impact on its ability to foster development of wind projects within the state. Many states have adopted strong public policies, goals and regulatory actions to support wind power development. Of these states, Minnesota, Iowa and Oregon have made particular progress in adopting policies that support wind power development.

Models for the siting of wind energy projects have also been developed or are undergoing development at the federal level. In July 2003, USFWS issued its "Voluntary Interim Guidelines to Avoid and Minimize Wildlife Impacts from Wind Turbines." USFWS is in the process of considering public comments on the interim guidelines in an effort to revise, streamline and update the guidelines. The goal of the USFWS interim guidelines is to protect wildlife and their habitats while allowing environmentally responsible wind energy development to proceed. It is anticipated that the USFWS will finalize these guidelines by 2010.

The U.S. Bureau of Land Management (BLM) also developed guidance on wind energy facility siting. BLM administers a number of wind energy rights-of-ways on federal lands in sev-

eral western states. In July 2005, BLM issued a programmatic environmental impact statement for the issuance of right-of-ways for wind energy projects on federal lands. The U.S. Forest Service is also developing national guidance to evaluate wind energy development proposals on national forest service land.

### ***Unified siting guidelines***

The lack of consistency in siting and permitting in the U.S. suggests that a unified nationwide program for siting and permitting wind energy projects could greatly streamline the permitting and approval process. The fundamental relationship between the state and federal governments and between local and state governments in the individual states, however, seems to weigh heavily against the prospects for a unified national system of siting regulations. The U.S. Constitution is based on the concept of federalism; that is, limited power is delegated to the federal government by the states on issues of national concern.

The federal government is limited in its ability to legislate in areas that do not implicate the federal interest in regulating interstate commerce.

Under this constitutional setting, the federal government maintains jurisdiction over migratory birds, certain wildlife, hazards to air navigation, applicable aspects of interstate energy generation, and transmission and energy projects on federal lands because all of these regulatory elements have some nexus to interstate commerce.

Conversely, matters of strictly state and local jurisdiction and importance, such as zoning, land use and associated approvals, are the sole domain of the state and local government. Accordingly, our system of federalism would seem to prohibit unified federal regulation of wind power siting and development.

Another issue is whether wind energy developers can expect to see increased wind energy siting authority at the state level or efforts at setting a consistent set of standards for wind energy siting between the various state governments. The answer is, perhaps, yes. Given the recent regulatory trends and growth in wind energy in the U.S., more states likely will establish specific wind siting authorities within the states' PSCs. Efforts at a consistent set of siting standards between the states are encouraged by

publications such as the 2006 study by the NCSL/NWCC and other initiatives that look for ways to standardize or streamline the wind energy permitting process.

The goal of these consistency-setting initiatives is to allow wind energy developers to scale experience in permitting and development of wind energy projects across the U.S. Because of the increased interest in and importance of wind and other renewable energy technologies, it is likely that wind energy advocates and developers will see increased pressure and emphasis placed on states to develop a more unified set of wind energy permitting guidelines and standards in the coming years. **SNP**



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