



North Dakota Legislative Council

Prepared for the Agriculture and Natural Resources Committee
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MITIGATION PLANS RELATING TO THE SITING AND OPERATION OF ENERGY CONSERVATION OR TRANSMISSION FACILITIES STUDY - BACKGROUND MEMORANDUM

Section 22 of Senate Bill No. 2009 (2023) ([appendix](#)) directs the Legislative Management to study plans for mitigation of adverse wildlife and environmental impacts and monetary payments made to state agencies, contractors, nongovernmental organizations, and others by applicants or other persons for mitigation during the siting and operation of energy conversion or transmission facilities. The study must include consideration of the provisions of law that affect the ability of developers to mitigate adverse wildlife habitat and environmental impacts effectively, applicant payments used for the purchase of perpetual or nonperpetual conservation easements, the distinction between an adverse direct environmental effect and an adverse indirect environmental effect, methods to quantify adverse direct or adverse indirect environmental effects monetarily, and alternative programs that may be used or developed for the mitigation of adverse wildlife and environmental effects.

STATE STATUTES AND ADMINISTRATIVE RULES

North Dakota Century Code (NDCC) Chapter 49-22 governs the siting of electric energy conversion facilities and electric transmission facilities. Under NDCC Chapter 49-22, the Public Service Commission (PSC) is authorized to review, reject, and accept applications for placement of an electric transmission facility or an electric energy conversion facility in North Dakota. The Public Service Commission also may promulgate rules under North Dakota Administrative Code (NDAC) Article 69-06 relating to the siting of these facilities. North Dakota Century Code Section 49-22-04 requires each utility that owns or operates, or plans within the next 10 years to own, operate, or start construction on a facility, to submit a 10-year plan to the PSC for review. The 10-year plan must contain a description, including the nature and location, of the facilities to be owned or operated, or removed from service by the utility during the applicable period; the preferred site on which facilities may be constructed in the ensuing 5 years; any coordinated regional plans with other utilities in the preferred service area; a plan to minimize and mitigate any environmental impacts during the construction and operation of facilities; and a statement of the projected demand for the service area. The Public Service Commission must assess the impact of the development proposed in the plan to ensure energy conversion facilities and transmission facilities will be sited in an orderly manner compatible with environmental preservation and efficient use of resources.

North Dakota Century Code Section 49-22-07 requires a utility to obtain a certificate of site compatibility or a route permit from the PSC before constructing an electric energy conversion facility or an electric transmission facility. Under NDCC Section 49-22-08, an application for a certificate must contain, among other things, a description of the size and type of facility, a summary of any studies undertaken regarding the environmental impact of the facility, and a description of the efforts that will be taken to mitigate any foreseen adverse impacts of the facility.

Once an application is received, the PSC must hold a public hearing relating to the application. The Public Service Commission is prohibited from conditioning the issuance of a certificate or permit on the applicant's payment of an assessed mitigation payment or a payment requested by another state agency or entity to mitigate negative impacts on wildlife habitat. In addition to a certificate of site compatibility, a utility installing an electric transmission facility within a designated corridor also must receive a route permit under NDCC Section 49-22-08.1. An application for a route permit must be filed within 2 years of an applicant receiving a certificate of site compatibility and contain, among other items, a plan to mitigate adverse impacts associated with the prospective electric transmission facility.

Under NDCC Section 49-22-09, the PSC must consider a number of factors to aid in its evaluation and designation of sites, corridors, and routes. Factors considered relating to environmental impacts include:

- The available research and investigations relating to the effects of the location, construction, and operation of the proposed facility on public health and welfare, natural resources, and the environment.

- The effects of new electric energy conversion and electric transmission technologies and systems designed to minimize adverse environmental effects.
- The adverse direct and indirect environmental effects that cannot be avoided if the proposed site or route is designated.
- The alternatives to the proposed site, corridor, or route which are developed during the hearing process and which minimize adverse effects.
- Any problems raised by federal agencies, other state agencies, and local entities.

