

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
Siting
Rulemaking

Case No. PU-17-339

**Statements on Regulatory Analysis, Small Entity Analysis,
and Takings Assessment
and
Regulatory Analysis for new Chapter 69-06-11**

November 29, 2017

The proposed rules consist of changes to the Public Service Commission's rules in the following areas:

Section 69-06-08-01. Energy Conversion Facility Siting Criteria

The Commission is proposing to amend the North Dakota Administrative Code section 69-06-08-01 to reflect the changes from the 2017 legislative session to North Dakota Century Code section 49-22-05.1 regarding setbacks from the property line of a nonparticipating landowner and the inhabited residence of a nonparticipating landowner.

The proposed rules are not pursuant to emergency rulemaking. Chapter 69-06-11 has adopted Federal Aviation Regulations [14 CFR 1.1. et. Seq.] in accordance with a requirement of N.D.C.C. § 49-22-16.4 to have rules consistent with [14 CFR 1.1. et. Seq.]. 14 CFR § 77.4 requires appropriate marking and lighting recommendations to use FAA Advisory Circular 70/7460-1 Obstruction Marking and Lighting to determine appropriate markings and lighting for wind turbine towers.

Chapter 69-06-11. Wind Energy Conversion Facility Lighting Systems

The Commission is proposing the new Chapter 69-06-11 to implement House Bill 1378 enacted during the most recent legislative session as North Dakota Century Code section 49-22-16.4 providing that the North Dakota Public Service Commission "shall adopt rules relating to the implementation of light-mitigating technology systems on wind energy conversion facilities" (Wind Farms).

Regulatory Analysis

N.D.C.C. § 28-32-08 requires an agency to prepare a regulatory analysis if the rule is expected to have an impact on the regulated community in excess of fifty thousand dollars, or if one is requested as provided in the law. The law provides, in part:

2. The regulatory analysis must contain:

- a. A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- b. A description of the probable impact, including economic impact, of the proposed rule;
- c. The probable costs to the agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues; and
- d. A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why the methods were rejected in favor of the proposed rule.

Section 69-06-08-01. Energy Conversion Facility Siting Criteria

A regulatory analysis has not been requested, and the proposal is not expected to impact the regulated community by an amount in excess of fifty thousand dollars (\$50,000.00). Consequently, no regulatory analysis has been prepared.

Regulatory Analysis for new CVchapter 69-06-11

Chapter 69-06-11. Wind Energy Conversion Facility Lighting Systems

The implementation of N.D.C.C. § 49-22-05.1 requiring wind farms to have light-mitigating technology systems is expected to have an impact on the regulated community in excess of fifty thousand dollars. Therefore, a regulatory analysis was performed.

- a. The classes of persons who will bear the costs of the proposed rule are the owners and developers of wind farms, and subsequently the costs are expected to be passed through to ratepayers and power cooperative members. Classes that will benefit are the producers and sellers of light mitigation technology.
- b. The probable impact will vary depending on the type of light-mitigating technology system used, number of turbines, facilities required for implementation, and whether or not retrofitting is needed.
 - i. The Public Service Commission staff estimates that for new wind farms of approximately 50 turbines, light intensity dimming solutions (“LIDS”) may cost up to 400,000. For aircraft detection lighting systems (“ADLS”), it is estimated that implementation may be up to \$1,000,000. The costs may

vary greatly for aircraft detection lighting systems depending upon the number of tower pads that needed, which are expected to cost between \$400,000 to \$500,000 apiece.

- c. It is difficult to estimate the costs to the agency of implementation, but our estimates are:
 - i. For future wind farms being sited, the light mitigation technology will likely be considered concurrently with the siting process. No additional costs are anticipated for implementation for new wind farms.
 - j. Currently there are 61 operating or sited wind facilities. If we take a conservative number and conservative cost, 10% of these previous facilities may require a hearing for compliance, enforcement, or determination of the appropriate technology used. That may result in a total cost of \$48,800 over the next two bienniums.

- d. No other alternative methods for achieving the purpose of the proposed rule were considered.

Takings Assessment

N.D.C.C. § 28-32-09 requires an entity to prepare a written assessment of the constitutional takings implications of a proposed rule that may limit the use of private real property. The law provides, in part:

- 1. ... The agency's assessment must:
 - a. Assess the likelihood that the proposed rule may result in a taking or regulatory taking.

