



December 4, 2020

North Dakota Public Service Commission
12 Floor of the State Capitol
600 East Boulevard Avenue Dept. 408
Bismarck, ND 58505

**Re: Case No. PU-20-422 - Article 69-06 – Energy Conversion Facility Siting Criteria
Submitted via email to: ndpsc@nd.gov**

Dear Chairman Kroshus, Commissioner Fedorchak and Commissioner Christmann:

The American Wind Energy Association¹ (AWEA) and Wind Industry North Dakota² (WIND) appreciate this opportunity to comment on the proposed revisions to North Dakota’s Energy Facility Siting Criteria³ to “minimize impacts on intercontinental ballistic missile facilities, launch control facilities and strategic defense operations.”⁴ AWEA and WIND thank the Commission for the invitation to participate in a meeting in Bismarck in January 2020 with Commission staff, the 20th Air Force, and the Department of Defense (DOD) Military Aviation and Installation Assurance Siting Clearinghouse (DOD Siting Clearinghouse) to discuss this issue. As noted in that meeting, and explained in more detail below, AWEA and WIND’s strong preference is to limit new regulatory burdens by ensuring compatibility between military missions and proposed energy projects via the existing federal review process managed by the DOD Siting Clearinghouse and including the 20th Air Force. That process has ensured that no project to which DOD objected has even been built. Nevertheless, to the extent the Commission moves forward with these draft changes, AWEA and WIND propose limited changes in these comments.

The U.S. wind industry believes that national security is paramount. Fortunately, the growth in wind energy has been and will continue to be consistent with protecting our national security, military operations, training, and readiness given the existing robust federal review process managed by the DOD Siting Clearinghouse.

¹ AWEA is the national trade association representing a broad range of entities with a common interest in encouraging the expansion and facilitation of wind energy resources in the United States, including offshore wind. AWEA’s more than 1,000 member companies include wind turbine manufacturers, component suppliers, project developers, project owners and operators, financiers, researchers, utilities, marketers, customers, and others. For more information, see: www.awea.org.

² Wind Industry of ND (WIND) is a coalition of industry members and supporters that include the American Wind Energy Association, Apex Clean Energy, Capital Power, EDF Renewable Energy, Enel North America Inc., Invenegy, NextEra Energy Resources, and Orsted. For more information visit www.windindustrynd.com.

³ ND PSC proposed revisions to Article 69-06 (Case No. PU-20-422). Published October 21, 2020. Available at: <https://psc.nd.gov/database/documents/20-0422/002-020.pdf>

⁴ ND PSC Notice of Intent. Published October 21, 2020. Available at: <https://psc.nd.gov/database/documents/20-0422/003-020.pdf>.

The existing DOD Siting Clearinghouse review process for proposed energy projects

The existing federal review process⁵ promotes early dialogue (including through an informal review option) and facilitates discussion between project proponents and DOD interests (individual military services, individual bases, major commands etc.), including on whether options are available to the developer and/or DOD that would resolve preliminary DOD concerns. In the so far rare event when DOD has concerns and mitigation cannot be agreed upon to address those concerns, developers have cancelled development of the projects (in all but one case, even before DOD formally objects).

The benefits of the existing federal review process include:

- DOD reviews encompass detailed technical information unique to each specific base and military service/command (its assets and missions), and the details of a proposed wind farm (turbine layout, number, height, location, topography etc.), with the goal of understanding potential impacts to specific military assets in the area.
 - In general, one-size-fits-all solutions are not appropriate as they may not adequately protect DOD interests and may be unnecessarily restrictive of landowner rights and developer interests. AWEA and WIND discuss this issue with respect to ICBM launch facilities in more detail below.
- If upon preliminary review, DOD finds the potential for adverse impacts on military operations and readiness, DOD issues a notice of presumed risk to the developer and the governor for the state in which the project is located and automatically requests discussions on potential mitigation options.
 - Developers have signed mitigation agreements to address DOD concerns. Developers have addressed DOD concerns by making changes to their proposed projects, including limiting the number of turbines or changing their heights and proposed locations; deploying night-vision compatible lighting; or agreeing to stop (“curtail”) turbines under certain conditions, among other measures.
- If mitigation options cannot be identified or agreed to by DOD, local bases and project developers, and the developer does not voluntarily cancel the project, DOD can formally object to the proposal.
 - No project has ever been built over a DOD objection.