The Public Service Commission is required to provide notice to designated state and federal agencies when considering a siting application under NDCC Chapter 49-22. North Dakota Administrative Code Section 69-06-01-05 provides the entities to which the PSC must provide notice are the Aeronautics Commission; Attorney General; Department of Agriculture; State Department of Health and Human Services; Department of Labor and Human Rights; Department of Career and Technical Education; Department of Commerce; Energy Infrastructure and Impact Office; Game and Fish Department; Industrial Commission; Governor's Office; Department of Transportation; State Historical Society of North Dakota; Indian Affairs Commission; Job Service North Dakota; Department of Trust Lands; Parks and Recreation Department; Natural Resources Conservation Service; State Water Commission; United States Department of Defense; United States Fish and Wildlife Service; United States Army Corps of Engineers; Federal Aviation Administration; County Commission of the county or counties where the project is located; North Dakota Transmission Authority; North Dakota Pipeline Authority; Department of Environmental Quality; North Dakota Geological Survey; North Dakota Forest Service; Federal Bureau of Land Management; Military Aviation and Installation Assurance Siting Clearinghouse; Twentieth Airforce 91st Missile Wing; and Minot and Grand Forks Air Force Base.

North Dakota Century Code Section 49-22-09(2) prohibits the PSC from conditioning the issuance of a certificate or permit on the applicant providing a mitigation payment assessed or requested by another state agency or entity to offset a negative impact on wildlife habitat. Although environmental impact mitigation payments are not required under NDCC Chapter 49-22, if an applicant elects to provide a payment to mitigate the environmental impact of the construction or operation of an energy conversion or transmission facility, the applicant must do so in accordance with NDCC Section 49-22-09.2. North Dakota Century Code Section 49-22-09.2 requires any payment for environmental mitigation be made to the Agriculture Commissioner for deposit in the environmental impact mitigation fund under NDCC Section 4.1-01-21.1.

The environmental impact mitigation fund consists of all money deposited in the fund under NDCC Section 49-22-09.2. North Dakota Century Code Section 4.1-01-21.1(2) provides money in the fund only may be used for consultation with environmental scientists or engineers, or industry specialists, for services to analyze and implement mitigation required as a result of the impact of development, and for the creation or restoration of habitats affected by development. Easements or leaseholds purchased by a person to mitigate adverse environmental effects under NDCC Chapter 49-22 are limited to the facility's operational life pursuant to NDCC Section 4.1-01-21.1. The Agriculture Commissioner must notify the PSC of any mitigation efforts on an energy conversion or transmission facility before the PSC issues a permit under NDCC Chapter 49-22.

FEDERAL LAW

The Federal Power Act (FPA)¹ is the primary federal statute governing the widespread transmission and sale of electricity, as well as the federal regulation of hydroelectric power.² Section 216 of the FPA provides the Federal Energy Regulatory Committee (FERC) authority to regulate interstate electricity transmission, whereas siting of the facilities largely is left to the states.³ Section 216 of the FPA authorizes the Secretary of Energy, after consultation with affected states, to declare certain areas as national interest electric transmission corridors. These areas may be declared national corridors when an area is experiencing electric energy transmission capacity constraints, is experiencing congestion that adversely affects consumers, or is expected to experience transmission capacity constraints or congestions. However, 16 U.S.C 824(p)(b)(1)(C), only allows these designations if a state utility commission has not made a determination on an application seeking approval 1 year after the later of when the application was filed or when the Secretary of Energy has declared an area a national interest electric transmission corridor.

¹ 41 Stat. 1063; 16 U.S.C. §§ 791 et seq.

² *The Legal Framework of the Federal Power Act*, Congressional Research Service, January 22, 2020 (<https://crsreports.congress.gov/product/pdf/IF/IF11411>).

