

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Public Service Commission
Energy Conversion Facility Siting Criteria
Rulemaking

Case No. PU-19-36

ORDER SUBMITTING RULES TO ATTORNEY GENERAL

March 27, 2019

Appearances

Commissioners Brian Kroshus, Julie Fedorchak, and Randy Christmann.

Preliminary Statement

On February 6, 2019, the North Dakota Public Service Commission (Commission) issued a formal Notice of Intent to Amend Administrative Rules and Notice of Public Hearing and Abbreviated Notice of Intent to Amend Administrative Rules and Notice of Public Hearing, proposing to amend section 69-06-08-01 of the North Dakota Administrative Code.

Also on February 6, 2019, Public Service Commission Staff filed statements regarding the required regulatory analysis, small entity analysis, and takings assessments.

On February 12, 2019, the Commission forwarded the notices to the Legislative Council for publication at least 30 days in advance of the hearing.

The Abbreviated Notice was published once in each of the 52 official county newspapers in the state during the weeks of February 13 through February 22, 2019.

On March 13, 2019, the Commission held the public hearing as noticed, beginning at 1:30 p.m., CST, in the Commission Hearing Room, 12th floor, State Capitol, Bismarck, North Dakota.

The Commission allowed, after the conclusion of the rulemaking hearing, a comment period until March 25, 2019, during which the Commission received and considered data, views, or written or oral comments concerning the proposed rulemaking as part of the rulemaking record.

The proposed amendments are summarized as follows:

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

The Commission is proposing to amend North Dakota Administrative Code section 69-06-08-01 to remove prime and unique farmland, and irrigated land from designation as exclusion areas for the siting of an energy conversion facility, and to clarify additional exclusion areas for a wind energy conversion facility.

Public Hearing and Comments

Written and oral comments by Patrick Fahn of Commission staff were received at the hearing. During the hearing, oral comments were submitted by Bruce Johnson from the 5th Civil Engineer Squadron of the Minot Air Force Base.

Prior to the hearing, written comments were submitted by Geronimo Energy (Geronimo) and Jeffrey Olsen. After the hearing, Geronimo submitted an additional filing containing comments from Marvin Thorson, Kathryn Waxler, Russell Ruliffson, Michael D. Johnson, and Duane Dows. Mark Mahoney of the Department of Defense also provided follow-up comments to the testimony provided by Bruce Johnson during the hearing.

All comments were reviewed and considered. The comments of Mr. Johnson and Mr. Mahoney are considered beyond the scope of the current rulemaking. However, Staff recorded these suggestions to consider for future rulemaking.

North Dakota Administrative Code section 69-06-08-01(1) provides a list of geographical areas that must be excluded in consideration of a site for an energy conversion facility. Prime farmland and unique farmland are currently exclusion areas, however, if the commission finds that the removal 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. Irrigated land is also currently an exclusion area.

North Dakota Administrative Code section 69-06-08-01(2) provides additional exclusion areas that must be excluded in the consideration of a site for a wind energy conversion facility.

The Director of Public Utilities, Patrick Fahn, testified that the proposed amendments will delete prime farmland, unique farmland, and irrigated land from the list of exclusion areas. The amendments are intended to allow flexibility in the siting process and does not eliminate commission consideration of a project's effects on agricultural production, family farms and ranches, land economically suited for irrigation, and agricultural quality of cropland; which are selection criteria under Section 69-06-08-01(5). Mr. Fahn also testified that the Commission is proposing to amend Subsection 2 of Section 69-06-08-01 to provide more clarity for additional exclusion areas for wind energy conversion facilities. The exclusion areas are clarified as one and one-tenth times the height of the turbine from "the nearest edge of an interstate or state roadway right of way,

from the nearest edge of a railroad right of way and from the nearest edge of a 115 kV or higher transmission right of way.”

Geronimo provided comments in support of the proposed amendments to remove prime farmland, unique farmland, and irrigated land from the list of areas that must be excluded from consideration of a site. Geronimo submitted that renewable projects provide opportunity for landowners to diversify their income and that they are voluntary agreements to develop their land.

In its additional filing, Geronimo reiterated its comments and attached letters of landowners in support of the rule change. All of the attached letters were from Cass County landowners and expressed support for landowner’s rights and the proposed rule changes.