The DOD review process for proposed energy projects has been revised by Congress on several occasions to strengthen DOD, military service, local base and state interests, most recently in the Fiscal Year 2018 National Defense Authorization Act.⁶ Due to specific revisions made in the FY18 NDAA, signed into law by President Trump, the DOD review process is now codified to:

- Require project developers to vet proposals with the military at least one year prior

⁵ Detailed in [10 USC 183a](#) and [32 CFR Part 211](#).

⁶ Section 311 of Public Law 115-91. Available at: <https://www.congress.gov/bill/115th-congress/house-bill/2810/text>

- to expected construction;
- Extend the deadline for preliminary DoD review to 60 days (the FY20 NDAA further extended to 75 days);
 - Explicitly require that local military installations are involved in the evaluation process;
 - Issue a “notice of presumed risk” to the project proponent if the preliminary review identifies the potential for adverse impacts, which triggers discussion on possible mitigation options. Such a notice will also need to be resolved by developers in order to move forward with wind farm construction because of the need to secure financing and insurance for proposed projects;
 - The notice is also provided to states at the same time. DOD must formally solicit comments from states, evaluate and consider those comments when making a final decision, and forward them on to the Federal Aviation Administration for consideration as well;
 - Reinforce that “any adverse impact” on military operations and readiness is the threshold for requiring mitigation discussions with project proponents;
 - Authorize DOD to establish maps of geographic areas in which energy projects could pose a concern;
 - Authorize DOD to evaluate projects proposed in such areas for six months, during which the FAA may not issue its own determination until DOD does so;
 - Require consideration of potential cumulative impacts of multiple wind farms when considering a proposed wind farm;
 - Reinforce DOD’s ability to object to proposed energy projects in cases where they pose an “unacceptable risk to the national security of the United States,” while pulling in the expansive definition from DOD regulations to include significant adverse impacts to training, research, development, testing, and evaluation, military operations or to maintaining military readiness;
 - Require notification of the “appropriate state agency” of a determination of unacceptable risk;
 - Eliminate a provision that set an objective for DOD to support robust deployment of renewable energy; and,
 - Clarify that DOD can request and accept funds from project proponents for mitigation.

One-size-fits-all standoff distances in general are “not useful,” but are ICBM launch facilities different?

The DOD Siting Clearinghouse itself has been critical of one-size-fits-all exclusion zones (i.e. “standoff distances”), writing in its March 2015 report⁷ to Congress, that such exclusion zones are “not useful.” The report elaborates on DOD’s concern, saying “Due to the wide variety of missions and the variability of impacts on different types of obstructions, it is not

⁷ Available at:

<https://www.acq.osd.mil/dodsc/library/CY14%20RTC%20on%20MCE%20BOD%20Final-%20ES%20Clean.pdf>

possible to apply a ‘one-size-fits-all’ standoff distance between DOD military readiness activities and development projects.”

The 20th Air Force and Clearinghouse officials have suggested that the ICBM and launch control facilities may be differently situated with respect to setbacks given the mission is the same wherever they are located when compared to, say, the differing uses of radars, military training routes and/or military base footprints. However, in one of the original meetings AWEA attended with the 20th Air Force that took place in Wyoming, a position paper was presented by the Air Force that suggested turbines between 1.5 nautical miles (nm) and 2 nm represented lower impacts compared to the “high” and “severe” risk designations if built within 1.5 and 0.5 nm, respectively. Given this evolving view, perhaps there could be circumstances in which something less than 2 nm could work (for example, depending on the layout of the other turbines in the wind farm, providing multiple entry/exit points etc.). AWEA and WIND’s view is the DOD Siting Clearinghouse process is the appropriate place to consider whether locating turbines within 2 nm of an ICBM facility may be acceptable in a particular location. The answer to individual developers may be 2 nm is required and here is why, but developers should be able to have that dialogue. In some circumstances, DOD may find that a setback less than 2 nm is acceptable, while in other circumstances something greater than 2 nm may be required. The current case-by-case approach allows DOD and the developer to reach an appropriate resolution for each specific turbine.

AWEA and WIND Comments on Proposed Revisions to North Dakota Energy Facility Siting Criteria Related to Military Compatibility

69-06-01-05. Designated agencies and officers

This section is revised to add the “Military Aviation and Installation Assurance Siting Clearinghouse” and the “20th Airforce 91st Missile Wing” (sic) to the list of designated agencies and officers. However, under the existing rules, listed as number 21 is “United States department of defense” (sic).

