NOTES

AT A CROSSROADS: A PATH FORWARD FOR WIND ENERGY IN INDIANA

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ABSTRACT

As the consequences of global climate change become more apparent, the push for a more resilient energy grid, supported by renewable energy production, has gained strength. While the federal government has some power to impact energy production in the United States, most of these decisions are made by state and local governments. States in the Midwest will play a crucial role in the concerted effort to transition the nation's energy grid to stronger reliance on renewable energy generation. Indiana and other Midwestern states have relied heavily on fossil fuels, but investments in renewable energy infrastructure in this region could signal a major shift in energy production for the United States. In March 2021, the Indiana General Assembly attempted to address local government roadblocks to renewable energy projects that have stymied the state's ability to increase its renewable energy profile. House Bill 1381 was designed to set forth standards for renewable energy siting throughout the state, a power that traditionally resides with localities and county commissions in Indiana pursuant to the state's Home Rule Act of 1980. The bill arose in response to the use by several counties, specifically rural areas in the southern portion of the state like Posey and Gibson counties, of siting authority to terminate proposed wind energy projects and deny the possibility for future renewable projects. Various groups, including local governments and environmental groups throughout the state, viewed House Bill 1381 as an attempt to usurp the siting authority held by local governments in Indiana. Those in opposition claimed the bill would have negative impacts on local communities. Ultimately, the bill was withdrawn in the state senate, and it was announced in April 2021 that the measure would not move forward. With the death of House Bill 1381, significant investment in wind and solar projects in

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Indiana seems unlikely if the current power balance between the state and local governments in Indiana remains unchanged.

The conflict between state legislatures and local governments over renewable energy siting is not a phenomenon exclusive to Indiana. Indiana lawmakers modeled House Bill 1381 after bills proposed in other state legislatures facing similar issues. Different states have taken different approaches to determine which governing body is best suited to make energy siting decisions. Additionally, renewable energy scholars have discussed in depth whether the local, state, or federal government is the appropriate forum for making these decisions. The typical response, and the system adopted by most states, is that local governments are best suited to determine questions of siting and standards for renewable energy projects in their respective regions of the state. House Bill 1381 set out to alter this standard by giving the state government significantly more power in the decision-making process. Indiana's proposed bill, however, provides a closer look at the challenges a state can face in delegating siting authority to local governments and the potential state legislatures have in reshaping the energy sector of the United States.

This Note proposes an ideal structure for siting authority in Indiana that strikes a balance between enough state decision making to further renewable investment and energy production goals and enough procedural safeguards for local governments to ensure that various stakeholders have the opportunity to meaningfully participate in decisions that will affect communities surrounding proposed renewable projects. This Note builds upon the existing literature surrounding home rule and renewable energy siting and analyzes different frameworks for siting authority throughout the United States to create an ideal solution for advancing Indiana's renewable energy infrastructure.

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INTRODUCTION

On February 27, 2022, the Intergovernmental Panel on Climate Change ("IPCC") issued a striking report outlining the unavoidable impacts of climate change approaching over the next two decades and criticizing the inaction by international governments that have failed to treat this threat to humanity with urgency.[1] The report indicates that weather extremes, such as increased heatwaves and floods, have already caused significant harms to people in various parts of Africa, Asia, South America, and other regions of the globe.[2] In the report's call to action for government leaders, the IPCC urges rapid reductions in greenhouse gas emissions and other action to build resilience and brace for the drastic changes set to come.[3] Other IPCC reports, along with recent observations and estimates of the effects of global climate change, have further enhanced the push for a more resilient energy grid built on renewables, such as wind and solar in the United States.[4] While the federal government has some power to impact energy production in the United States, most of these decisions are made by state and local governments.[5] However, many statewide opportunities for renewable energy projects face difficult hurdles that ultimately end in termination of the proposals. These hurdles often stem from local governments that oversee renewable energy projects within their geographic limits and respond to public backlash or are unwilling to allow a transition away from reliance on fossil fuels for energy production.[6] Whatever the reasoning may be, the result is the same: widespread termination of energy projects leads to stagnation in building a resilient energy grid.

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[1] HANS-OTTO PÖRTNER & DEBRA C. ROBERTS, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY 126 (2022).

[2] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE: A THREAT TO HUMAN WELLBEING AND HEALTH OF THE PLANET. TAKING ACTION NOW CAN SECURE OUR FUTURE (Feb. 28, 2022), https://www.ipcc.ch/2022/02/28/pr-wgii-ar6/ [https://perma.cc/5WHC-DCKR].

[3] *Id.* ("[A]mbitious, accelerated action is required to adapt to climate change, at the same time as making rapid, deep cuts in greenhouse gas emissions.").

[4] *See* Ivan Penn, *From 4% to 45%: Energy Department Lays Out Ambitious Blueprint for Solar Power*, N.Y. TIMES (Sept. 8, 2021), https://www.nytimes.com/2021/09/08/business/energy-environment/biden-solar-energy-climate-change.html (detailing Biden Administration's report on solar energy).

[5] *See* Troy A. Rule, *Renewable Energy and the Neighbors*, 2010 UTAH L. REV. 1223, 1242-49 (2010) (explaining existing problem of local resistance to renewable energy, including "'hands-off' approach," state mandates, grants, incentives, and preemption).

[6] Jon Webb, Opinion, *The Death of a Proposed Southern Indiana Wind Farm is Complicated*, EVANSVILLE COURIER & PRESS (Sept. 3, 2020, 8:07 AM CST), https://www.courierpress.com/story/opinion/columnists/jon-webb/2020/09/02/death-proposed-southern-indiana-wind-farm-complicated/5696395002/ [https://perma.cc/PRD8-A2GS] ("After more than a year of heavy lobbying, the people railing against a proposed wind farm that would have stretched across [Indiana] counties finally received the news they'd been waiting for: the project is dead.").

States in the Midwest will play a crucial role in the concerted effort to transition the nation's energy grid to stronger reliance on renewable energy generation. Indiana and other Midwestern states have relied heavily on fossil fuels, but investments in renewable energy infrastructure in this region could signal a major shift in energy production for the United States.[7] In March 2021, the Indiana General Assembly attempted to address local government roadblocks to renewable energy projects that have stymied the state's ability to increase its renewable energy profile. House Bill 1381 was designed to set forth standards for renewable energy siting throughout the state, a power that traditionally resides with localities and county commissions in Indiana pursuant to the state's Home Rule Act of 1980.[8] House Bill 1381 arose in response to counties, specifically rural areas in the southern portion of the state like Posey and Gibson Counties, using siting authority to terminate proposed wind energy projects and deny the possibility for future renewable projects.[9] Various groups, including local governments and environmental groups throughout the state, viewed House Bill 1381 as an attempt to usurp the siting authority held by local governments in Indiana.[10] Those in opposition claimed the bill would have negative impacts on local communities.[11] Ultimately, the bill was withdrawn in the State Senate, and it was announced in April 2021 that the measure would not move forward.[12] With the death of House Bill 1381, significant investment in wind and solar projects in Indiana seems unlikely if the current power balance between the state and local governments in Indiana remains unchanged.

The conflict between state legislatures and local governments over renewable energy siting is not a phenomenon exclusive to Indiana. Indiana lawmakers modeled House Bill 1381 after bills proposed in other state legislatures facing similar issues.[13] Different states have taken different approaches to determine which governing body is the best suited to make energy siting decisions.

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[7] Benjamin Storrow, *A Midwest Energy Transition Will Help Drive Future U.S. Emissions Reductions*, SCI. AM. (Oct. 26, 2018), https://www.scientificamerican.com/article/a-midwest-energy-transition-will-help-drive-future-u-s-emissions-reductions/ [https://perma.cc/JMQ3-DC2T].

[8] London Gibson & Sarah Bowman, *34 Indiana Counties Restrict Wind, Solar Projects. Lawmakers are Pushing a Bill To Override Them*, INDYSTAR. (Mar. 10, 2021, 5:57 PM), https://www.indystar.com/story/news/environment/2021/03/10/indiana-general-assembly-wind-solar-efforts-standardize-solar-wind-projects-called-overreach/4541897001/ [https://perma.cc/F8TA-7Q46].