³ *Id.*

The federal government's power in siting these national interest electric transmission corridors is not without limitation. "In *Piedmont Environmental Council v. FERC* (558 F.3d 304 (4th Cir. 2009)), the U.S. Court of Appeals for the Fourth Circuit held that FERC may not permit transmission facilities if a state has denied the applicant's request to site transmission facilities; FERC may permit the transmission facilities only in the event the state has not acted on the applicant's request."⁴ "Furthermore, in *California Wilderness Coalition v. U.S. Dep't of Energy* (631 F.3d 1072 (9th Cir. 2011)), the U.S. Court of Appeals for the Ninth Circuit vacated the Department of Energy's first two national interest electric transmission corridor designations, finding that the agency had failed to consult adequately with the states as required by the FPA."⁵

APPROACHES BY SURROUNDING STATES

Minnesota

Minnesota's energy facility siting act is codified in Chapter 216 E of the Minnesota Revised Statutes. Section 216 E.01 gives siting authority to the Public Utilities Commission. Section 216 E.03 does not allow an applicant to construct a large electric generating plant without a permit from the commission. Section 216 E.03(5) requires every permit to be subject to an environmental review. The Commissioner of the Department of Commerce is required to prepare an environmental impact statement for the Minnesota Utilities Commission. Additionally, Section 216 E.03(7) provides Minnesota's goals of conserving resources, minimizing environmental impacts, and other land use conflicts guide whether a site and route permit is issued.

Section 216 E.04 provides an alternative review process for lower-voltage electric power plants and transmission lines. This review process also requires an application to be submitted to the Public Utilities Commission. Under 216 E.04 (5), the application is subject to an environmental review by the Commissioner of the Department of Commerce. The environmental review must contain information on the human and environmental impacts of the proposed project and other sites or routes identified by the commission and shall address mitigating measures for all of the sites or routes considered. Section 216 E.05 allows an applicant not installing a utility under Sections 216 E.03 and 216 E.04 to petition a local unit of government having jurisdiction over the site or route. If local approval is granted, a site or route permit is not required from the Public Utilities Commission. All applications under Section 216 E.05 also are subject to an environmental review.

South Dakota

The laws governing the siting of energy conversion and transmission facilities in South Dakota are codified in Chapter 49-14B of the South Dakota Code. Similar to North Dakota, Section 49-41B-3 requires a utility owning or planning to own or operate an energy conversion facility to submit a 10-year plan to the Public Utilities Commission in South Dakota. Section 49-41B-4 requires all utilities to obtain a permit from the Public Utilities Commission before commencing construction on a facility. Under Section 49-41B-11, an applicant must include in the application, among other criteria, any environmental studies pertaining to the prospective facility.

Section 49-41B-12 requires all applicants include in the application a fee for deposit with the Public Utilities Commission. The maximum fee assessed cannot exceed one-quarter of 1 percent of the first \$100 million of estimated construction costs plus one-twentieth of 1 percent of all additional estimated construction costs of the facility. The initial deposit cannot be less than \$8,000. The State Treasurer is the custodian of the fee and must disburse, through vouchers approved by the Public Utilities Commission, the actual cost of investigating, reviewing, processing, and serving notice of the application. Under Section 49-41B-12, the maximum deposit fee will increase if the Public Utilities Commission determines an environmental impact statement needs to be prepared. If an environmental impact statement is prepared, the maximum fee cannot exceed one-half of 1 percent of the first \$100 million of estimated construction costs plus one-twentieth of 1 percent of all additional estimated construction costs of the facility.

Under Section 49-41B-19, the Public Utilities Commission must collaborate with any unit of government relating to any environmental risks associated with a project. When seeking approval for a permit under Chapter 49-14B, the applicant must prove to the Public Utilities Commission by a preponderance of the evidence that the facility will not pose a serious injury to the environment.

RECENT LEGISLATION

During the 2023 Legislative Session, the North Dakota Legislative Assembly introduced Senate Bill No. 2008 relating to the siting of electric transmission and electric energy conversion facilities. Senate Bill No. 2008 increased from \$100 to \$200 the administrative fee for siting applicants for each \$1 million of original investment and also

⁴ *Id.*

⁵ *Id.*

increased from \$25,000 to \$50,000 the maximum administrative fee that may be collected. The bill also imposed the administrative fee on each applicant for a certificate of site compatibility, a certificate of corridor compatibility and route permit, and a transfer of a certificate or permit under NDCC Chapter 49-22.1.

SUGGESTED STUDY APPROACH

In conducting this study, the committee may wish to receive testimony from representatives from:

- The entities listed in NDAC Section 69-06-01-05;
- The United States Department of Energy; and
- The energy industry in North Dakota.

ATTACH: 1