

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Ohio Power Siting                     )  
Board's Review of Rule 4906-4-08 of the                 ) Case No. 16-1109-GE-BRO  
Ohio Administrative Code.                                     )

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**REPLY COMMENTS OF  
GREENWICH NEIGHBORS UNITED**

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**NOVEMBER 8, 2016**

**ATTORNEYS FOR GREENWICH NEIGHBORS UNITED**

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In an Entry dated September 22, 2016, the Ohio Power Siting Board ("OPSB") requested interested parties to submit comments on the Staff's proposed changes to Rule 4906-4-08, Ohio Administrative Code ("O.A.C."). That Entry also called for reply comments to be filed on November 8, 2016. In accordance with the OPSB schedule, Greenwich Neighbors United ("GNU") filed Initial Comments on October 24, 2016. GNU offers the following Reply Comments for the OPSB's consideration.<sup>1</sup>

**I.     ABOUT THE COMMENTERS**

GNU is a nonprofit corporation formed for the purpose of promoting the safety and well-being of the community in and around Greenwich, Ohio. Among other things, it works to proactively address issues relating to the siting of industrial wind turbines. In addition to GNU's participation in this case, GNU or its members have actively participated in OPSB Case Nos. 12-1981-GE-BRO, 13-990-EL-BGN and 15-1921-EL-BGA.

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<sup>1</sup> GNU's Reply Comments should not be interpreted or applied to suggest that GNU is no longer interested in OPSB addressing issues that GNU has previously raised. Also, any failure by GNU to contest a position advanced by another party should not be construed as though GNU agrees with the position advanced by the other party unless GNU has specifically expressed support. For example, GNU has previously expressed support for the positions advanced by Union Neighbors United ("UNU").

Previously and in Case No. 12-1981-GE-BRO, GNU filed comments on January 16, 2015. In GNU's January 16, 2015 comments, it supported the views and recommendations offered by UNU in comments filed the same day.<sup>2</sup> Then, and in more detail, GNU addressed the failure of the proposed rules to: (1) comply with R.C. 4906.20(B)(2)(c) with regard to the population of adjoining property owners who must execute a valid waiver from the minimum setback requirements before any waiver can operate for the benefit of a wind farm developer; (2) establish, by rule, the procedure which must be followed before such a waiver may be lawfully obtained and used by a wind farm developer to evade the minimum setbacks; and, (3) recognize the unavailability of such a waiver in any case where the OPSB determines, in any case, that the minimum setback is not a reasonable setback. More broadly speaking, GNU, like UNU, also observed that the OPSB's proposed rules in Case No. 12-1981-GE-BRO comprehensively failed to meet the letter and spirit of the rulemaking requirements set forth in R.C. 4906.20.

As previously explained, the OPSB failed to address the substance of the issues, comments and recommendations of UNU<sup>3</sup> and GNU after they were submitted in Case No. 12-1981-GE-BRO. And, unfortunately, nothing that has happened in this proceeding indicates that the OPSB intends to address the substance of those issues, comments or recommendations.

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<sup>2</sup> In its comments, GNU stated: "The OPSB has not adopted rules that contain reasonable regulations for each subject area identified in Section 4906.20(B)(2), Revised Code. Section 4906.20(A), Revised Code, states that a certificate may only be issued pursuant to Section 4906.20, Revised Code. The OPSB's failure to adopt the rules required by Section 4906.20(B)(2), Revised Code, means that the certificates which have been issued by the OPSB have not been issued pursuant to Section 4906.20, Revised Code." *In the Matter of the Ohio Power Siting Board's Review of Chapters 4906-1, 4906-5, 4906-7, 4906-9, 4906-11, 4906-13, 4906-15, and 4906-17 of the Ohio Administrative Code*, OPSB Case No. 12-1981-GE-BRO, GNU's Initial Comments at 2, fn. 1 (January 16, 2015).

<sup>3</sup> On February 13, 2015, UNU also filed reply comments in Case No. 12-1981-GE-BRO.

