

SENATE BILL No. 279

By Committee on Federal and State Affairs

2-24

1 AN ACT concerning energy; establishing the wind generation permit and
2 property protection act; relating to certain electric generation facilities;
3 imposing setbacks from certain property; restricting approval of
4 facilities by boards of county commissioners; terminating property
5 easements and conveyances; imposing certain conditions thereto;
6 amending K.S.A. 2020 Supp. 58-2272 and repealing the existing
7 section.
8

9 *Be it enacted by the Legislature of the State of Kansas:*

10 New Section 1. Sections 1 through 4, and amendments thereto, shall
11 be known and may be cited as the wind generation permit and property
12 protection act.

13 New Sec. 2. For the purposes of the wind generation permit and
14 property protection act:

15 (a) "Airport" means any area of land or water designed and set aside
16 for the landing and takeoff of aircraft and utilized or to be utilized in the
17 interest of the public for such purposes, including any such area used for
18 military or commercial purposes.

19 (b) "Applicant" means any developer filing an application pursuant to
20 this act. In the event that there is more than one person or entity qualifying
21 as a developer, any of such persons or entities may serve as the applicant
22 pursuant to this act.

23 (c) "Board" means the board of county commissioners of the county
24 to which an application is submitted.

25 (d) "Developer" means any person, firm, partnership, corporation,
26 limited liability corporation, association, cooperative corporation or other
27 entity desiring to construct all or any portion of a facility and holding by
28 lease, easement or otherwise the real property rights necessary for
29 construction of a facility. "Developer" includes any of the persons or
30 entities that may hold record title to the real property rights used or
31 intended to be used for a facility.

32 (e) "Facility" means an electric generation facility consisting of one
33 or more wind turbines and any accessory structures and buildings,
34 including substations, meteorological towers, electrical infrastructure,
35 transmission lines and other appurtenant structures located within the
36 boundaries of land where a developer plans to construct all or a portion of

1 such electric generation facility.

2 (f) "Industrial wind turbine" means any wind turbine with a
3 generating capacity in excess of one megawatt.

4 (g) "Nonparticipating" means any landowner who owns real property
5 adjacent to real property that has signed a lease agreement for the
6 installation of an industrial wind turbine.

7 (h) "Residential property" means any single-family dwelling, multi-
8 family dwelling that contains two or more separate residential dwelling
9 units, rural home site or farm home site that has been used as a residence
10 within the last three years.

11 (i) "System height" means the total height of a wind turbine as
12 measured from the end of one blade of such turbine in a vertical position
13 to the lowest point of the tower base.

14 (j) "Wind easement" means a right, whether stated in the form of a
15 restriction, easement, covenant or condition, in a deed, will or other
16 instrument executed by or on behalf of an owner of land for the purpose of
17 ensuring adequate exposure of a facility to the winds.

18 New Sec. 3. (a) No facility shall be constructed within this state
19 unless an applicant enters into a facility agreement pursuant to section 4,
20 and amendments thereto, and the setback distance from the nearest wind
21 turbine of the facility, as measured from the end of one blade in a vertical
22 position, is not less than:

23 (1) 12 times the system height or 7,920 feet, whichever is greater,
24 from any residential property or public building;

25 (2) 20 times the system height or 15,840 feet, whichever is greater,
26 from any airport, federal wildlife refuge, public hunting area or public
27 park; and

28 (3) 10 times the system height or 5,280 feet, whichever is greater,
29 from any property line of nonparticipating real property.

30 (b) Prior to the construction of any facility, the board of county
31 commissioners of any county that contains any property within the setback
32 distances established pursuant to subsection (a) shall approve an
33 application for the construction of the facility. In addition to any other
34 reasonable requirements imposed by the board by resolution and without
35 respect to whether such requirements are imposed as part of any zoning
36 regulation pursuant to K.S.A. 12-741 et seq., and amendments thereto, an
37 application shall be approved by the board if the applicant complies with
38 the following:

39 (1) The developer shall submit an application to the board on a form
40 and in the manner specified by the board. Such application shall include:

41 (A) The name, address and telephone number of the applicant and the
42 applicant's contact person for the construction of the facility;

43 (B) a detailed site plan for the facility, including, but not limited to,

1 proposed locations for turbines and any accessory structures and buildings
2 and compliance with the setback distances established pursuant to
3 subsection (a); and

4 (C) a certification that the developer has entered into a facility
5 agreement with the landowner pursuant to section 4, and amendments
6 thereto.

