

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Harmony Solar ND, LLC
Harmony Solar Project – Cass County
Siting Application

Case No. PU-18-219

HARMONY SOLAR ND, LLC'S
POST-HEARING BRIEF

INTRODUCTION

Harmony Solar ND, LLC (“Harmony”) submits this post-hearing brief to the North Dakota Public Service Commission (“Commission”) in support of its Application for a Certificate of Site Compatibility (“Application”) for the Harmony Solar Project (“Project”) in Cass County, North Dakota. Per the direction of the Commission, the brief will focus on the prime farmland exclusion area requirement set forth in N.D.A.C. § 69-06-08-01(1)(d) (the “Prime Farmland Rule”). As discussed further below, the Prime Farmland Rule should not be applied to the Project because the amount of prime farmland and farmland of statewide importance that will be removed from use for the life of the Project will have a negligible impact on agricultural productions.

BACKGROUND

Harmony filed its Application for a Certificate of Site Compatibility for the Project on June 29, 2018. The Project consists of a 200 megawatt solar energy conversion facility and associated infrastructure to be located within an approximately 1,662-acre project area (“Project Area”) in Harmony Township, Cass County, North Dakota. The Project Area is agricultural land with soils classified as prime farmland or prime farmland if drained. Project facilities would directly impact (i.e., be placed on) only approximately 41.4 acres of the Project Area. The remaining acres would be seeded with pollinator-friendly restoration seed mixes, which would

be maintained throughout the life of the Project by grazing with sheep, mowing, or haying. The acres of the Project Area maintained as grassland would mitigate soil erosion, restore soil nutrients and productivity, attract pollinators (who would assist in the growth and production of nearby vegetation), and provide potential habitat for bee hives/bee keeping on site. Following decommissioning of the Project, the Project Area would be available for row-crop production, should the landowners so choose.

DISCUSSION

I. The Project Will Have a Negligible Impact on Agricultural Production.

The Prime Farmland Rule should not be applied in this proceeding because the Project will have a “negligible impact on agricultural productions.” N.D.A.C. § 69-06-08-01(1)(d) provides:

Prime farmland and unique farmland, as defined by the land inventory and monitoring division of the soil conservation service, United States department of agriculture, in 7 C.F.R. part 657 [must be excluded in the consideration of a site for an energy conversion facility]; *provided, however, that if the commission finds that the prime farmland and unique farmland that will be removed from use for the life of the facility is of such small acreage as to be of negligible impact on agricultural productions, this exclusion does not apply.*

(Emphasis added).

Based on a thorough review of the Commission’s rulemaking dockets related to the development of its exclusion area, avoidance area, selection, and policy criteria, there was little discussion regarding the Prime Farmland Rule. In particular, there is no discussion of the exception provided for in the second half of the rule, or how the exception is to be interpreted or applied. The exception was not in the original criteria analyzed in the 1975 rulemaking proceeding, at which point the criteria appear to have been included in Section 49-22-10.2 of the

Commission's rules.¹ However, the exception was included – without reference to an amendment or explanation as to the reason for its inclusion – in the rules used in the 1978 proceeding *In the Matter of the Update of the Inventory of Exclusion and Avoidance Areas as Required by Chapter 49-22, NDCC*, Case No. PU-78-9750.² Further, while the 1978 proceeding involved an inventory of all exclusion areas and avoidance areas within the State of North Dakota, the information regarding the Prime Farmland Rule included is limited to the source of the soil classification definitions (i.e., “the Land Inventory and Monitory Division of the Soil Conservation Service, United States Department of Agriculture”) and the source of the criteria for prime farm soil (i.e., “Land Inventory and Monitoring Memorandum 3, of the Soil Conservation Service, dated October 15, 1975”). Unlike other exclusion and avoidance areas, areas of prime farmland or farmland of statewide importance are not specifically identified in the county-by-county lists and maps developed as part of the inventory. Thus, the rule's history does not provide a rationale for or a basis for interpretation of the exception in the rule.

Turning to the specific language of the rule, the Prime Farmland Rule is silent as to what level of comparison is to be used when determining whether a project will remove from use such a small acreage of prime farmland and farmland of statewide importance as to have a negligible impact on agricultural productions. Thus, the Commission could reasonably consider the Project's impact on agricultural productions within an area as large as the State of North Dakota.

At a minimum, Harmony Solar believes the Commission should consider the Project's impact on agricultural productions at the county level. The collection of prime farmland data, as

¹ See *In the Matter of the Proposed Rules Governing the Siting of Energy Conversion and Transmission Facilities pursuant to Chapter 49-22, N.D.C.C., in the State of North Dakota*, Case No. PU-75-9286.

² See N.D.A.C. § 65-06-08-01, referenced in Case No. PU-78-9750.

well as crop data, is administered by the U.S. Department of Agriculture (“USDA”). Because the USDA is the source for both relevant sets of data, it is reasonable to rely on the scale at which the USDA reports on these datasets. Soils (i.e., prime farmland) data from the USDA is administered at the county level; similarly, the most detailed USDA reports on crop production, livestock, and agriculture economics are at the county level. As such, at a minimum, the appropriate level of comparison for agricultural production in the Project Area should be at the county level. In addition, at least one other energy conversion facility siting application analyzed prime farmland impacts based on a comparison to the county level.³

Using Cass County data, there are 1,130,971 total acres in Cass County, 971,038 acres of which are prime farmland, prime farmland if drained, and farmland of statewide importance.⁴ The Project would convert, at most, approximately 1,620.6 acres to grassland, with approximately 41.4 acres of direct impacts, totaling 1,662 acres. Thus, with respect to agricultural productions in Cass County:

- The Project will temporarily convert up to approximately 0.167% of land within the prime farmland categories in Cass County to grassland during the life of the Project;
- The Project will have direct impacts on approximately 0.004% of land within the prime farmland categories in Cass County; and,
- In total, the Project will impact up to approximately 0.171% of land within the prime farmland categories in Cass County.