## **II. THE CONTEXT FOR THIS RULEMAKING**

Ohio law makes the OPSB responsible for the development and implementation of reasonable land use controls for wind farms greater than 5 megawatts. It is obligated to administer this statewide scheme. The OPSB is legally obligated to advance this mission by promulgating reasonable regulations. Projects of 5 megawatts or less are subject to local land use regulations.

All land use control systems (statewide or local) must operate within our legal system that sits on a foundation of private property rights which are vested in citizens. These rights are exercisable by individuals who hold and are permitted to use such rights within a zone that has the highest level of state and federal Constitutional protections.

The Ohio General Assembly has established a framework for the statewide system of land use control and, in some cases, looked to the OPSB to add important details through the promulgation of reasonable regulations (rules). As between the OPSB and the Ohio General Assembly, it is the Ohio General Assembly, not the OPSB, that establishes policy. The OPSB is, as the court decisions say, a creature of statute and it must faithfully read and apply the law.

For many years, the OPSB has ignored the directions of the Ohio General Assembly by persistently refusing to promulgate the reasonable regulations called for by R.C. 4906.20 and 4906.201. It has responded to applications for approval of certificates and applications to amend certificates as though the OPSB could rewrite Ohio law to permit the OPSB to act based on its own preferences rather than in accordance with the directives of the Ohio General Assembly. And, based on the rules circulated for

comment in this proceeding, the stage has been set for the OPSB to repeat these errors.

Some of the comments that have been submitted in this proceeding urge the OPSB to discharge its rulemaking duty by promulgating rules that “... encourage and support the growth of wind energy in Ohio,”<sup>4</sup> “... encourage the development of clean, renewable wind energy in an effort to transition away from fossil-fuels,”<sup>5</sup> and recognize that it is “... essential that the regulatory agencies and stakeholders partner with the wind industry to expand the use of clean renewable energy....”<sup>6</sup> In one case, comments remarkably suggest that the OPSB is discriminating against wind farms by proposing rules that apply to wind farms.<sup>7</sup>

These comments imply a context for this rulemaking that is, at best, misleading. They invite the OPSB to again ignore the proper role of the OPSB, the basic purpose of a system of land use controls, the protections that must be accorded private property rights and the Ohio General Assembly’s directives to which the OPSB must faithfully adhere.

### **III. SOME SURPRISING STAKEHOLDER AGREEMENT**

At page 6, the OEC Comments state:

Ohio law and rule should be the product of thoughtful engagement of all stakeholders, and decision-making should be rooted in well-accepted data and analysis.

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<sup>4</sup> Initial Comments of the Mid-Atlantic Renewable Energy Coalition (“MAREC Comments”) at 1.

<sup>5</sup> Ohio Environmental Council’s untitled filing (“OEC Comments”) at 1.

<sup>6</sup> Initial Comments of Icebreaker Windpower, Inc. (“IWI Comments”) at 1.

<sup>7</sup> IWI Comments at 4. Of course, the Ohio General Assembly has directed the OPSB to adopt and apply rules specifically addressing wind farms. Assuming that the OPSB is obligated to comply with the Ohio General Assembly’s directives, IWI’s discrimination allegation cannot pass the laugh test.

GNU agrees with the above-quoted statement. In its Initial Comments, GNU explained why the OPSB is currently on a course that dismisses the role of thoughtful engagement of all stakeholders, good data, good analysis and reasoned decision-making.<sup>8</sup>

In the Comments of 6011 Greenwich Windpark, LLC (“6011 Comments”), 6011 Greenwich Windpark, LLC (“Greenwich”) asserts that the proposed rules introduce vague and subjective terms or provisions. It also claims that the OPSB Staff has provided no explanation for some of the proposed changes to the current rules (many of which violate current law). The potential for these problems grew in this proceeding as the OPSB actively elected to not use a stakeholder process to engage in meaningful discussions of issues which the OPSB previously held would be addressed in this proceeding. Instead, the OPSB ran away from the stakeholder process it said it would undertake in Case No. 12-1981-GE-BRO.