7 (2) The applicant shall demonstrate to the board that all applicable
8 setback distances pursuant to subsection (a) will be satisfied.

9 (3) The applicant shall demonstrate that each turbine of the facility
10 will be equipped only with navigational lights that are activated by
11 infrared or other radar technology used to detect nearby aircraft and that
12 such lights will not be activated absent such technology, unless the board
13 has modified this requirement by resolution.

14 (4) The applicant shall provide notice, in writing, of the application
15 and the proposed construction of the facility to all owners of any property
16 located within any applicable setback distances provided in subsection (a).
17 The applicant shall publish such notice in the official newspaper of the
18 county in which the proposed facility would be located and in any county
19 that contains property within any of the setback distances provided in
20 subsection (a). The notice shall include a description of the location of the
21 proposed facility and the total number of wind turbines and the system
22 height of such wind turbines to be constructed.

23 (5) Each application shall include a sound study pursuant to
24 subsection (c) that includes information regarding the effects of and plans
25 for avoiding, minimizing or mitigating potential adverse effects of the
26 proposed energy facility on public health and safety to ensure that any
27 industrial wind turbine that is installed does not generate noise levels that
28 exceed 40 decibels.

29 (6) The wind turbine density shall not exceed one turbine per square
30 mile.

31 (7) For any proposed facility that includes industrial wind turbines, an
32 application for construction shall include:

33 (A) An assessment that identifies the astronomical maximum as well
34 as the anticipated hours per year of shadow flicker expected to be
35 perceived at each residence, educational facility, workplace, healthcare
36 setting, outdoor or indoor public gathering area, other occupied building
37 and roadway within a minimum of one mile of any turbine based on
38 shadow flicker modeling that assumes an impact distance of at least one
39 mile from each of the turbines;

40 (B) a description of the planned setbacks that explains why the
41 indicated distances are adequate to protect the public from risks associated
42 with the operation of the proposed wind energy facility and that indicates
43 the distance between each wind turbine and the nearest:

- 1 (i) Landowner's existing building and property line; and
- 2 (ii) public road and overhead or underground energy infrastructure or
- 3 energy transmission pipeline within two miles of any such wind turbine;
- 4 (C) an assessment of the risks of ice throw, blade shear and tower
- 5 collapse on public safety, including a description of the measures taken or
- 6 planned to avoid or minimize the occurrence of such events and the
- 7 alternative measures considered but not included by the applicant;
- 8 (D) a description of the lightning protection system planned for the
- 9 proposed facility;
- 10 (E) a description of the federal aviation administration's lighting,
- 11 turbine color and other requirements for the wind turbines and any
- 12 determination made by the federal aviation administration regarding
- 13 whether any hazard to aviation is expected from any of the wind turbines
- 14 included in the proposed facility;
- 15 (F) a decommissioning plan prepared by an independent, qualified
- 16 person with demonstrated knowledge and experience in wind generation
- 17 projects and cost estimates. Such plan shall include:
- 18 (i) A description of sufficient and secure funding to implement the
- 19 plan that does not account for the anticipated salvage value of facility
- 20 components or materials;
- 21 (ii) the provision of financial assurance in the form of an irrevocable
- 22 standby letter of credit, performance bond, surety bond or unconditional
- 23 payment guaranty executed by a parent company of the facility owner
- 24 maintaining at all times an investment-grade credit rating;
- 25 (iii) a plan for disassembly and removal of all turbines, including the
- 26 blades, nacelles and towers from the site;
- 27 (iv) a plan for the removal from the site of all transformers, overhead
- 28 power collection conductors and electric poles;
- 29 (v) a plan for the removal from the site of all underground
- 30 infrastructure that is at depths of four feet or less below grade and the
- 31 abandonment in place of all underground infrastructure at depths greater
- 32 than four feet below finished grade; and
- 33 (vi) a plan to fill, grade to match adjacent contours and appropriately
- 34 reseed areas where subsurface components are removed to stabilize such
- 35 areas and allow them to revegetate naturally;
- 36 (G) a plan for fire protection for the proposed facility that is prepared
- 37 by or in consultation with a fire safety expert; and
- 38 (H) an assessment of the risks that determines whether the proposed
- 39 facility will interfere with the weather radars used for severe storm
- 40 warning or any local weather radars.
- 41 (c) (1) All sound studies conducted for an application made pursuant
- 42 to this act shall be prepared in accordance with professional standards by
- 43 an expert in the field. The methodology for conducting a sound study of