[9] *Id.*

[10] Sarah Bowman, *'Like a Hostage Negotiation': Indiana Bill on Renewable Energy Standards Dies After Pushback*, INDYSTAR. (Apr. 15, 2021, 6:09 AM), https://www.indystar.com/story/news/environment/2021/04/15/indiana-general-assembly-kills-bill-wind-solar-energy-standards/7222252002/ [https://perma.cc/8ND7-APG6].

[11] *See id.* (describing how local officials may have differing opinions of what constitutes "proper" regulations because preempting local authority may not lead to best results for each community).

[12] *Id.*

[13] *See* Gibson & Bowman, *supra* note 8.

Additionally, renewable-energy scholars have discussed in depth whether the local, state, or federal government is the appropriate forum for making these decisions.[14] The typical response, and the system adopted by most states, is that local governments are best suited to determine questions of siting and standards for renewable energy projects in their respective regions of the state.[15] House Bill 1381 set out to alter this standard by giving the state government significantly more power in the decision-making process. Indiana's proposed bill, however, provides a closer look at the challenges a state can face in delegating siting authority to local governments and the potential state legislatures may have in reshaping the energy sector of the United States.

This Note proposes an ideal structure for siting authority in Indiana that strikes a balance between enough state decision making to further renewable investment and energy production goals and enough procedural safeguards for local governments to ensure that various stakeholders have the opportunity to meaningfully participate in decisions that will affect communities surrounding proposed renewable projects. Part I examines the legal history of renewable energy siting authority and the doctrine of home rule that underlies the division of power between local governments and the state government in Indiana. Part I also provides the three main approaches that states have adopted in dividing siting authority, considering the benefits and drawbacks for each approach. Part II provides an example of local reaction to renewable energy projects in Indiana counties that have adopted restrictive measures to keep out wind and solar projects. Additionally, Part II explores the story behind Indiana House Bill 1381, analyzing the intentions, reactions, and outcomes throughout the proposed bill's existence. Part II also addresses key actors in House Bill 1381's story. Finally, Part III builds on work from various scholars and reactions to Indiana House Bill 1381 to suggest that Indiana legislators focus on creating a system of siting authority that balances the need for state control to achieve broader goals while simultaneously acknowledging valid local concerns and ensuring equitable decision making. This Note does not suggest that the proposal will work for every state facing local opposition to renewable energy. The suggestions in this Note attempt to respond to the specific controversies and discussions that arose in the context of wind farm siting in Indiana.

The most recent IPCC report has made it clearer than ever that governments must take ambitious action now to cope with the unavoidable risks we face from climate change.[16] Indiana could serve as a potential guide for state and local governments in the United States as this urgency pushes for more renewable energy infrastructure across the nation in the coming years.

[14] *See infra* Part I.B.

[15] *See* Rule, *supra* note 5, at 1251 (suggesting broad state mandates would ignore specific considerations of each locality).

[16] *See* PÖRTNER & ROBERTS, *supra* note 1, at 126.

I. HOME RULE AND THE VARIOUS STATE APPROACHES TO ENERGY SITING AUTHORITY

With the looming threat of climate change, one of the most important actions people around the world must take involves decarbonizing energy production. President Joseph R. Biden and national and state leaders have made it clear that the United States must transition away from fossil fuels and toward more resilient renewable energy sources that produce fewer-to-no greenhouse gases.[17] However, despite the urgency of the climate crisis, the governmental structure in many states stands as an obstacle to achieving expansive renewable energy goals. Finding a solution to the power balance in Indiana that allows local governments to deny the siting of renewable energy facilities involves understanding the doctrine of home rule and its implications. This Section first traces the history of home rule, how states have adopted this legal framework, and what implications home rule has for renewable energy siting authority. Following that discussion is an analysis of the different approaches states have taken when allocating siting authority, including where Indiana's existing structure and the structure of House Bill 1381 fall in these categories.

A. *History of Home Rule*

Prior to 1875, before the existence of the modern home rule doctrine, many states followed Dillon's Rule.[18] This rule provided states "the 'constitutional rationale for intervening' in local affairs."[19] Dillon's Rule construed local government powers narrowly and generally limited them to powers explicitly designated by the state.[20] Furthermore, county governments had little lawmaking authority and were generally "considered administrative arms of the state government."[21] Dillon's Rule left local governments subject to the authority of state governments, which led to significant opposition from local government leaders who sought to have more authority over local decisions. Opposition to Dillon's Rule rose as people began to understand that states did not have the capacity to appropriately address and manage the various concerns arising in all of their localities.[22] Concerns about whether a state is the appropriate forum for decisions only affecting a few communities arose in the debate over Indiana's House Bill 1381, with local governments and environmental groups expressing

[17] *See* Exec. Order No. 14,057, 86 Fed. Reg. 70935 (Dec. 13, 2021) (setting out plan for emissions reductions in United States energy grid).

[18] Matthew Mahoney, Note, *Home Rule in Ohio: General Laws, Conflicts, and the Failure of the Courts To Protect the Ohio Constitution*, 67 CLEV. ST. L. REV. 117, 123 (2019) (quoting John G. Grumm & Russel D. Murphy, *Dillon's Rule Reconsidered*, 416 ANNALS AM. ACAD. POL. & SOC. SCI. 120, 124 (1974)).

[19] *Id.*

[20] Uma Outka, *Intrastate Preemption in the Shifting Energy Sector*, 86 U. COLO. L. REV. 927, 943 (2015) [hereinafter Outka, *Shifting Energy Sector*].

[21] Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1123 (2007).

[22] Mahoney, *supra* note 18, at 124-25.

worries that the state legislature would not be able to respond to localized concerns based on specific experiences and characteristics of various communities.[23]

In response to states' inability to effectively manage local issues, many states adopted the concept of home rule beginning around 1875.[24] Home rule serves to distribute legislative authority between states and local governments, generally giving local governments authority "over areas of purely local concern and the power to address local needs without the state's interference."[25] Proponents of the doctrine believe that home rule better suits the interests of local governments, reflecting the idea that these governing bodies have the best "political judgment" to respond to issues that arise within their boundaries.[26] Local governments have used home rule as "a powerful tool . . . to control land use regulation such as zoning."[27] Some understand home rule as a pursuit of democratic values.[28]

While the pro-democratic understandings of home rule seem to suggest the doctrine has an overall positive impact, home rule has not existed without criticism. Concerns arose about the potential for local governments to use home rule as a tool to pursue policies of "isolation" or "segregation."[29] By providing local governments with stronger lawmaking authority, home rule has allowed exclusionary zoning practices that harm low-income communities, creating a "race to the bottom" on many subjects.[30] Evidence of these exclusionary and race-to-the-bottom practices exist within the energy siting debate in Indiana. As evidenced below in Part II, over thirty Indiana counties have imposed restrictive ordinances that limit the ability for renewable energy projects to exist within their boundaries.[31] Regardless of how home rule is understood, it has increased local control in decisions on many subjects, and can therefore have broader-reaching effects. However, the process by which a state adopts home rule impacts the effectiveness of the doctrine, and thus the actual power that local governments can utilize to influence decisions.

States have adopted home rule in two distinct ways that determine the strength of the local government's authority over certain matters. The first approach to implementing home rule is to incorporate the doctrine into the state's constitution. If state constitutions include a home rule provision, designating power to local governments, then traditional legislative action will not alter these

[23] *See infra* Part II.D (analyzing public reaction to House Bill 1381).

[24] Mahoney, *supra* note 18, at 120 ("In 1875, Missouri became the first state to adopt the doctrine of home rule. By 1963, twenty-eight states adopted home rule in one form or another." (footnote omitted)).

[25] *Id.* at 121.

[26] *Id.* at 122.

[27] Alexa Burt Engelman, *Against the Wind: Conflict over Wind Energy Siting*, 41 ENV'T L. REP. NEWS & ANALYSIS 10549, 10559 (2011).

[28] Diller, *supra* note 21, at 1124.

[29] *Id.* at 1132.