Jeffrey R. Olsen provided comments in opposition to removing prime farmland, unique farmland, and irrigated land from consideration in the siting criteria for energy conversion facilities. Mr. Olsen expressed concern that out-of-state interests will take advantage of cash-strapped farmers to sign away productive land with lease agreements of 50 years or more, encourage the stripping of landscape and cover, and plow and drain natural prairie potholes and nesting areas. Mr. Olsen encouraged adopting stricter rules, some of which were beyond the scope of the rulemaking, but also encouraged preventing the visual impact and impact to relationships and the well-being of neighbors.

In consideration of the Comments received, the Commission recognizes the need for balance when it comes to the siting of infrastructure. With commercial-scale energy development, there can be competing interests between the rights of the developing property owner, interests of the developing company, environmental concerns, and the welfare of nearby neighbors. The proposed rulemaking does not change exclusion and avoidance areas with an environmental impact. It also does not prevent Commission consideration of effects on agricultural production, land suitable for irrigation, agricultural quality of cropland, and effects on family farms and ranches. The proposed rulemaking allows the flexibility to consider a project while retaining the authority to address the concerns through the siting process.

The Commission received no further comments regarding this section and the Commission proposes to adopt this amendment without revisions.

Discussion

Having reviewed the proposed rules, and the testimony and comments received, the Commission finds good cause for submitting the proposed rules, attached to and made a part of this order, to the Attorney General for an opinion as to legality.

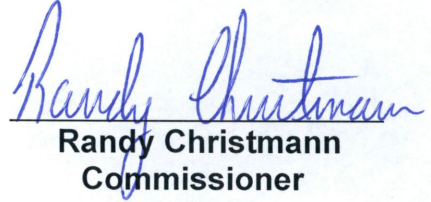
Order

The Commission orders the proposed revision to section 69-06-08-01 to the North Dakota Administrative Code attached to and made a part of this order, be submitted to the Attorney General for an opinion that the rules are approved as to legality.

PUBLIC SERVICE COMMISSION


Julie Fedorchak
Commissioner


Brian Kroshus
Chairman


Randy Christmann
Commissioner

**CHAPTER 69-06-08
CRITERIA**

Section	
69-6-8-1	Energy Conversion Facility Siting Criteria
69-6-8-2	Transmission Facility Corridor and Route Criteria

69-06-08-01. Energy conversion facility siting criteria.

The following criteria must guide and govern the preparation of the inventory of exclusion and avoidance areas, and the site suitability evaluation process.

1. **Exclusion areas.** The following geographical areas must be excluded in the consideration of a site for an energy conversion facility.
 - a. Designated or registered national: parks; memorial parks; historic sites and landmarks; natural landmarks; historic districts; monuments; wilderness areas; wildlife areas; wild, scenic, or recreational rivers; wildlife refuges; and grasslands.
 - b. Designated or registered state: parks; forests; forest management lands; historic sites; monuments; historical markers; archaeological sites; grasslands; wild, scenic, or recreational rivers; game refuges; game management areas; management areas; and nature preserves.
 - c. County parks and recreational areas; municipal parks; parks owned or administered by other governmental subdivisions; hardwood draws; and enrolled woodlands.
 - ~~d. 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; 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.~~
 - ~~e. Irrigated land.~~
 - f. Areas critical to the life stages of threatened or endangered animal or plant species.
 - g. Areas where animal or plant species that are unique or rare to this state would be irreversibly damaged.
 - h. Areas within one thousand two hundred feet of the geographic

center of an intercontinental ballistic missile (ICBM) launch or launch control facility.

2. **Additional exclusion areas for wind energy conversion facilities.** The following geographical areas must be excluded in the consideration of a site for a wind energy conversion facility:

a. Areas within:

- (1) One and one-tenth times the height of the turbine from the nearest edge of an interstate or state roadway right of way;
- (2) One and one-tenth times the height of the turbine plus seventy-five feet from the centerline of any county or maintained township roadway;
- (3) One and one-tenth times the height of the turbine from the nearest edge of any a railroad right of way;
- (4) One and one-tenth times the height of the turbine from a the nearest edge of a one hundred fifteen kilovolt or higher transmission line right of way; and
- (5) One and one-tenth times the height of the turbine from the property line of a nonparticipating landowner and three times the height of the turbine from an inhabited rural residence of a nonparticipating landowner, unless a variance is granted. A variance may be granted if an authorized representative or agent of the permittee, the nonparticipating landowner, and affected parties with associated wind rights file a written agreement expressing all parties' support for a variance to reduce the setback requirement in this subsection. A nonparticipating landowner is a landowner that has not signed a wind option or an easement agreement with the permittee of the wind energy conversion facility as defined in North Dakota Century Code chapter 17-04.