1 preconstruction sound levels for a facility shall adhere to the protocol of
2 the American national standard quantities and procedures for description
3 and measurement of environmental sound. The preconstruction sound
4 measurements shall include:

5 (A) Short-term attended measurements pursuant to part 3 short-term
6 measurements with an observer present, ANSI S12.9-2013;

7 (B) long-term unattended monitoring conducted pursuant to part 2
8 measurement of long-term, wide-area sound, ANSI S12.9-1992, that
9 includes audio recordings taken in order to clearly identify and remove
10 transient noises from the data, with frequencies above 1250 hertz with 1/3
11 octave band to be filtered out of the data;

12 (C) the use of microphones that are placed one to two meters above
13 ground level, at least 7.5 meters from any reflective surface, located within
14 close proximity to an anemometer and field calibrated before and after
15 measurements;

16 (D) data collection performed with a windscreen of the type
17 recommended by the monitoring instrument's manufacturer;

18 (E) measurements conducted at the nearest properties from the
19 proposed wind turbines that are representative of all residential properties
20 within two miles of any turbine; and

21 (F) omission of any sound measurements when:

22 (i) The wind velocity is greater than four meters per second at the
23 microphone position;

24 (ii) there is rain; or

25 (iii) temperatures are below instrumentation minimums.

26 (2) Final preconstruction sound reports shall provide A-weighted and
27 C-weighted sound levels for L-10, Leq and L-90 and include a map or
28 diagram clearly showing the:

29 (A) Layout of the project area, including topography, project
30 boundary lines and property lines;

31 (B) locations of the sound measurement points;

32 (C) distance between any sound measurement point and the nearest
33 wind turbine;

34 (D) location of significant local sound and vibration sources other
35 than turbine sound and vibration sources;

36 (E) distance between all sound measurement points and significant
37 local sound sources;

38 (F) location of all sensitive receptors, including schools, daycare
39 centers, healthcare facilities, residences, residential neighborhoods, places
40 of worship and elderly care facilities; and

41 (G) indication of temperature, weather conditions, sources of ambient
42 sound and prevailing wind direction and speed for the monitoring period.

43 (3) The predictive sound modeling study shall include:

1 (A) Observations of all sound measurements conducted in accordance
2 with the standards and specifications of the international organization for
3 standardization for acoustics, attenuation of sound during propagation
4 outdoors, part 2, general method of calculation, ISO 9613-2 1996-12-15;
5 and

6 (B) an adjustment to the Leq sound level produced by the model
7 applied in order to adjust for turbine manufacturer uncertainty. Such
8 adjustment shall be determined in accordance with the most recent release
9 of the international electrotechnical commission wind turbines, acoustic
10 noise measurement techniques, IEC 61400 part 11 standard, edition 3.0
11 2012-11.

12 (d) (1) Upon the filing of an application and publication of notice is
13 made pursuant to subsection (b), the board of county commissioners shall
14 hold a public hearing on the application at least 20 days, but not more than
15 90 days, after the publication of such notice. The board shall deny the
16 application if the board finds that the developer failed to comply with any
17 of the requirements set forth in this section.

18 (2) If an application for construction is denied, nothing in this section
19 shall prohibit a developer from resubmitting to the board an application for
20 construction pursuant to this section.

21 (e) Nothing in this section shall prohibit zoning regulations adopted
22 pursuant to K.S.A. 12-741 et seq., and amendments thereto, from imposing
23 additional conditions or limitations with respect to facilities, approval of
24 facilities or setbacks required for facilities.