[30] *Id.*

[31] *See infra* Part II.A.

powers.[32] Typically, under a constitutional guarantee, local governments will avoid preemption from state action that attempts to infringe upon "a locality's constitutionally-defined scope of authority."[33]

The second approach to implementing home rule involves enacting a statute that outlines the home rule powers granted to local governments. Legislative home rule enactments generally seek to place the state legislature as the deciding body on the limits of home rule for local governments, rather than courts that would usually decide issues arising under constitutional home rule disputes.[34] Unlike constitutional grants of authority, however, if local governments derive their power through state home rule statutes, state legislatures can more easily alter or repeal these powers.[35] The majority of states have adopted the legislative home rule approach.[36]

Indiana, like most other states, took the legislative approach to grant home rule powers to local governments within the state. Local governments in Indiana derive their authority over local matters from Indiana's Home Rule Act of 1980.[37] The Home Rule Act provides local governments "all . . . powers necessary or desirable in the conduct of its affairs, even though not granted by statute."[38] The preemption provision of the statute "prohibits local regulation of 'conduct that is regulated by a state agency, except as expressly granted by statute.'"[39]

Indiana's Home Rule Act does not provide broad power that is traditionally expected from home rule provisions. The statute "mostly enumerates a long list of restrictions" that prohibit local governments from exercising legislative authority.[40] Courts have interpreted Indiana's Home Rule Act as having a "presumption that 'any doubt as to the existence of a power of a [local government] shall be resolved in favor of its existence,'" but only when that power relates to issues of purely local concern.[41] This limitation helps explain the arguments pushed by the authors of House Bill 1381, which focus on how local government decisions that restrict renewable energy projects affect more

[32] Outka, *Shifting Energy Sector*, *supra* note 20, at 944.

[33] *Id.*

[34] Diller, *supra* note 21, at 1125-26.

[35] *Id.*

[36] *Id.* at 1126-27.

[37] IND. UNIV. PUB. POL'Y INST., POLICY CHOICES FOR INDIANA'S FUTURE: HOME RULE IN THE MIDWEST 2 (2010), https://ppidb.iu.edu/Uploads/PublicationFiles/PC_HmRules_Web.pdf [https://perma.cc/PCX4-6U8P].

[38] IND. CODE § 36-1-3-4(b)(2) (2023).

[39] Sam Thompson, *Localism and the Opioid Crisis: Overcoming State and Federal Hurdles to City- and County-Run Supervised Injection Facilities and Syringe Exchange Programs in Indiana*, 18 IND. HEALTH L. REV. 441, 458 (2021) (quoting IND. CODE § 36-1-3-8 (2021)).

[40] IND. UNIV. PUB. POL'Y INST., *supra* note 37, at 2.

[41] Mance v. Bd. of Dirs. of the Pub. Emps.' Ret. Fund, 652 N.E.2d 532, 536 (Ind. Ct. App. 1995) (quoting IND. CODE § 36-1-3-3(b) (1995)).

than just those people living in the county. The proponents of the bill sought to emphasize the state-level nature of the issue in order to limit the application of home rule to energy siting decisions in the state.[42]

B. *State Approaches to Designating Siting Authority*

Like Indiana, other states have experienced the obstacles that home rule poses to renewable energy siting. Throughout the nation, states have adopted different approaches to grapple with the question of which authority should have the decision-making power in these situations. These states' approaches can be grouped into three main categories: local, state, and hybrid control.[43] The state approaches addressed below focus specifically on wind energy siting authority, but the conclusions and approaches suggested in the following section can also be applied to solar energy siting authority. Understanding the structure, benefits, and drawbacks of these approaches, along with where Indiana lies in relation to other states, will help Indiana legislators find an appropriate balance for siting authority in the state.

1. The Local Control Approach

One common power structure to wind energy siting is a purely local approach. Twenty-two states employ this method, leaving the enactment of siting regulations solely in the hands of local governments.[44] Indiana falls within this category of purely local control. Under the purely local regime, some states allow for minimal state standards, but these standards usually have limited impact on the decision to approve or deny projects in the first place.[45] For example, in Texas, the main siting decisions are made by local governments, with the state legislature only having the authority to enact regulations regarding the decommissioning of wind facilities.[46]

The benefits and drawbacks of this approach generally reflect the debate surrounding home rule itself. Some proponents of the local approach emphasize the need for local governments to have the ability to respond to harmful local externalities that will result from developing new renewable energy projects.[47] However, delegating too much authority to local governments can lead to competency issues, especially when dealing with complex or large-scale

[42] *See id.* at 537 ("However, where affairs of statewide concern are involved, the local governmental unit's power to act must be express or necessarily implied.").

[43] Jaclyn Kahn & Laura Shields, *State Approaches to Wind Facility Siting*, NAT'L CONF. STATE LEGISLATURES (Sept. 2, 2020), https://www.ncsl.org/research/energy/state-wind-energy-siting.aspx [https://perma.cc/5YPC-DHQW].

[44] *Id.* (citing Texas as example of state with purely local approach to wind energy siting).

[45] *Id.*

[46] *See id.*; TEX. UTIL. CODE ANN. § 301 (West 2023).

[47] Hannah J. Wiseman, *Taxing Local Energy Externalities*, 96 NOTRE DAME L. REV. 563, 611 (2020) ("Despite some legitimate reasons for questioning strong local authority, local governments need tools to address externalities, particularly for growing energy industries with disproportionately harmful local effects.").

projects, and fears that industry leaders will have more success in lobbying for more favorable regulations at the local level.[48] Additionally, local control allows familiar not-in-my-backyard ("NIMBY") complaints to dominate siting decisions, a phenomenon that has become increasingly prevalent in the wind energy context.[49] People raising NIMBY opposition often focus on impacts to property values, health and safety, and occasionally the environment.[50] NIMBYs create serious obstacles for wind energy projects because, unlike for fossil fuel-powered facilities, siting of wind turbines "are often located in remote, undeveloped places," leaving these projects susceptible to push back from people living in the surrounding area.[51] Wind project developers in Indiana faced significant NIMBY opposition, which ultimately led to the restrictive local ordinances discussed below.[52]

2. The State Control Approach

The next approach that a few states take to allocate wind siting authority is to allow the state government full decision-making power. Only four states have adopted this approach, raising concerns about the potential success of adopting it in other states.[53] Those who support the state control approach point to regulatory uniformity as one of the key benefits.[54] Indiana's House Bill 1381 attempted to align the state with this approach. The state standards set forth in the bill would have displaced any county regulations that imposed more strict requirements on new proposed projects.[55]

Some states adopted a centralized approach initially to intervene in siting decisions regarding transmission lines and fossil fuel-powered plants "given the clear public importance of such facilities, beyond the interests of a single

[48] *Id.* at 570.

[49] Patricia E. Salkin & Ashira Pelman Ostrow, *Cooperative Federalism and Wind: A New Framework for Achieving Sustainability*, 37 HOFSTRA L. REV. 1049, 1052 (2009) ("Indeed, the intensity of local opposition has prompted one prominent energy siting consultant to remark that 'wind energy is fast becoming "the mother of all NIMBY wars."'").

[50] *Id.* at 1069 ("In opposing wind projects, NIMBYs raise a varity of concerns regarding the impact of wind turbines on property values, noise, aesthetics, health and safety, and wildlife preservation.").

[51] *Id.* at 1071 ("Sparks fly when lands viewed as public viewscapes . . . appear threatened" (alteration in original)).

[52] *See infra* Part II.A (recounting opposition to wind energy projects in two Indiana counties that reflect NIMBY talking points).

[53] *See* Salkin & Ostrow, *supra* note 49, at 1052 (noting Connecticut, Maryland, North Carolina, and West Virginia are only states that currently have state government as primary wind siting authority).

[54] Sherry Stout, *Jurisdictional Authority: Who Has the (Solar) Power?*, NAT'L RENEWABLE ENERGY LAB'Y (Aug. 5, 2014), https://www.nrel.gov/state-local-tribal/blog/posts/jurisdictional-authority.html [https://perma.cc/H345-SP2B] (pointing to state control of energy siting as opposite of home rule).