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<sup>8</sup> The OPSB’s Business Impact Analysis (“BIA”) is, at best, misleading. For example, and in response to a request that the OPSB list the stakeholders included by the OPSB in the development or initial review of the draft regulation, the OPSB claims that the Board conducted a workshop on June 9, 2016 to receive feedback and that the OPSB “... enjoyed significant stakeholder participation at the workshop.” Entry, Attachment C (BIA) at 2-3 (September 22, 2016) (hereinafter referred to as “BIA”). As noted previously, the June 9, 2016 meeting took place without any guidance on the purpose of the meeting and since the “draft regulation” did not show up until September 22, 2016, it was not possible for anybody who participated in the June 9, 2016 meeting to provide feedback on any “draft regulation.” For example, and in response to a question regarding the scientific data used to develop the rule or the measurable outcomes of the rule and how the scientific data support the regulation being proposed, the OPSB tellingly asserts that “[n]o specific scientific data was cited in the development of these rules.” BIA at 3. Because the OPSB is obligated, by R.C. 4906.20(B)(2) to prescribe reasonable regulations regarding such things as erosion control, wildlife protection, interconnection, ice throw, sound and noise levels, blade sheer, shadow flicker, and decommissioning, GNU asserts that the OPSB’s clear admission that it has relied on no scientific data is an acknowledgement, by the OPSB, that its draft regulations ignore a primary and critical input (scientific data) which must be considered to prescribe reasonable regulations. For example, in response to a request that the OPSB identify the impacted business community, the OPSB claims that “... the only businesses impacted by the rules would be entities seeking to build electric generation facilities and wind farms.” BIA at 4. GNU’s members include family farmers engaged in the business of farming and land owners who host and operate recreational businesses. The property rights of these businesses and the opportunity for these businesses to enjoy their property rights without wind farm trespassing are affected by the draft rules; these businesses are part of the business community impacted by the draft rules.

GNU and Greenwich likely differ about the specific locations of vague and subjective language or the lack of explanations. But, wind farm developers like Greenwich, the OPSB, participating land owners, non-participating land owners and the public interest are all poorly served by proposed rules that do not provide lawful and reliable guidance which can be readily applied in the real world.

The proposed rules continue the OPSB's failed and illegal, certificate-applicant-controlled, case-by-case approach. This OPSB approach cannot and does not guide conduct, identify risks, identify opportunities and, more generally, allow stakeholders to make good decisions that respect and advance the public interest.

Rather, the proposed rules seem designed to serve the administrative convenience of the OPSB and equip the OPSB with unlimited discretion to make stuff up, on a case-by-case basis while keeping everyone guessing until the case-by-case litigation dust settles. The OPSB's approach feeds litigation, fear and a lack of confidence in the State agency charged with the duty to proactively serve the public interest. Arbitrarily grabbing the content of some conditions that the OPSB adopted in prior certification cases, as the OPSB Staff is doing in the proposed rules, cannot, as a matter of law, satisfy the OPSB's obligation to add required and important details to Ohio's statewide scheme through the promulgation of reasonable regulations.

#### **IV. SETBACK WAIVERS**

This subject was addressed extensively in GNU's Initial Comments. The setback waiver subject was also addressed in MAREC's Comments.

MAREC's Comments at page 7 state:

It is clear that this rule, as amended, merely lays out the process to obtain a waiver, but does not vary from the prior interpretation in terms of from whom a waiver is required.

MAREC's Comments then propose modifications to the Staff's proposed rule that are MAREC wrongly interprets as yielding a good fit between the controlling statutory language and the rule. MAREC embarks on its campaign based, it seems, on the view that the OPSB has some license to interpret the controlling statutory language. However, the OPSB has previously and explicitly rejected the claim that the controlling statute provides the OPSB with interpretation rights.