The proposed rules do not appear to cause a taking of private property by government action. Article I, § 16, N.D. Const., provides that “[p]rivate property shall not be taken or damaged for public use without just compensation.” This right is “broader than the guarantee of the Fifth Amendment of the United States Constitution.” See Grand Forks—Traill Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 346 (N.D. 1987).

Under N.D.C.C. § 28-32-09(3), a regulatory taking means:

[A] taking of real property through the exercise of the police and regulatory powers of the state which reduces the value of the real property by more than fifty percent. However, the exercise of the police or regulatory power does not effect a taking if it substantially advances legitimate state interests, does not deny an owner economically viable use of the owner's land, or is in accordance with applicable state or federal law.

Proposed Section 69-06-08-01 reflects the statutory requirements of N.D.C.C. § 49-22-05.1 for setbacks from nonparticipating landowners, however, it is not expected to change the application of the rules or current siting practices. Proposed Chapter 69-06-11 may require additional costs to implement light mitigation technology, but it is not expected to limit the use of private property.

Since the proposed changes are not expected to deny a landowner “economically viable use of the land” or “reduce the real property by more than fifty percent,” and is in accordance with applicable state law, the Commission does not believe the proposed rule will result in a Constitutional or regulatory taking.

- b. Clearly and specifically identify the purpose of the proposed rule.

Section 69-06-08-01. Energy Conversion Facility Siting Criteria

The Commission is proposing to amend the North Dakota Administrative Code section 69-06-08-01 to reflect the changes from the 2017 legislative session to North Dakota Century Code section 49-22-05.1 regarding setbacks from the property line of a nonparticipating landowner and the inhabited residence of a nonparticipating landowner.

- c. Explain why the proposed rule is necessary to substantially advance that purpose and why no alternative action is available that would achieve the agency’s goals while reducing the impact to private land owners.

Chapter 69-06-11. Wind Energy Conversion Facility Lighting Systems

The Commission is proposing Chapter 69-06-11 to implement House Bill 1378 enacted during the most recent legislative session as North Dakota Century Code section 49-22-16.4 providing that the North Dakota Public Service Commission shall adopt rules relating to the implementation of light-mitigating technology systems on wind energy conversion facilities (“Wind Farms”).

The proposed rules are necessary to substantially advance the legislative changes to the Siting Act by implementing House Bill 1378 and the changes to N.D.C.C. § 49-22-5.1 from the 2017 legislative session. No alternative action was chosen, as the changes were closely tied to the legislative policy.

- d. Estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking or regulatory taking.

Given that the proposed rules are not expected to constitute a constitutional taking, there is no estimated potential cost.

- e. Identify the source of payment within the agency’s budget for any compensation that may be ordered.

Given that the proposed rules are not expected to constitute a constitutional taking, there is no estimated potential cost.

- f. Certify that the benefits of the proposed rule exceed the estimated compensation costs.

The proposed rules are not expected to constitute a constitutional taking, therefore, there are no estimated potential costs. The benefit to landowners and the public from implementation of light mitigation technology and protection for nonparticipating landowners by implementing legislative changes have been found to be of public importance by the legislature.

Small Entity Regulatory Analysis

N.D.C.C. § 28-32-08.1 requires that before adoption of any proposed rule, the adopting agency prepare a regulatory analysis in which the agency considers options to minimize adverse impact on small entities. The law provides, in part:

2. . . . The agency shall consider each of the following methods of reducing impact of the proposed rule on small entities:
 - a. Establishment of less stringent compliance or reporting requirements for small entities;
 - b. Establishment of less stringent schedules or deadlines for compliance or reporting requirements for small entities;
 - c. Consolidation or simplification of compliance or reporting requirements for small entities;
 - d. Establishment of performance standards for small entities to replace design or operational standards required in the proposed rule; and
 - e. Exemption of small entities from all or any part of the requirements contained in the proposed rule.

The proposed chapter and amendments are not expected to affect small entities, so the Commission has not provided less-stringent requirements or exemptions for small entities.

Small Entity Economic Impact Statement

1. Which small entities are subject to the proposed rule?

2. What are the administrative and other costs required for compliance with the proposed rule?
3. What is the probable cost and benefit to private persons and consumers who are affected by the proposed rule?
4. What is the probable effect of the proposed rule on state revenues?
5. Is there any less intrusive or less costly alternative methods for achieving the purpose of the proposed rule?

The proposed chapter and amendments are not expected to affect small entities or have an economic impact on them, so the Commission has not provided less-stringent requirements or exemptions for small entities.