[55] *See infra* Part II.C (discussing proposal and contents of House Bill 1381).

locality."[56] State control can remedy concerns that differing local government positions will lead to a patchwork of regulations that deter future investments in the state and make achieving state goals for renewable energy generation unlikely.[57] Another key feature of state control is that state regulatory agencies can have more power in planning energy production throughout the state, rather than leaving location of energy projects up to the companies proposing the projects.[58] Drawbacks of the state control approach echo the benefits of the local control approach, mainly that "consolidating state siting authority may not be culturally or politically viable in every state."[59] Additionally, even in states that have adopted a centralized approach to siting authority, local governments maintain significant power and often have powerful influence over the ultimate decision.[60] The power that local governments maintain in state control regimes further exemplifies the infeasibility of this approach truly overcoming the effects of home rule for siting decisions.

3. The Hybrid Control Approach

The third approach taken by many states is that of hybrid control. Under hybrid control, both the state government and various local governments where energy projects are proposed have a role in making the ultimate decision to approve or deny the projects.[61] Different states have adopted variations of this approach, but most include a requirement of approval from at least one of the state or local governments.[62] In some states, like Minnesota, state legislators create a project size limit that determines when the state or local government will make the siting decision.[63] Once a project falls below the specified size, the company proposing the wind facility can opt to have local governments decide whether to approve the project.[64] Other states using the hybrid control approach require approvals from both governing entities.[65] In Colorado, the Public Utilities Commission makes most energy siting decisions, but "a project

[56] Uma Outka, *Renewable Energy Siting for the Critical Decade*, 69 U. KAN. L. REV. 857, 862 (2021) [hereinafter Outka, *Renewable Energy Siting*].

[57] Wiseman, *supra* note 47, at 570.

[58] *See* Outka, *Renewable Energy Siting*, *supra* note 56, at 863-64.

[59] *Id.* at 868.

[60] *Id.* at 862-63.

[61] Kahn & Shields, *supra* note 43.

[62] *Id.*

[63] *Id.* ("For example, in Minnesota, the Public Utilities Commission is the primary state-level agency responsible for larger wind facilities, while siting decisions over smaller facilities are left to local governments.").

[64] *Id.* (describing Minnesota system where projects smaller than twenty-five megawatts can opt into local approval process).

[65] *Id.* (describing Colorado system where state issues certificate for facility, and if local government denies permit, developer can appeal to state).

developer still needs to obtain local permits" to move the project forward.[66] Additionally, states like Colorado often have some form of state review for projects denied by local governments.[67] The hybrid control approach allows states to set general state standards for the implementation of renewable energy projects, while also allowing local governments to have a stake in the decision-making process that would not be present under the state control regime. This approach helps to streamline the process of siting decisions and allows for meaningful debate of community concerns when necessary.

II. RENEWABLE ENERGY IN INDIANA AND HOUSE BILL 1381

To transition away from fossil fuel-powered energy production, countries and communities around the world must develop renewable energy production facilities. The most recent IPCC report specifically calls on government leaders to actively and urgently pursue rapid reductions in greenhouse gas emissions to prevent more serious "loss of life, biodiversity and infrastructure."[68] The state of Indiana has remained heavily reliant upon fossil fuels as other states have made significant efforts to transition their energy grids to net-zero emissions.[69] However, renewable energy providers have not simply overlooked Indiana while other states implement these changes. The state has great potential to impact the nation's energy production because of its proximity to the east coast and its expansive, open regions, suitable for wind and solar production.[70] Wind gusts from Lake Michigan make the northern portions of the state very suitable for increased wind energy production, and Indiana's position between two electric grids that serve the Midwestern and eastern states makes it a prime location for increasing renewable power generation that will be available to a

[66] *Id.*; *see Colorado State Energy Profile*, U.S. ENERGY INFO. ADMIN. (May 18, 2023), https://www.eia.gov/state/print.php?sid=CO [https://perma.cc/2TVV-B5F7] (stating renewable energy sources accounted for thirty-seven percent of Colorado's energy consumption in 2022).

[67] Kahn & Shields, *supra* note 43.

[68] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 2.

[69] *See, e.g.*, Helen Booth-Tobin, *Illinois Embraces a Net-Zero Emissions Future with Ambitious Climate Legislation*, CERES (Sept. 14, 2021), https://www.ceres.org/news-center/press-releases/illinois-embraces-net-zero-emissions-future-ambitious-climate [https://perma.cc/S73U-ZMKV] (discussing Illinois bill to put "the state on a path to a carbon-neutral energy sector by 2050"); *see also Hawaiian Electric Sets Goal of 70% Carbon Reduction by 2030, Envisions Zero Emissions by 2045*, HAWAIIAN ELEC. (Nov. 5, 2021), https://www.hawaiianelectric.com/hawaiian-electric-sets-goal-of-70-percent-carbon-reduction-by-2030-envisions-zero-emissions-by-2045 [https://perma.cc/37AL-F3PE] (stating net-zero emissions commitment by Hawaii's largest energy provider).

[70] Dan Gearino, *Wind Energy Is a Big Business in Indiana, Leading to Awkward Alliances: Hotly Debated Legislation Would Open the State to Renewable Energy Projects, Trumping Local Restrictions*, INSIDE CLIMATE NEWS (Mar. 30, 2021), https://insideclimatenews.org/news/30032021/indiana-wind-energy/ [https://perma.cc/K8WX-TQQY].

significant portion of the country.[71] These characteristics have made Indiana a prime target for many renewable energy companies seeking to build facilities in the state.[72] The proposed projects, however, have faced significant opposition from Hoosiers[73] living nearby, stifling any chance of taking significant strides in transitioning Indiana's energy grid.[74] This Section begins by examining the opposition to wind energy projects in Indiana and then follows the life of House Bill 1381 in the Indiana legislature. Finally, this Section discusses the different perspectives expressing support and criticism for the bill, which help provide context for the proposals to change Indiana's siting regime in Part III.

A. *Indiana's Renewable Energy Obstacles*

Two Indiana counties in particular highlight the intrastate tension building between those seeking increased renewable energy and those opposed to the change. In southern Indiana, Posey and Gibson Counties were the desired location of a 200-megawatt wind energy project that could have reshaped the region's energy sector.[75] The project had the potential to place between forty-seven and eighty-one wind turbines in the predominantly rural regions of these counties,[76] which continue to rely heavily on fossil fuels for energy production.[77] An additional 400-megawatt project, worth an estimated $600 million, had been proposed by a different renewable energy company for the counties.[78] Before either project could make progress, however, community members and local government leaders formed organizations opposing the projects and imposed

[71] London Gibson, *Indiana's Strategic Position Boosts Its Wind Power Industry*, U.S. NEWS & WORLD REP. (July 31, 2021, 12:01 AM), https://www.usnews.com/news/best-states/indiana/articles/2021-07-31/indianas-strategic-position-boosts-its-wind-power-industry#.

[72] *Id.*

[73] "Hoosier" is the official term used to refer to inhabitants of Indiana. *See What Is a Hoosier*, IND. HIST. BUREAU, https://www.in.gov/history/about-indiana-history-and-trivia/emblems-and-symbols/what-is-a-hoosier/ [https://perma.cc/RNN9-BLKS] (last visited Aug. 25, 2023).

[74] *See infra* Part II.A (detailing local opposition to renewable energy projects in Indiana).

[75] Webb, *supra* note 6.

[76] Mark Wilson, *How Many Wind Turbines Does a Renewable Energy Company Want To Build in Posey County?*, COURIER & PRESS (Dec. 14, 2018, 11:59 AM CST), https://www.courierpress.com/story/news/local/2018/12/14/wind-turbines-posey-county-e-renewables/2291486002/ [https://perma.cc/4JVU-47TW].

[77] Enrique Saenz, *Misinformation Thwarting Indiana's Clean Energy Initiatives*, IND. ENV'T REP. (Aug. 2, 2021), https://www.indianaenvironmentalreporter.org/posts/misinformation-thwarting-indianas-clean-energy-initiatives [https://perma.cc/JP23-G8KN].