In Case No. 08-1024-EL-ORD,<sup>9</sup> the OPSB had occasion to address an argument advanced by Buckeye Wind, LLC ("Buckeye"). In the *2008 Rulemaking*, the OPSB adopted a rule that said that:

Minimum setbacks may be waived in the event that all owners of property adjacent to the turbine agree to such waiver ...<sup>10</sup>

During the rehearing process associated with the *2008 Rulemaking*, Buckeye claimed that the above quoted language was unreasonable and unlawful because it could be interpreted as requiring consent of every owner of property. Buckeye urged the OPSB to change the adopted rule and suggested language based on Buckeye's interpretation of the controlling statute (much as MAREC has done here). The OPSB rejected Buckeye's position (for reasons advanced by UNU) stating as follows:

The Board finds that Section 4906.20(B)(2), Revised Code, is clear and unambiguous as to who must agree to the waiver of the minimum setback.

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<sup>9</sup> *In the Matter of the Power Siting Board's Adoption of Chapter 4906-17 of the Ohio Administrative Code and the Amendment of Certain Rules in Chapters 4906-1, 4906-5 and Rule 4906-7-17 of the Ohio Administrative Code to Implement Certification Requirements for Electric Generating Wind Facilities*, Case No. 08-1024-EL-ORD ("2008 Rulemaking").

<sup>10</sup> *2008 Rulemaking*, Opinion and Order, Rule 4906-17-08(C)(1)c)(iii), O.A.C. (October 28, 2008).

To that end we agree with UNU that it is a well-settled principle of statutory construction that, where the statute is clear and unambiguous, statutory interpretation is not necessary and the statute must be applied giving effect to the words used. *In re Collier*, 85 Ohio App.3d 232, 236-237 (1993). Further, ***where the statute is clear and unambiguous, the agency must give effect to the words in the statute without deleting words used or inserting words not used in the statute.*** *Id.* Accordingly, the Board finds it unnecessary and inappropriate to revise Rule 4906-17-08(C)(l)(c)(iii), O.A.C, as proposed by Buckeye.<sup>11</sup>

In any event, the Staff's proposed change to Rule 4906-04-08(C)(2)(d), O.A.C., deletes language that is contained in the controlling statute and inserts words not used in the statute. Then, in proposed Rule 4906-04-08(C)(3), O.A.C., language is added to simply indicate that "... owner(s) of adjacent property to any wind farm property may waive the minimum setback requirements ...." The new language also addresses the form and content of the waiver. Neither the existing language in the OPSB's rules nor the new language in the draft rules establishes the procedure which must be followed by a wind farm developer to obtain a lawful waiver.

As the OPSB knows, the controlling statutory language states that the minimum setbacks may not be evaded unless "all owners of property adjacent to the wind farm property waive application of the setback to that property pursuant to a procedure the board shall establish by rule and except in which, in a particular case, the board determines that a setback greater than the minimum is necessary."<sup>12</sup> The OPSB has no authority to rewrite or ignore the controlling statutory language and it has no ability to establish a rule that does so. The OPSB's prior holdings confirm that the controlling statutory language is clear and leaves no room for interpretational monkey business.

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<sup>11</sup> 2008 Rulemaking, Entry on Rehearing at 5-6 (emphasis added) (January 26, 2009).

<sup>12</sup> R.C. 4906.20(B)(2)(c).

Accordingly, GNU urges the OPSB to adopt the controlling language in R.C. 4906.20(B)(2)(c) for purposes of identifying the population of adjacent property owners that must agree to a setback waiver before the waiver can permit a wind farm developer to evade the minimum setback requirements. The word “all” cannot be written out of the law by the OPSB’s application of an existing rule or through the establishment of a new rule. The OPSB’s rules must respect the Ohio General Assembly’s command that no waiver of the minimum setback requirements will be effective unless and until all owners of property adjacent to the wind farm property waive application of the minimum setback requirements.

As previously discussed in GNU’s Initial Comments, there are a number of important and waiver-related issues that were not addressed in the proposed rules and they are also not addressed in most of the comments. For example, the proposed rules do not attempt to identify the wind farm property to which owners must be adjoining for purposes of defining the population of owners, all of whom must agree to waive application of the minimum setback requirements.

