

A closer look at EDP's legal challenge

By Kevin O'Brien

About a year ago, amid a flurry of activity by companies looking to build wind power operations, multiple townships in Marathon and Clark counties adopted nearly identical ordinances that placed new restrictions and regulations on these operations.

The Wind Energy Facility (WEF) Licensing Ordinance, drafted by attorney Adam Jarchow of Clear Lake, is a 30-page document that spells out the townships' desire to protect "the health, safety and well-being" of local residents by requiring wind farm operators to obtain a license from the township before erecting any turbines or building other infrastructure.

On the first page of the ordinance, it says the state of Wisconsin's draft wind ordinance is "inadequate to reasonably protect public health and safety." The ordinance points out that the state's Wind Siting Council, which is supposed to meet every five years to update regulations, did not do so in 2019, leaving the existing state regulations outdated.

The ordinance says the Wisconsin State Constitution "legally obligates government officials to protect the health, safety and well-being of their residents," and goes on to list a wide range of concerns about industrial wind operations, from the "disruption of views and skylines" to environmental impacts, damage to town roads, and the effects of noise and vibrations on wildlife and residents. It also points to "serious legal and economic downsides for landowners entering into complicated and one-sided lease/easement agreements."

To ensure the township's interests are protected, the ordinance lays out a detailed licensing process for wind operations that gives the town board ultimate authority to approve or deny permit applications.

EDP's complaint

In a six-page notice of injury and claim filed in September of last year, EDP Renewables North America LLC, doing business as Marathon Wind Farm (MWF), the company's attorney points out that the town ordinance violates Section 66.0401(1m) of state statute, which expressly forbids local units of government from enacting any restrictions on wind operations that are more restrictive than those developed by the Wisconsin Public Service Commission (PSC).

"The wind ordinance makes it effectively, if not literally, impossible to establish a wind energy system in the town of Eau Claire," wrote attorney Matthew D. Lee. "This contravenes state law in violation of the above authority and unlawfully restricts MWF's ability to do business in the town."

The notice includes a side-by-side comparison of the PSC regulations and those included in the town ordinance, highlighting 11 provisions that are stricter than what the state allows. Some of those provisions include the following:

- A 35-decibel around-the-clock noise limit, compared to PSC's 50-decibel limit from 6 a.m. to 10 p.m. and a 45-decibel limit from 10 p.m. to 6 a.m.

- A minimum setback between turbines and neighboring property lines of either one mile or 10 times the height of the turbine (whichever is greater), compared to the PSC's lesser of 1,250 feet or 3.1 times the maximum blade tip height from non-participating landowners and occupied community buildings.

- A guarantee from the wind company that no property within two miles of a turbine operation will lose value, versus a PSC provision for annual compensation to non-



participating landowners within a half-mile of the facilities.

- A requirement for an Environmental Impact Study with comments from multiple state agencies, which is not required by PSC regulations.

- A requirement to indemnify the town for "construction, operation, maintenance, repair and removal" of wind operations, versus a PSC indemnification requirement that only applies to the property owner for any damages or injuries caused by construction, operation or decommissioning of the facilities.

- Required reimbursement to the township and Wisconsin Department of Transportation for damage to roads, which is not required by PSC regulations.

- A required post-construction study paid for by the applicant through an escrow account, which is not required by PSC regulations.

- Required decommissioning based on condemnation by a state building code official or after three consecutive months of non-operation. The PSC regulations do not include a condemnation provision, and decommissioning is only required after 540 days of continuous non-generation of power or 360 days since the end of the useful life of the power system.

Attorney Marti Machtan, a member of the Farmland First group that promoted the local ordinances, recently told residents and officials in Eau Claire that EDP's challenge of one ordinance is a threat to all of them.

"Since they're all very similar, there's a good chance that if Eau Claire and Brighton fall, the other dozens of towns across the state fall," he said. "That's one of the reasons why we're encouraging Eau Claire and Brighton to fight to preserve the ordinance."

EDP responds

When asked for a comment about its legal action against the towns of Eau Claire and Brighton, EDP Renewables North America, LLC released the following statement from Kris Cheney, executive vice president:

"Our primary intention has always been, and continues to be, to work directly with the townships of Brighton and Eau Claire to identify a workable path forward. We remain willing to do so and view legal action as a less desirable alternative."

"EDPR NA has been developing, owning, and operating wind farms for more than 20 years. We take our relationships with our future neighbors very seriously and understand the vital role that local leadership plays in building a good project. We're proud of the reputation we've earned in the communities in which we operate, and that is the key reason we have been able to continue to grow over the last two decades, including being welcomed back by more than 15 communities to build additional phases onto existing projects."

"Marathon Wind Farm would bring 98 megawatts of clean, Wisconsin-sourced energy onto the local grid, strengthening the area's electricity supply, and contributing to America's energy independence. Additionally, it would provide stable revenue to approximately 50 local landowners who have chosen to exercise their private property rights to earn income from their land, add \$12 million to the local tax base, and spend an estimated \$9.8-plus million in the local economy. We welcome the opportunity to collaborate with the townships to ensure questions are answered, concerns are addressed, and a path forward is found for Marathon Wind Farm."