3. **Avoidance areas.** The following geographical areas may not be approved as a site for an energy conversion facility unless the applicant shows that under the circumstances there is no reasonable alternative. In determining whether an avoidance area should be designated for a facility the commission may consider, among other things, the proposed management of adverse impacts; the orderly siting of facilities; system reliability and integrity; the efficient use of resources; and alternative sites. Economic considerations alone will not justify approval of these areas. A buffer zone

of a reasonable width to protect the integrity of the area must be included. Natural screening may be considered in determining the width of the buffer zone.

- a. Historical resources which are not designated as exclusion areas.
 - b. Areas within the city limits of a city or the boundaries of a military installation.
 - c. Areas within known floodplains as defined by the geographical boundaries of the hundred-year flood.
 - d. Areas that are geologically unstable.
 - e. Woodlands and wetlands.
 - f. Areas of recreational significance which are not designated as exclusion areas.
4. **Additional avoidance areas for wind energy conversion facilities.** A wind energy conversion facility site must not include a geographic area where, due to operation of the facility, the sound levels within one hundred feet of an inhabited residence or a community building will exceed fifty dBA. The sound level avoidance area criteria may be waived in writing by the owner of the occupied residence or the community building.
5. **Selection criteria.** A site may be approved in an area only when it is demonstrated to the commission by the applicant that any significant adverse effects resulting from the location, construction, and operation of the facility in that area as they relate to the following, will be at an acceptable minimum, or that those effects will be managed and maintained at an acceptable minimum. The effects to be considered include:
- a. The impact upon agriculture:
 - (1) Agricultural production.
 - (2) Family farms and ranches.
 - (3) Land which the owner demonstrates has soil, topography, drainage, and an available water supply that cause the land to be economically suitable for irrigation.
 - (4) Surface drainage patterns and ground water flow patterns.

- (5) The agricultural quality of the cropland.
 - b. The impact upon the availability and adequacy of:
 - (1) Law enforcement.
 - (2) School systems and education programs.
 - (3) Governmental services and facilities.
 - (4) General and mental health care facilities.
 - (5) Recreational programs and facilities.
 - (6) Transportation facilities and networks.
 - (7) Retail service facilities.
 - (8) Utility services.
 - c. The impact upon:
 - (1) Local institutions.
 - (2) Noise-sensitive land uses.
 - (3) Light-sensitive land uses.
 - (4) Rural residences and businesses.
 - (5) Aquifers.
 - (6) Human health and safety.
 - (7) Animal health and safety.
 - (8) Plant life.
 - (9) Temporary and permanent housing.
 - (10) Temporary and permanent skilled and unskilled labor.
 - d. The cumulative effects of the location of the facility in relation to existing and planned facilities and other industrial development.
6. **Policy criteria.** The commission may give preference to an applicant that

will maximize benefits that result from the adoption of the following policies and practices, and in a proper case may require the adoption of such policies and practices. The commission may also give preference to an applicant that will maximize interstate benefits. The benefits to be considered include:

- a. Recycling of the conversion byproducts and effluents.
- b. Energy conservation through location, process, and design.
- c. Training and utilization of available labor in this state for the general and specialized skills required.
- d. Use of a primary energy source or raw material located within the state.
- e. Not relocating residents.
- f. The dedication of an area adjacent to the facility to land uses such as recreation, agriculture, or wildlife management.
- g. Economies of construction and operation.
- h. Secondary uses of appropriate associated facilities for recreation and the enhancement of wildlife.
- i. Use of citizen coordinating committees.
- j. A commitment of a portion of the energy produced for use in this state.
- k. Labor relations.
- l. The coordination of facilities.
- m. Monitoring of impacts.
- n. A commitment to install lighting mitigation technology for wind energy conversion facilities subject to commercial availability and federal aviation administration approval.

History: Amended effective August 1, 1979; July 1, 2006; April 1, 2013; July 1, 2017; July 1, 2018.

General Authority: NDCC 28-32-02, 49-22-18

Law Implemented: NDCC 49-22-05.1, 49-22.1-03

69-06-08-02. Transmission facility corridor and route criteria.