It is GNU’s position that this “wind farm property” identification should be required by the rules and all certificate applicants should be required to include this identification in the proposed application notice and the application submitted by a wind farm developer.<sup>13</sup> This identification must be accompanied by easily readable maps showing parcel boundaries and parcel numbers. And the identification of the adjoining property should be based on the developer’s proposed project area, not isolated segments or

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<sup>13</sup> Beginning at page 10, the Initial Comments of Union Neighbors United, Julia F. Johnson, and Robert and Diane McConnell (“UNU Comments”) contain recommendations in favor of important and public disclosures taking place in the certificate application and other documents which are part of the public record.

islands strategically selected to deprive all the property owners of the protection which the Ohio General Assembly has established for their individual and collective benefit. Of course, the wind farm developer's identification should be open to dispute by parties to the proceeding and this identification should be independently evaluated and reported on by the OPSB's Staff.

Once the applicant has identified the adjoining property owners who must agree to waive the minimum setback requirements, the rules should require the applicant to submit all the executed waivers (having the required content, showing the required signatures and showing proper recording) with the application. The OPSB's practice of issuing certificates to wind farm projects that will violate the minimum setback requirements subject to a certificate condition that requires the wind farm developer to subsequently secure all the necessary waivers is an OPSB practice that leaves important questions unresolved and important OPSB duties unfulfilled. If an applicant cannot demonstrate, in the application, that it has obtained proper waivers that must be executed by all owners of property adjacent to the wind farm property, then the application must be rejected.

With regard to the content of the waiver, GNU urges the OPSB to adopt rules that state that any properly executed waiver shall be binding only with regard to the project proposed by the developer which is specifically identified or referenced in the waiver document.

Additionally, the rules should specify that any proposed amendment to a certificate that, if approved, would increase the invasion of the minimum setback area shall be deemed a new application rather than an amendment of an issued certificate

(meaning that no such amendment can be approved without a hearing). It is GNU's position that the OPSB is obligated to respect the rights of adjoining property owners and to make sure those rights don't get pushed through the cracks as a result of a proposed certificate amendment or modification.

The new language in draft Rule 4906-04-08(C)(3)(b), O.A.C., calls for the waiver content to include consent to commencement of construction activities that invade the minimum setbacks. However, certificates are issued for construction and operating purposes. Accordingly, GNU urges the OPSB to adopt rules that require that the waiver disclose, in detail, the extent to which the operation of the proposed wind farm may affect the adjacent property and include consent to the operating consequences without compliance with the minimum setbacks. Ice throw, sound, blade sheer and other risks attendant to wind farms are associated with the operation of the wind farm (not at the construction phase). In any event, dealing only with the minimum setback requirements violation at the construction phase of a wind farm is a misleading indication of the actual risks. The actual risks (construction and operation) should be fully and proactively disclosed to all adjoining property owners before they might be asked to allow a wind farm developer to evade the minimum setback requirements.

The content of any valid waiver should also include a notice to all owners of adjacent property, in large and bold font, that states: (1) the person seeking the waiver represents the interests of the wind farm developer and not the interests of the property owner; (2) the waiver will relieve the wind farm from compliance with the setback requirements that the Ohio General Assembly has established as the minimum necessary to protect the rights of adjoining property owners; (3) a wind farm cannot

evade the minimum setback requirements without the written, voluntary consent of all adjoining property owners; (4) the waiver is for the benefit of the wind farm developer; (5) an adjoining property owner should not sign the waiver without seeking and receiving independent advice from an attorney hired to represent the property owner; and, (6) if executed, the waiver will be recorded with the county recorder and filed with the OPSB thereby making it a written document available to the public at large.

## **V. CONCLUSION**

For the foregoing reasons and those previously expressed, GNU urges the OPSB to consider and address the issues raised by and recommendations contained in the Comments filed by UNU and GNU and incorporate the results of such considerations in the final rules as promulgated by the OPSB. GNU urges the OPSB to also consider favorably the Reply to Initial Comments of The Mid-Atlantic Energy Renewable Coalition and the supporting documentation submitted by Senator William J. Seitz as well as the comments submitted by Mr. Biglin and Ms. Elsasser.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *Reply Comments of Greenwich Neighbors United* has been served upon the following parties of record this 8<sup>th</sup> day of November 2016 *via* electronic service, hand-delivery or U.S. mail, postage prepaid.

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