[78] Enrique Saenz, *House Utilities Committee Approves Bill Establishing Statewide Standards for Wind, Solar Sites*, IND. ENV'T REP. (Feb. 12, 2021), https://www.indianaenvironmentalreporter.org/posts/house-utilities-committee-approves-bill-establishing-statewide-standards-for-wind-solar-sites [https://perma.cc/9U3L-HDXT].

obstacles to prevent these and future renewable energy projects from being introduced to the area.[79]

Community-led organizations in Posey and Gibson Counties have cited various concerns for their widespread opposition of "industrial wind turbines."[80] PoCo Wind Safety & Rights ("PoCo Wind")[81] emerged as the prominent community group with the stated goal to "inform . . . neighbors and fellow county residents about the issues of Safety, Property Rights, Health, and Property Values regarding industrial wind turbines in Posey County."[82] The organization's website provides various references to other websites and sources with a key focus on wind turbine interference with weather radar systems.[83]

Some of the claimed concerns about wind turbines pushed by PoCo Wind, specifically the health effects from turbine noise, reflect familiar NIMBY opposition, as well as false statements and misinformation that can be traced back to leaders in the fossil fuel industry seeking to stall the implementation of renewable energy projects.[84] Fossil fuel companies like ExxonMobil and Murray Energy "fund front groups like the Institute for Energy Research . . . [and the] Heartland Institute" that develop intentional disinformation campaigns.[85] These campaigns funnel unsupported claims to communities facing wind project proposals to confuse members into thinking the companies care about local concerns, when the real motivating factor is preserving corporate profits.[86] With their strong social media presences in local communities, groups like PoCo Wind can spread this misinformation while simultaneously raising valid concerns and contribute to confusion about wind energy's true benefits.

Due to the confusion caused by opposition groups and fossil fuel companies, many people in Indiana seem to prioritize aesthetic concerns over the significant benefits that can result from increased wind energy production throughout the state. Wind energy production benefits include profits for local landowners and

[79] *See Industrial Wind Turbines in Posey and Gibson County Concern Us All*, POCO WIND SAFETY & RTS., https://pocowind.org/ [https://perma.cc/NX6N-3HLG] (last visited Aug. 25, 2023) [hereinafter POCO WIND] (outlining studies and reports of negative impacts of wind turbines).

[80] *Id.*

[81] "PoCo" is a common phrase in the region to refer to Posey County, the home of the organization. *See id.*

[82] *Id.*

[83] *Id.* (presenting articles, studies, and expert testimony on risk of wind turbine interference with radar systems).

[84] Saenz, *supra* note 77 ("Certainly, there's what you call genuine 'not in my backyard' opposition from people who might prefer to use a parcel of land for fishing, hunting, a good view, et cetera, but there's also a real proliferation of opposition to these projects through blogs, websites and, increasingly, on social media . . . [that are] picking up more disinformation that comes from a pretty familiar set of actors.").

[85] *Id.*

[86] *See id.* (highlighting front groups' fearmongering of meritless concerns, including "infrasound from wind turbines and toxicity leaking from solar panels").

generation of property taxes for local communities. Property owners in rural communities "make an average of $5,000 a year per turbine" when leasing land to companies operating wind farms.[87] At least some farmers, who stand to benefit from wind turbine leases on their farmland, generally welcome wind projects in their communities.[88] Additionally, wind energy production can "generate . . . property taxes for cash-strapped schools and communities."[89] The potential for wind energy production in Indiana also has positive economic implications for the state. A study conducted on the economic impact of the first thousand megawatts of wind energy in Indiana found that the state gained "$570 million in in-state gross economic activity and more than 4,400 jobs."[90] If Indiana acted on its potential to install more wind energy production sites, the state could see further economic growth stemming from the development of manufacturing facilities as well.[91]

Despite the lack of support for claims echoed by these community organizations, their influence on local government energy siting decisions is unmistakable. Following the significant public outcry amplified by groups like PoCo Wind, Posey County and at least thirty-three other Indiana counties had adopted restrictive ordinances against wind and solar projects within their borders by 2021.[92] By passing zoning ordinances, Posey and Gibson Counties effectively terminated the proposed wind energy projects before any construction could begin.[93] As long as these ordinances remain in effect, it is likely that extremely few, if any, other projects will even be introduced.[94] Clearly, these ordinances have significant implications for Indiana's potential to transition to a more renewable energy grid.

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[87] Maureen Hayden, *Wind Farms Whipping Up Opposition Across Rural Indiana*, GOSHEN NEWS (June 9, 2016) https://www.goshennews.com/news/wind-farms-whipping-up-opposition-across-rural-indiana/article_65ed1618-1500-5c56-b4d1-053a483e9e79.html [https://perma.cc/DFX3-3QG5].

[88] *Id.*

[89] *Id.*

[90] S. TEGEN, D. KEYSER, F. FLORES-ESPINO & R. HAUSER, NAT'L RENEWABLE ENERGY LAB'Y & UNIV. CORP. FOR ATMOSPHERIC RSCH., ECONOMIC IMPACTS FROM INDIANA'S FIRST 1,000 MEGAWATTS OF WIND POWER 22 (2014).

[91] *See id.* (suggesting Indiana has ability to impact wind power supply chain because of Indiana's development of manufacturing facilities).

[92] *Posey County Commission Approves Wind Turbine Restriction*, TRISTATEHOMEPAGE.COM (Jan. 8, 2021, 12:42 PM CST), https://www.tristatehomepage.com/news/top-stories/posey-county-commission-approves-wind-turbine-restriction/ [https://perma.cc/8CN6-6Z47] (describing county commission's vote to restrict construction of wind turbines within ten miles of Doppler Radar site as "one more nail in the windmill coffin in Posey County"); Gibson & Bowman, *supra* note 8 (surveying motivations for and impacts of restrictions on wind turbines across thirty-four counties).

[93] *See* Webb, *supra* note 6 (noting no way for construction to start under zoning laws that prohibited turbines from being belt within two miles of "schools, hospitals, and other structures").

[94] *Id.*

B. *The State of Air Pollution in Indiana*

Air pollution in southwestern Indiana exists not only as a constant threat to the health of people residing there, but also as a reminder of the region's heavy reliance on fossil fuels.[95] Most of Indiana's energy production relies on coal and natural gas.[96] In 2020, Indiana consumed thirty-three million tons of coal (less than only two other states, Texas and Missouri), which included imported coal because the state's own coal production does not meet the energy demand within the state.[97] Around fifty-eight percent of Indiana's electricity comes from coal-fired power plants.[98] Additionally, Indiana consumes a significant amount of natural gas. With roughly twenty-nine percent of Indiana's electricity consumption in 2021 coming from natural gas-fired power plants, the state has become "one of the top 10 natural gas-consuming states."[99]

Even though the state has slowly shifted away from coal toward natural gas for its energy production in recent years (from ninety percent coal in 2010 to fifty-eight percent in 2021), Indiana's continued reliance on fossil fuels has contributed to its standing as eighth among states emitting the most carbon dioxide in 2018.[100] Aside from the obvious health concerns related to the burning of coal and natural gas in Indiana, other factors weigh heavily in favor of transitioning toward more renewable energy sources. The state has a significant interest in producing more renewable energy because "Indiana, on some days, is buying almost 80% of [its] electricity from out of state."[101] As of 2018, only seven wind farms, producing 1,800-megawatts of power, existed in Indiana.[102] These existing wind facilities contribute to only eight percent of the state's energy production, and even when wind energy is combined with all other renewable energy resources in Indiana, renewables make up only ten percent of the state's net energy production.[103] Additionally, a 2021 survey shows that "[n]early three-quarters of voters (74 percent) – including 63 percent of Republicans – favor expanding the use of renewable energy sources."[104] These

[95] *See id.* (lamenting loss of wind farm which could have decreased region's dependence on fossil fuels).

[96] Saenz, *supra* note 78.

[97] *Indiana State Profile and Energy Estimates*, U.S. ENERGY INFO. ADMIN. (Aug. 18, 2022), https://www.eia.gov/state/analysis.php?sid=IN [https://perma.cc/T6PK-9SN3].