AWEA and WIND do not object to the inclusion of the Siting Clearinghouse or the 20th Air Force 91st Missile Wing to the list of designated agencies. However, AWEA and WIND respectfully suggest deletion of the more general United States Department of Defense listing as the Siting Clearinghouse is the designee for the DOD under federal law for facilitating proposed energy project reviews⁸ making the DOD listing duplicative and potentially confusing for the regulated community. For that matter, the Clearinghouse would be seeking feedback from the 20th Air Force 91st Missile Wing for projects in the vicinity of their assets, so it may be sufficient to just list the Clearinghouse in order to avoid requests to include a laundry list of DOD interests specific to North Dakota in the rules.

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

⁸ 10 USC 183(a)(b)

Existing rules, which the Commission does not propose to change, include the following areas as “exclusion zones” (meaning energy projects may not be permitted in these areas) –

- (1) “Areas within one thousand two hundred feet of the geographic center of an Intercontinental ballistic missile (ICBM) launch or launch control facility,” and;
- (2) “Within thirty feet [9.14 meters] on either side of a direct line between an Intercontinental ballistic missile (ICBM) launch facility and a missile alert or launch control facilities to avoid microwave Interference. This restriction only applies to aboveground structures, not to surface features, such as roads, or below ground Infrastructure.”

AWEA and WIND do not object to the above limitations, but we do note that to our knowledge the GIS coordinates for the ICBM launch or launch control facility locations are not publicly available and the Air Force has not been able/willing to share with developers (this was confirmed at the January meeting in Bismarck). So, there needs to be some clarity provided about how developers are supposed to know if they were considering turbines within these ranges or the new avoidance area range proposed by the Commission and discussed below.

The Commission has proposed to expand “avoidance areas” to include “Areas within 2 nautical miles of the geographic center of an intercontinental ballistic missile (ICBM) launch or launch control facility.” As with the other avoidance areas in the existing regulations, proposed energy projects “may not be approved” in this avoidance area “unless the applicant shows that under the circumstances there is no reasonable alternative.” Factors that will be considered include, among others “the proposed management of adverse impacts.” Buffers of a “reasonable width to protect the integrity of the area must be included.”

To the extent the Commission does not just strike this language completely given the existing federal review process, AWEA and WIND strongly prefer, as the Commission has proposed, the inclusion of the 2 nm zone around ICBM launch and launch control facilities as avoidance areas rather than as exclusion areas. The framework set up by the proposed revisions sends the signal to developers that proposing turbines within 2 nm may be difficult to get approved, but, as described earlier in these comments, it appropriately leaves the negotiations over whether an alternative is acceptable up to the developer and the military through the DOD Siting Clearinghouse process.

This framework also provides more protection for private property rights. Were the 2 nm zone to be proposed as an exclusion zone, it would put thousands of acres of private property off-limits to wind energy development even if a developer was able to arrange an alternative approach for a particular project through the DOD Siting Clearinghouse process.

To facilitate industry compliance with some other state siting requirements, the DOD Siting Clearinghouse has begun issuing “mission compatibility” letters when the project is cleared as having no adverse impact to military operations or readiness and/or potential adverse impacts have been resolved to the satisfaction of DOD through mitigation discussions.



AWEA and WIND suggest that if such a letter was obtained via the DOD Siting Clearinghouse process for the siting of a wind turbine or turbines within the 2 nm zone that the letter should satisfy the requirements proposed by the Commission related to alternative considerations, management of adverse impacts and buffers of a reasonable width.

AWEA and WIND also recommend that the Commission clarify the avoidance area designation is only intended to apply to vertical elements of a wind turbine, not to associated surface or subsurface infrastructure like roads, collector lines, and laydown yards as these elements would not interfere with the mission of the 20th Air Force to protect the ICBM facilities. And, the existing DOD review process would ensure compatibility between wind farm surface and subsurface elements and any existing DOD infrastructure like buried cables to ensure the 20th Air Force mission to operate and maintain the ICBM facilities was also protected.

Finally, AWEA and WIND recommend that the Commission clarify that the proposed revisions, particularly the avoidance area designation, does not apply to pending projects with active determinations of no hazard from the FAA.

Conclusion

Thank you for your careful deliberations on this important matter and your consideration of these comments. We stand ready to assist with any additional information you may need. Please do not hesitate to contact us.

Sincerely,

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