25 New Sec. 4. (a) Before making an application for the construction of
26 a facility, a developer shall enter into a facility agreement with the
27 landowner that demonstrates that the developer has:

28 (1) (A) Obtained and is required to deliver to the landowner evidence
29 that the developer has secured financial assurance that conforms to the
30 requirements of this section to secure the performance of the grantee's
31 obligation to remove the grantee's facilities located on the landowner's
32 property. Acceptable forms of such financial assurance include a parent
33 company guaranty with a minimum investment-grade credit rating for the
34 parent company issued by a major domestic credit rating agency, a letter of
35 credit, a bond or another form of financial assurance acceptable to the
36 landowner;

37 (B) the amount of financial assurance required by this subsection
38 shall be at least equal to the estimated cost of removing the facilities from
39 the landowner's property and restoring the property to, as near as
40 reasonably possible, the condition of the property as of the date the
41 agreement began, less any portion of the value of the facilities pledged to
42 secure outstanding debt. For each industrial wind turbine, a minimum of $\frac{1}{4}$
43 of the total cost of developing the land, constructing access roads,

1 installing the turbine, including all appurtenant equipment, and connecting
2 the turbine to the grid shall be set aside for decommissioning of each such
3 turbine;

4 (C) such financial assurance shall be provided to the landowner not
5 later than the date the facility agreement is terminated or 10 years after the
6 date the facilities located on the landowner's leased property are approved
7 for participation in market operations by a regional transmission
8 organization, not including the date when the generation of electrical
9 energy or any other operation was conducted for purposes of maintenance
10 and testing, whichever is earlier;

11 (2) accounted for the estimated cost, as determined by an
12 independent, third-party professional engineer licensed in this state, of
13 removing the facilities from the landowner's property and of restoring the
14 property to, as near as reasonably possible, the condition of the property as
15 of the date the agreement begins. At least once every five years, the
16 developer shall provide the landowner with an updated estimate prepared
17 by an independent, third-party professional engineer licensed in this state
18 of the cost of such removal of the facilities and restoration of the property;
19 and

20 (3) the responsibility for maintaining the required amount of financial
21 assurance that is sufficient to cover the amount required by this section.

22 (b) The developer shall be responsible for the costs of obtaining
23 financial assurance described by this section and the costs of determining
24 the estimated removal costs. The developer shall not cancel the financial
25 assurance before the date the developer has completed the developer's
26 obligation to remove the facilities located on the landowner's property in
27 the manner provided by this act, unless the developer provides the
28 landowner with replacement financial assurance at the time of or before
29 the cancellation. In the event of a transfer of ownership of the developer's
30 facilities, the financial assurance provided by the developer shall remain in
31 place until the date evidence of financial assurance meeting the
32 requirements of this act are provided to the landowner.

33 (c) For any facility agreement that involves a wind easement or wind
34 energy lease, such easement or lease shall be:

35 (1) Delivered to the landowner with a completed cover page in at
36 least 16-point type font containing the following paragraph:

37 "Special message to property owners: This is an important agreement
38 our lawyers have drafted that will bind you and your land for up to
39 _____ years. We will give you enough time to study and thoroughly
40 understand it. We strongly encourage you to hire a lawyer to explain this
41 agreement to you. You may talk with your neighbors about the wind
42 project and find out if they also received a proposed contract. You and
43 your neighbors may choose to hire the same attorney to review the

1 agreement and negotiate changes on your behalf.";

2 (2) held at least 10 business days after the first proposed easement or
3 lease has been delivered to the property owner before it may be executed
4 by the parties;

5 (3) free from any nondisclosure agreement for any negotiations or the
6 terms of any proposed lease or easement, except that the parties may agree
7 to a mutual confidentiality agreement in the final executed lease or
8 easement; and

9 (4) executed in a manner that:

10 (A) Preserves the right of the landowner to continue conducting
11 business operations as currently conducted for the term of the agreement.
12 When a facility is being constructed and when it is completed, the
13 landowner shall make accommodations to the developer, owner or
14 operator of the facility for the facility's business operations to allow the
15 construction and operation of the facility;