[98] *Id.*

[99] *Id.*

[100] *Id.*; *see also* Sarah Bowman, *Scrub Hub: How Much of the U.S. Carbon Emissions Come From Indiana? (Hint: It's a Lot)*, INDYSTAR. (Sept. 7, 2021, 5:34 AM), https://www.indystar.com/story/news/environment/2021/09/07/indiana-carbon-emissions-ranking-among-highest-us/5683729001/ [https://perma.cc/J6BG-Y7LE] ("[T]he Hoosier state emitted nearly 190 million metric tons of energy-related carbon dioxide in 2018.").

[101] Saenz, *supra* note 78.

[102] Wilson, *supra* note 76.

[103] *Indiana State Profile and Energy Estimates*, *supra* note 97.

[104] *New Indiana Poll Reveals Strong Bipartisan Support for Renewable Energy*, AUDUBON

factors signal, as many activists and state legislators have suggested, that Indiana needs more renewables.[105] However, the continuing opposition to renewable energy projects from local governments remains a significant obstacle.

C. *Proposing House Bill 1381*

In 2020, the Indiana General Assembly attempted to overcome local obstacles in renewable energy siting. Representative Ed Soliday, a Republican state legislator in Indiana, authored House Bill 1381 in response to local pushback against renewable energy projects in various counties throughout the state.[106] Soliday stated that his reasons for proposing the bill stemmed from "decisions of some counties [that] are preventing the rest of the state from benefiting from renewables investment."[107] Although the bill on its face seemed to support positive changes to Indiana's energy governance structure, the unusual partnerships it formed between environmental groups and restrictive local governments, and the public responses during its debate, show that the bill was steeped in controversy.

"House Bill 1381 creates 'default' standards limiting where solar and wind systems can be installed and under what conditions."[108] The default standards in the bill include: "[s]etback requirements . . . [h]eight restrictions . . . [s]ignal interference . . . [and r]equired repairs to drainage related infrastructure" for wind power devices, with similar requirements for solar devices.[109] Additionally, the bill set out to "[a]mend[] the home rule statute" by requiring that local governments follow the procedures set forth in the bill and not adopt more restrictive regulations than the default standards.[110] The bill would have effectively taken the decision-making power away from local governments and stopped more restrictive regulations from appearing outside of the statehouse.[111]

(Jan. 28, 2022), https://www.audubon.org/news/new-indiana-poll-reveals-strong-bipartisan-support-renewable-energy-0# [https://perma.cc/2SZG-PES9].

[105] *See, e.g.*, Rebecca Thiele, *Youth Climate Activists – Once Again – Urge the Indiana Legislature To Study Climate Solutions*, WYFI INDIANAPOLIS (Feb. 1, 2023), https://www.wfyi.org/news/articles/youth-climate-activists-once-again-urge-the-indiana-legislature-to-study-climate-solutions [https://perma.cc/T9JU-2YA3] (highlighting collaboration between high school students and local lawmakers to promote bipartisan renewable energy policy).

[106] *See* Gibson & Bowman, *supra* note 8 (explaining bill "would create consistent statewide standards" for renewable projects, thereby overruling county-level restrictive ordinances).

[107] *Id.*

[108] Saenz, *supra* note 78.

[109] H.B. 1381, 121st Gen. Assemb., Reg. Sess. (Ind. 2021), https://iga.in.gov/legislative/2021/bills/house/1381/details [https://perma.cc/7SB8-2DBK] (last visited Aug. 25, 2023).

[110] *Id.*

[111] Saenz, *supra* note 78.

D. *Public Reaction to House Bill 1381*

Although the bill supported increasing the presence of renewable energy in Indiana, the controversy surrounding it made the proposed legislation much more complicated. To begin, Representative Soliday, the bill's author, made it clear that his motivations for proposing the state standards were not environmental.[112] Soliday reacted to pushback by emphasizing that his bill is "not the Green New Deal, and you won't see that coming from [him]," a remark that signals the complicated political nature of the debate on renewable siting in Indiana.[113] Attempting to balance his conservative views with the goals of his bill, Soliday also signaled that he supports local control, but only "when it impacts only your locality . . . when your local control impacts your neighbor, it becomes a state issue."[114] Other supporters of the bill push for state standardization and point to the "millions of dollars in potential income" that local governments are stifling as the need for more state control.[115] The business community supported House Bill 1381 because the bill would "bring significant investment to the state and help with Indiana's energy transition."[116]

Local governments and community organizations in many rural counties led the opposition against House Bill 1381.[117] Thirty-four counties have land use restrictions on wind and solar projects and strongly believe "planning and zoning authority should remain in the hands of local officials."[118] County leaders, who are mostly Republicans, were fighting Republican state legislators and business leaders, groups they typically support.[119] Approximately sixty Indiana counties "approved resolutions opposing the bill."[120] The main political debate has little to do with concerns about the environment and everything to do with concerns about state overreach. While the critical focus of the debate seemed to be centered around the fight over home rule and the power it grants to county governments, concerns about the bill included familiar NIMBY complaints often seen with zoning debates, exemplifying the impact of misinformation and confusion surrounding the benefits of distributed wind energy production.[121]

Given the complicated political debate that created unusual enemies among Indiana's local- and state-level Republican leaders, environmental groups were understandably hesitant to express their thoughts on House Bill 1381. Indiana's environmental groups, such as the Hoosier Environmental Council, supported

[112] *See* Gearino, *supra* note 70 ("[T]he pairing of wind industry and legislative leaders is still awkwards at times, while environmental groups watch in discomfort.").

[113] *Id.*

[114] Gibson & Bowman, *supra* note 8.

[115] *Id.*

[116] Bowman, *supra* note 10.

[117] *Id.*

[118] *Id.*

[119] Gearino, *supra* note 70.

[120] *Id.*

[121] Bowman, *supra* note 10.

increasing renewable energy production in the state but opposed measures that failed to consider environmental harms or that have disproportionate effects on marginalized communities.[122] Some of the groups' initial hesitancy arose from the view that local governments are best suited to respond to the specific needs of their communities.[123] Additionally, the "landowner veto" section of the bill, which would have given private property owners the ability to veto local standards protecting water and habitat quality under proposed solar farm projects on their land, was a serious point of concern for environmental groups.[124] Overall, Indiana environmental groups continued to avoid taking a strong stance on the bill until its final stages.

House Bill 1381 initially passed the House and moved to Senate committee assignment.[125] However, following several amendments that weakened its impact on local government control, House Bill 1381 died in the Senate after being withdrawn.[126] The fate of the bill stands as a continual reminder of the power Indiana's local governments hold over the state's energy decisions. Although the bill was rightfully criticized by environmental groups, the impact the bill could have had on renewable energy in Indiana was lost with its withdrawal. The remaining patchwork of county regulations and unsuccessful experiences of renewable energy companies in the wake of House Bill 1381's failure will continue to result in loss of investments into the state as it falls behind other states' improving renewable energy infrastructure.[127] In order to expand the presence of renewable energy facilities in the state, Indiana legislators and interested stakeholders must look to other states to find a new approach that strikes an appropriate balance between state and local control over siting decisions.

III. A BETTER BALANCE

Overcoming home rule obstacles in Indiana presents a complicated issue that must be addressed appropriately by the measures state legislators choose to adopt. House Bill 1381 sought to allow preemptive power to state standards over conflicting local ordinances, but it ultimately failed because of overwhelming public opposition.[128] Many scholars have expressed disapproval and hesitancy when discussing state preemption of local authority over energy siting disputes

[122] *HB 1381, the Renewable Energy Siting Bill, and HEC's Position*, HOOSIER ENV'T COUNCIL (Apr. 24, 2021), https://www.hecweb.org/bill-watch-2021/hb-1381-groundcover-and-pollinator-friendly-solar/ [https://perma.cc/J393-H3VZ].

[123] Gearino, *supra* note 70.

[124] *HB 1381, the Renewable Energy Siting Bill, and HEC's Position*, *supra* note 122.

[125] Gibson & Bowman, *supra* note 8.

[126] Bowman, *supra* note 10.