³ See ONEOK Rockies Midstream, L.L.C.’s Bear Creek Gas Plant Expansion Project in Dunn County (Case No. PU-18-021) (citing to the number of acres of prime farmland within Dunn County when addressing the Prime Farmland Rule).

⁴ See USDA, NRCS. 2018. National soil survey handbook, title 430-VI http://www.nrcs.usda.gov/wps/portal/nrcs/detail/soils/ref/?cid=nrcs142p2_054242. Accessed May 2018.

Accordingly, at most, the Project will impact less than one-quarter of one percent of land within the prime farmland categories in Cass County. Based on this analysis, it is reasonable for the Commission to conclude that the Project will have a negligible impact on agricultural productions and determine that the Prime Farmland Rule exclusion area should not be applied to the Project.

Even if the Commission were to consider the Project's impact based on the Study Area around the Project Area, the impact on prime farmland and farmland of statewide importance is still negligible. Even if the entire 1,662-acre Project Area were converted to facilities and grassland for the Project, which is not currently anticipated, the Project would result in only approximately 4.5 percent of the prime farmland in the Study Area being removed from row crop production during the life of the Project (*see* Table 6-7 of the Application for the prime farmland classifications within the Study Area).

II. The Project Area May Continue to Include Agricultural Uses.

The Project will temporarily remove land within the Project Area from row crop production and convert it to grassland. However, agricultural uses within the Project Area may continue. As discussed in the Application and at the hearing, one of the vegetation management strategies that Harmony Solar may employ for the Project is grazing with sheep. Harmony Solar would like to implement this vegetation management strategy and is in the process of confirming that sheep will be available for grazing in the area. Even if sheep are not available for grazing, however, the Project may include other agricultural uses, such as haying or bee-keeping. Bee-keeping is implemented at other solar projects because of the pollinator-friendly vegetation planted within those projects. Bee-keeping in the Project Area may also be beneficial to crop production outside of the Project Area.

Accordingly, the record demonstrates that agricultural uses may continue within the Project Area. These potential agricultural uses, combined with the Project's overall negligible impact on agricultural productions in Cass County, weigh in favor of not applying the Prime Farmland Rule to the Project.

III. The Prime Farmland Rule Should Not Interfere With Landowners' Property Rights.

The Commission's Prime Farmland Rule references the definitions of prime farmland found in federal law.⁵ Thus, it may be instructive to look to the federal Farmland Policy Protection Act ("FPPA") and its implementing regulations when considering interpretation of the Commission's Prime Farmland Rule. The purpose of the FPPA is to "minimize the extent to which Federal programs contribute to the unnecessary and irreversible conversion of farmland to nonagricultural uses."⁶ As such, FPPA regulations further specify that "[o]nly assistance [i.e., funding] and actions that would convert farmland to nonagricultural uses are subject to this Act."⁷ However, the FPPA does "not authorize the Federal Government in any way to regulate the use of private or non-Federal land, or in any way affect the property rights of owners of such land."⁸ In addition, the FPPA regulations do not apply to permitting actions on private or state

⁵ N.D.A.C. § 69-06-08-01(1)(d); see also 7 C.F.R. part 657.

⁶ 7 C.F.R. § 658.3(a) (emphasis added).

⁷ 7 C.F.R. § 658.3(c).

⁸ 7 C.F.R. § 658.3(c).

lands.⁹ Thus, the FPPA and its regulations are not intended to interfere with a landowner's use of private property, nor are they intended to apply to permitting actions like the Project.

Here, the Project will not irreversibly convert the Project Area to a non-agricultural use. Rather, the evidence presented by Harmony Solar demonstrated that the Project will temporarily remove land within the Project Area from row crop production. The vegetation management plan that will be utilized for the Project will enhance, protect, and restore existing soil properties. As such, the Project will not degrade existing soil quality. Instead, after the Project is decommissioned, the underlying soil will still be prime farmland soil and will still be suitable for row crop production, if the landowner chooses.

Similarly, the Project does not remove farmland from production over the objection of a private landowner. The farmland at issue is owned by private landowners who have made the thoughtful and reasoned decision to temporarily remove their land from row crop production and, instead, participate in the Project. The FPPA counsels that its regulations should not be construed to "affect the property rights" of landowners. This reasoning seems equally applicable to the Commission's Prime Farmland Rule.

Taken together, the facts concerning the Project allow the Commission to reasonably conclude that the Prime Farmland Rule should not be applied as an exclusion area in this proceeding. Under the circumstances of this case, the Commission should not interfere with the private landowners' thoughtful choices regarding how to best use their land.

⁹ See 7 C.F.R. § 658.2(c)(1) (excluding "Federal permitting, licensing, or rate approval programs for activities on private or non-Federal lands" from the definition of "Federal program").

CONCLUSION

For the reasons set forth above, Harmony respectfully requests that the Commission find that the prime farmland exclusion area requirement in N.D.A.C. § 69-06-08-01(1)(d) does not apply to the Project. Further, Harmony requests that the Commission issue a Certificate of Site Compatibility for the Project.

Dated this 3rd day of December, 2018.

Respectfully Submitted,



By _____

Mollie M. Smith, ND Bar #06714
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402
Phone: (612) 492-7270
Fax: (612) 492-7077

65303048.4