16 (B) does not make the landowner liable for any property tax
17 associated with the facility or other equipment related to wind energy
18 generation;

19 (C) does not make the landowner liable for any damages caused by
20 the facility and equipment or the operation of such facility, including
21 liability or damage to the landowner or to third parties;

22 (D) obligates the developer, owner and operator of the facility to
23 comply with federal and state law and local ordinances and does not make
24 the landowner liable in the case of a violation;

25 (E) allows the landowner to terminate the facility agreement if the
26 facility has not operated for a period of at least three years, unless the
27 property owner receives the normal minimum lease payments that would
28 have occurred if the facility had been operating during such period;

29 (F) clearly states any circumstances that will allow the developer,
30 owner or operator of the facility to withhold payments from the property
31 owner; and

32 (G) states that the owner of the facility shall carry general liability
33 insurance relating to claims for property damage or bodily injury arising
34 out of the construction or operation of the facility project site and may
35 include the landowner as an additional insured on the policy.

36 (d) If the terms of any wind easement or wind energy lease are not in
37 accordance with this section, the court may alter the easement or lease in
38 accordance with this section, void the easement or lease or order any
39 equitable relief allowed by law.

40 Sec. 5. K.S.A. 2020 Supp. 58-2272 is hereby amended to read as
41 follows: 58-2272. (a) Every instrument that conveys any estate or interest
42 created by any lease or easement involving wind or solar resources and
43 technologies to produce and generate electricity shall include:

1 (1) A description of the real property subject to the easement and a
2 description of the real property benefitting from the wind or solar lease or
3 easement;

4 (2) a description of the vertical and horizontal angles, expressed in
5 degrees, and distances from the site of the wind or solar power system in
6 which an obstruction to the wind or solar system is prohibited or limited;

7 (3) all terms or conditions under which the lease or easement is
8 granted or may be terminated, except that if the instrument is recorded
9 under K.S.A. 58-2221, and amendments thereto, any compensation
10 received by the owner of the real property may be excluded; and

11 (4) any other provisions necessary or desirable to execute the
12 instrument.

13 (b) No person other than the surface owner of a tract of land shall
14 have the right to use such land for the production of wind or solar
15 generated energy unless granted such right by the lawful owner of the
16 surface estate by lease or easement for a definite period.

17 (c) The provisions of subsection (b) shall not apply to any lease or
18 easement filed of record prior to July 1, 2011, with the register of deeds of
19 the county in which the tract is located.

20 (d) *A lease or easement involving wind resources for the generation
21 of electricity shall be:*

22 (1) *Void if, within five years after the easement commences, the
23 property that is the subject of the lease or easement does not have a:*

24 (A) *Certificate of site compatibility or conditional use permit issued,
25 if required; and*

26 (B) *transmission interconnection request that is in process and not
27 under suspension; and*

28 (2) *presumed to be abandoned if a period of 36 consecutive months
29 has passed with no construction or operation of the facility as defined in
30 section 2, and amendments thereto. If the developer as defined in section
31 2, and amendments thereto, of such facility does not file a plan with the
32 board of county commissioners of the county in which the real property is
33 located outlining the steps and schedule for continuing construction or
34 operation of the facility within the 36-month period, the landowner may
35 provide, by certified mail or other personal delivery to the developer, a 60-
36 day written notice of the intent to terminate the easement. If, within 60
37 days of the receipt of such notice, the developer fails to provide a written
38 objection to the notice by certified mail or other personal delivery, the
39 landowner may file a notice of termination with the register of deeds in the
40 county in which the real property is located. Termination of the lease or
41 easement shall become effective when the notice of termination is filed and
42 recorded with the register of deeds.*

43 (e) Nothing in this section shall be construed to affect any otherwise

1 enforceable restriction on the use of any tract of land for the production of
2 wind or solar energy whether or not such restriction is in the form of an
3 easement for a definite term.

4 Sec. 6. K.S.A. 2020 Supp. 58-2272 is hereby repealed.

5 Sec. 7. This act shall take effect and be in force from and after its
6 publication in the statute book.