[127] *Id.*

[128] *Id.*

and other environmental issues.[129] These arguments focus on the reality that local governments are "ordinarily better situated to make local land use decisions than their state-level counterparts" but simultaneously highlight the near impossibility of convincing municipalities to pursue similar policies aimed at improving renewable energy production.[130] Allocating siting authority solely within the state government, however, does not present a viable solution for a state like Indiana, with geographical regions and communities that have vastly different interests and concerns spread throughout the state. The experiences of the Posey and Gibson County wind projects provide strong support for, at least, adopting a new system of wind siting authority among the state and local governments in Indiana. Local governments, claiming authority under Indiana's Home Rule Act, have made renewable energy siting a state issue by signaling that Indiana is "closed for business for renewables."[131] Indiana is falling behind other states, missing out on renewable energy investments, and further entrenching its reliance on fossil fuels and out-of-state energy providers. This Section includes a potential solution that consists of standardization, a new state regulatory body, and procedural safeguards to respond to the controversy surrounding House Bill 1381 and set Indiana on a path for increased renewable energy production.

A. *A Need for Reevaluation*

Uma Outka points out that "[t]o accelerate renewable energy development, new state level siting approaches may be necessary . . . and restructuring, where possible, the role of local governments in siting decisions."[132] Outka's argument stands as a call to action for innovation to meet the necessary energy grid revitalization called for by the IPCC, government leaders, and local organizers around the world.[133] Indiana can participate in this call to action by amending its home rule provision and adopting a new siting level regime. Amending home rule for renewable energy siting does not mean that home rule cannot exist in

[129] *See* Patricia E. Salkin, *Can You Hear Me Up There? Giving Voice to Local Communities Imperative for Achieving Sustainability*, 4 ENV'T & ENERGY L. & POL'Y J. 256, 258-59 (2009) ("For the United States of America to emerge as a leader among nations on sustainability, the federal government and the states must listen to the groundswell of whispers at the local level."); Sarah Fox, *Home Rule in an Era of Local Environmental Innovation*, 44 ECOLOGY L.Q. 575, 579 (2017) (discussing potential for local environmental policies and negative consequences of state override); Jerrold A. Long, *Sustainability Starts Locally: Untying the Hands of Local Governments To Create Sustainable Communities*, 10 WYO. L. REV. 1, 2 (2010) ("Sustainable communities must emerge from a *local* exercise in creating an imagined future and developing the means to achieve that future. In order to implement their visions of sustainable community effectively, individual communities—cities, towns and counties—must possess the land-use or other natural resource management authority to build the places they imagine.").

[130] Rule, *supra* note 5, at 1251.

[131] Gibson & Bowman, *supra* note 8.

[132] Outka, *Renewable Energy Siting*, *supra* note 56, at 864.

[133] *Id.* at 859, 864.

other respects. Home rule in Indiana already exists in statutory form, allowing for easier amending and enumerating of state and local authority. One author provides a compelling argument that local governments in Indiana are better suited to respond to the opioid crisis and should use the home rule to do so.[134] This argument is distinguishable, however, because of the local reactions to renewable energy projects that have already significantly hindered the state's ability to transition its energy grid.[135] By specifically altering the allocation of power for energy siting, state legislators can ensure that home rule remains effective for potential uses where the doctrine can provide the most benefits, while effectively removing the near-complete denial of renewable energy projects it has allowed from local governments in Indiana.

Clearly, based on the lack of success for proposed renewable energy projects in Indiana, the state should consider reevaluating its current balance of authority for renewable energy siting provided by its home rule statute. The proposal of House Bill 1381 signals that some Indiana state legislators are interested in shifting the power dynamics of decision-making in energy siting.[136] One of the main issues with House Bill 1381, however, stemmed from the bill's sponsors hope to leap from local government control under the traditional home rule approach to stricter state control.[137] The public reaction to House Bill 1381, and the bill's ultimate death in the Indiana Senate, suggested the approach taken by the legislators supporting the proposed bill would not achieve the appropriate balance of power needed to satisfy stakeholders, voters, and legislators while simultaneously increasing the number of renewable energy projects introduced in the state.

Reaching the appropriate balance for Indiana should involve taking into consideration the various factors and community responses that led to the proposal of House Bill 1381, as well as the public reaction to the bill itself. A new approach to siting authority should amend home rule, allowing the state government to make the final call for wind energy siting decisions in Indiana. Standardization among Indiana's counties would increase transparency for renewable project developers and allow the state to better manage and plan renewable energy infrastructure. At the same time, recognizing that local governments are better suited to raise and respond to local concerns should encourage the adoption of procedures and access to agency or judicial review for certain siting decisions.[138] Ensuring that local governments hold the ability to meaningfully participate in decisions, while avoiding local government vetoes over state decisions, is the key to obtaining enough support for a new siting

[134] Thompson, *supra* note 39, at 443.

[135] *See infra* Part II.B (explaining opposition to renewable energy projects due to safety, property, and health concerns).

[136] Gibson & Bowman, *supra* note 8 (describing Indiana Republican Representative Soliday's efforts to propose changes to Indiana's siting authority structure that garnered support from state Democrats and Republicans).

[137] Bowman, *supra* note 10.

[138] *See* Gearino, *supra* note 70.

regime in Indiana. State legislators should look to structures employed by other states, like New York, to craft a successful solution. Without a different approach, the structure of Indiana's siting decisions will remain the same, and based on the actions of many counties throughout the state, this stagnation would result in little-to-no development in the state's renewable energy infrastructure.

B. *A Potential for Progress in Indiana*

Based on the three different approaches that states have taken to allocate wind energy siting authority discussed above,[139] it seems that adopting a hybrid approach would allow Indiana legislators to simultaneously address concerns that arose during the debate on House Bill 1381 and make meaningful progress in increasing success for renewable energy projects in the state. Some of the main concerns raised by local government leaders and community organizations during the debate of the bill highlighted the importance of local input in siting decisions to many Indiana residents.[140] Conversely, those supporting the bill hoped to overcome prevalent local restrictions which stifle the possibility of increasing the presence of renewable energy.[141] House Bill 1381 failed because it attempted to shift the state's siting authority from predominantly local control to predominantly state control, sparking backlash that revealed the motivations of the various actors involved. The common problems associated with the state control approach were echoed by county governments and environmental groups. Both groups worried that Indiana's state government would not be able to make siting decisions that adequately and carefully considered the local interests at stake. However, remaining with the local control approach has its disadvantages. The progress of renewable energy in Indiana remains stalled, further entrenching its reliance on fossil fuels to power its energy production. The economic opportunities missed as well as the serious climate implications of Indiana's current energy profile should signal to state legislators and other stakeholders that a new allocation of siting authority is necessary.

By adopting a hybrid approach modeled after other states' methods, Indiana legislators can strike a balance that gives the state government enough authority to overcome the stagnation and make a space for local governments to voice valid concerns that help determine the outcome of each decision. Additionally, this approach allows for factors besides just economic importance to have significant roles in the decision-making stage. The following proposal operates as an ideal statutory regime that Indiana legislators could adopt to address these issues and guarantee that Indiana is ready and willing to welcome more renewable energy facilities within its borders.

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[139] *See infra* Part I.

[140] *See* Gearino, *supra* note 70 (stating opposition to bill was primarily about local control, even more than health or safety); Bowman, *supra* note 10 (finding no amount of amendments to House Bill 1381 was enough to alleviate concerns over local control).

[141] *See* Gibson & Bowman, *supra* note 8 (noting restrictions such as ordinances and moratoriums).

C. *A Model for Striking the Balance*

1. Setting Minimum Standards

The first step Indiana lawmakers should take is to set statewide standards for energy projects that (1) determine what approval process the project will be subject to, (2) establish design and operational requirements, and (3) provide for consideration of specific factors in each siting determination. As the controversy surrounding House Bill 1381 indicates, state standards for energy projects remain unpopular among those supporting local control for siting.[142] However, House Bill 1381 sought to impose specific requirements and overrule county ordinances altogether, allowing the state to make more decisions with little local input.[143] A better structured bill should seek to provide more authority to the state through standardization of processes. Under the hybrid control format, the state government should control the siting process for projects at a specified size or larger. Wind turbines in the United States produced on average 2.75 megawatts of power in 2020.[144] Some states with full state control of siting decisions, like Minnesota, allow projects below a certain size to opt into local government control while leaving all other projects above a certain size subject to state siting authority.[145] However, the threshold for local control in these states is low,[146] leaving little authority for local governments. A policy with such a low standard for size would almost certainly bring about the same critiques from local governments and others who opposed House Bill 1381 in Indiana.