The following criteria must guide and govern the preparation of the inventory of exclusion and avoidance areas, and the corridor and route suitability evaluation process. Exclusion and avoidance areas may be located within a corridor, but at no given point may such an area or areas encompass more than fifty percent of the corridor width unless there is no reasonable alternative.

1. **Exclusion areas.** The following geographical areas must be excluded in the consideration of a route for a transmission facility. A buffer zone of a reasonable width to protect the integrity of the area must be included. Natural screening may be considered in determining the width of the buffer zone.
 - a. Designated or registered national: parks; memorial parks; historic sites and landmarks; natural landmarks; monuments; and wilderness areas.
 - b. Designated or registered state: parks; historic sites; monuments; historical markers; archaeological sites; and nature preserves.
 - c. County parks and recreational areas; municipal parks; and parks owned or administered by other governmental subdivisions.
 - d. Areas critical to the life stages of threatened or endangered animal or plant species.
 - e. Areas where animal or plant species that are unique or rare to this state would be irreversibly damaged.
 - f. Areas within one thousand two hundred feet of the geographic center of an intercontinental ballistic missile (ICBM) launch or launch control facility.
 - g. Areas within thirty feet on either side of a direct line between intercontinental ballistic missile (ICBM) launch or launch control facilities to avoid microwave interference.
2. **Avoidance areas.** The following geographical areas may not be considered in the routing of a transmission facility unless the applicant shows that under the circumstances there is no reasonable alternative. In determining whether an avoidance area should be designated for a facility, the commission may consider, among other things, the proposed management of adverse impacts; the orderly siting of facilities; system reliability and integrity; the efficient use of resources; and alternative routes. Economic considerations alone will not justify approval of these areas. A

buffer zone of a reasonable width to protect the integrity of the area will be included unless a distance is specified in the criteria. Natural screening may be considered in determining the width of the buffer zone.

- a. Designated or registered national: historic districts; wildlife areas; wild, scenic, or recreational rivers; wildlife refuges; and grasslands.
 - b. Designated or registered state: wild, scenic, or recreational rivers; game refuges; game management areas; management areas; forests; forest management lands; and grasslands.
 - c. Historical resources which are not specifically designated as exclusion or avoidance areas.
 - d. Areas which are geologically unstable.
 - e. Within five hundred feet [152.4 meters] of a residence, school, or place of business. This criterion shall not apply to a water pipeline transmission facility.
 - f. Reservoirs and municipal water supplies.
 - g. Water sources for organized rural water districts.
 - h. Irrigated land. This criterion shall not apply to an underground transmission facility.
 - i. Areas of recreational significance which are not designated as exclusion areas.
3. **Selection criteria.** A corridor or route shall be designated only when it is demonstrated to the commission by the applicant that any significant adverse effects which will result from the location, construction, and maintenance of the facility as they relate to the following, will be at an acceptable minimum, or that those effects will be managed and maintained at an acceptable minimum. The effects to be considered include:
- a. The impact upon agriculture:
 - (1) Agricultural production.
 - (2) Family farms and ranches.
 - (3) Land which the owner can demonstrate has soil, topography, drainage, and an available water supply that cause the land to be economically suitable for irrigation.

- (4) Surface drainage patterns and ground water flow patterns.
- b. The impact upon:
 - (1) Sound-sensitive land uses.
 - (2) The visual effect on the adjacent area.
 - (3) Extractive and storage resources.
 - (4) Wetlands, woodlands, and wooded areas.
 - (5) Radio and television reception, and other communication or electronic control facilities.
 - (6) Human health and safety.
 - (7) Animal health and safety.
 - (8) Plant life.
- 4. **Policy criteria.** The commission may give preference to an applicant that will maximize benefits that result from the adoption of the following policies and practices, and in a proper case may require the adoption of such policies and practices. The commission may also give preference to an applicant that will maximize interstate benefits. The benefits to be considered include:
 - a. Location and design.
 - b. Training and utilization of available labor in this state for the general and specialized skills required.
 - c. Economies of construction and operation.
 - d. Use of citizen coordinating committees.
 - e. A commitment of a portion of the transmitted product for use in this state.
 - f. Labor relations.
 - g. The coordination of facilities.
 - h. Monitoring of impacts.

- i. Utilization of existing and proposed rights of way and corridors.
- j. Other existing or proposed transmission facilities.

History: Amended effective August 1, 1979; January 1, 1982; February 1, 1995; July 1, 2006; April 1, 2013.

General Authority: NDCC 49-22-18

Law Implemented: NDCC 49-22-05.1