The Indiana standards should allow for automatic state control of projects over a size such as fifty megawatts, allowing local governments to maintain more control over smaller, non-utility-scale projects. However, to respond to obstacles wind energy production has faced in Indiana from local government control, projects that fall under the automatic local control threshold should still have the opportunity to opt into state control if they meet specific requirements that the state deems appropriate for allowing state override of local authority.[147] This policy would be the inverse of the Minnesota regime mentioned above and would better serve the interests of those seeking to open Indiana to more

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[142] *See supra* Part II.D (discussing public reaction to House Bill 1381).

[143] Bowman, *supra* note 10.

[144] *Wind Turbines: The Bigger, the Better*, OFF. OF ENERGY EFFICIENCY & RENEWABLE ENERGY (Aug. 16, 2022), https://www.energy.gov/eere/articles/wind-turbines-bigger-better [https://perma.cc/DC6V-SXVV].

[145] Kahn & Shields, *supra* note 43.

[146] In Minnesota, the minimum size for wind projects to fall under state control is five megawatts, a capacity which could be reached by installing just two wind turbines in 2020. *Id.*; *see also Wind Turbines: The Bigger, the Better*, *supra* note 144 ("Higher capacity turbines mean that fewer turbines are needed to generate the same amount of energy across a wind plant . . . .).

[147] *See* Gibson & Bowman, *supra* note 8 (presenting various state-local power disputes faced by Indiana legislature).

renewable energy production.[148] The ability to opt in to state control enhances state decision making over wind energy siting decisions and minimizes local obstacles. Additionally, standardization of design and operational requirements would impose responsibilities on project developers rather than local governments. These standards could also help combat misinformation campaigns in Indiana by providing clear explanations of how wind energy facilities should operate throughout the state.

2. Creating a State Regulatory Body

Indiana should create a state regulatory body tasked with setting the standards described above, as well as other important responsibilities to ensure that the state pursues renewable energy development and appropriately responds to local concerns. For the purposes of this proposal, the state regulatory body will be referred to as the Indiana Renewable Siting Authority ("IRSA"). IRSA should establish the minimum operational standards for wind projects proposed in the state. IRSA should also work with local governments to determine areas of the state that would offer the best potential for productive and efficient renewable energy production. Working with experts and allowing public participation in these decisions, IRSA can better bridge the gap between state siting control and local opposition. By working with local governments, IRSA could respond to concerns raised during the debate over House Bill 1381 about the state's ability to adequately respond to localized externalities.[149]

Selecting members for the new regulatory body is a crucial component to avoid regulatory capture from industry or people who oppose pursuing renewables. An effective IRSA should consist of members who have experience with statewide energy planning, specifically seeking people who have served on or worked with the Indiana Utility Regulatory Commission, a state agency that reviews utility decisions and disputes and provides information to state legislators about Indiana's energy regulatory process.[150] IRSA should also contain members from the renewable industry to ensure that any standards being set are cost effective and possible for developers to comply with. Additionally, local government officials should have the ability to serve as IRSA members in order to connect with communities and make local government outreach more meaningful.

3. Reviewing Local Decisions

Some states employing the hybrid control regime allow for state review of local government decisions.[151] Although the state government should have more

[148] *See* Kahn & Shields, *supra* note 43 (describing Minnesota's program as one where state authority kicks in at just five megawatts).

[149] *See infra* Part II (discussing life and death of House Bill 1381).

[150] *About the IURC*, IND. UTIL. REGUL. COMM'N, https://www.in.gov/iurc/about-us/about-the-iurc/ [https://perma.cc/W599-6PZN] (last visited Aug. 25, 2023).

[151] Kahn & Shields, *supra* note 43.

authority in siting decisions for utility-scale wind projects, the ideal approach for Indiana should continue to include some local control for certain projects based on the minimum standards set by IRSA. However, as the experience of proposed wind farms in Indiana illustrates, local government control often blocks the success of renewable energy projects and thus the ability for the state to achieve renewable energy goals.[152] For those reasons, a review process should be established by which projects that have been denied by the local government have the ability to appeal the decisions to ISRA in order to review the initial determination.

Although local governments in Indiana would retain more control in siting decisions than the supporters of House Bill 1381 would have liked, local governments would not have unbridled authority to make determinations arbitrarily. The review process for local government decisions would require a reasoned explanation for the ultimate decision reached. Indiana legislators should set standards by which ISRA would review local government decisions, creating a system that gives adequate weight to valid local concerns while simultaneously allowing for the pursuit of statewide renewable energy goals. In instances where renewable energy projects have been denied and the decisions appealed, local governments should be required to complete an analysis that shows the costs of the proposed project would outweigh the benefits the project would bring to the region and the state. This analysis should be something akin to a cost-benefit analysis, while sharing some similarities with an environmental impact statement, as required under the National Environmental Policy Act for certain federal projects.[153] These requirements would allow industry leaders and those seeking to improve Indiana's renewable energy production the ability to challenge certain decisions made by local governments that do not adequately consider the benefits or drawbacks of each proposed project.

Additionally, to satisfy the critiques about House Bill 1381 and concerns that local grievances might be ignored, some state-level siting decisions should be reviewable by a body made up of local government leaders from throughout the state.[154] This type of review should be extremely limited and should only be allowed when a challenge arises over a project which (1) is below the automatic state control threshold, (2) has opted into state control, and (3) is wholly located within one local government's jurisdiction. Allowing local governments to review these decisions in limited instances can provide communities a chance to challenge state decisions that will affect only a small region of the state. Other projects that are larger in scale or that would impact more than one local jurisdiction should not be eligible for this type of review.

By establishing minimum standards, a new regulatory body, and a process for review of local government decisions, this approach provides opportunity to

[152] *See supra* Part II.A (describing local resistance in Indiana to wind turbines).

[153] *See* 42 U.S.C. § 4321 (1970).

[154] *See* Bowman, *supra* note 10 ("Local citizens should be able to influence zoning decisions through elected officials and appointed boards that live in the community.").

expand renewable energy production in Indiana while also allowing input from people most affected by siting decisions.[155] A hybrid approach to siting reform is the best approach for a state like Indiana where the local concerns and the state priorities frequently come into conflict.

CONCLUSION

The debate surrounding energy siting authority persists, and the fate of renewable energy in Indiana remains unknown in the wake of House Bill 1381's failure in the General Assembly. Indiana finds itself at a crossroads, true to the state's motto—Indiana can either alter the balance of power among the state legislature and local governments to ensure greater investments in more renewable energy production, or it can preserve the present local government control that will inevitably lead to missed opportunities and loss in crucial investments as many forces pressure states to invest in renewables. Even though the first attempt to alter this power structure failed, state legislators and other stakeholders should learn from House Bill 1381's public debate. Clearly, local governments are not going to give away powers granted to them under Indiana's home rule statute quietly. However, by adopting approaches from other states that have developed hybrid methods to incorporate local and state control in energy siting decisions, new possibilities for renewables in Indiana may arise. By balancing the need for listening to local concerns with the desire to invest in more renewable energy facilities, Indiana legislators can pursue creative solutions that adapt with changing energy needs and prevent Indiana from falling behind other states. As the most recent IPCC report indicates, the need for dramatic shifts to renewable energy infrastructure has never been more dire.[156] If Indiana decides to follow the path toward enhancing renewable energy production within its borders, it can work toward achieving its potential as a key player in building a resilient energy grid for future generations.

[155] *See, e.g.*, Rule, *supra* note 5, at 1251 n.141 (discussing importance of local input in renewable energy decisions).

[156] PÖRTNER & ROBERTS, *supra* note 1, at 126.