



Ohio Environmental Council

To: Ohio Power Siting Board
From: Miranda Leppla, Clean Energy Attorney, Ohio Environmental Council
Date: November 8, 2016
Subject: Reply Comments of the Ohio Environmental Council on Review of Rule OAC 4906-04-08 and Proposed OAC 4906-4-09, Case No. 16-1109-GE-BRO

On behalf of Ohio Environmental Council (“OEC”) and its over 100 environmental and conservation member organizations, and thousands of individual members around Ohio, OEC submits these reply comments on the Ohio Power Siting Board’s review of Rule 4906-4-08 and newly proposed Rule 4906-4-09, related to electric generation facilities in Ohio.

I. Introduction

Wind energy is essential to move Ohio forward on the path to cleaner air and to reduce our carbon footprint in order to combat climate change. To achieve those goals, Ohio needs thoughtful policies that protect our citizens, wildlife, and habitat, while implementing reasonable requirements that invite development of these clean energy technologies.

Generally, OEC is supportive of the comments filed by Senator Skindell, Icebreaker Windpower, Inc., Mid-Atlantic Renewable Energy Coalition, and Greenwich Windpark, LLC, unless otherwise noted herein. However, several organizations have filed initial comments containing rule recommendations that do nothing but further complicate the regulatory requirements for wind farm siting, and are merely more red tape dissuading companies from developing Ohio’s wind energy potential. Union Neighbors United (“UNU”), Greenwich Neighbors United (“GNU”), Senator Bill Seitz, and Mr. Gary Biglin submitted comments regarding setbacks, noise, and shadow flicker that have no grounding in science or data, and cite concern over individuals’ private property rights as the cause and justification for unreasonable setback distances from property lines. These cited concerns over property rights are disingenuous, as their comments amount to placing higher value on non-participating property owners’ rights than on the rights of participating property owners.

II. Discussion

1. Setbacks (4906-4-08(C)(2)-(3))

As OEC indicated in its initial comments, setbacks should be measured from sensitive receptors (houses), rather than property lines. Greenwich Neighbors United (GNU) and Union Neighbors United (UNU) both propose additional suggestions related to waivers from minimum setback requirements that would make wind development difficult or impossible in Ohio. Generally speaking, the changes suggested by GNU and UNU do not have any positive impact on safety, health or the environment, and, if implemented, would create more red tape to an already onerous siting process for wind developers in Ohio.

GNU's recommendation complicates the rules by arguing that there should be maps showing parcel boundaries and numbers in order to identify adjoining property. (See GNU Initial Comments at 7-8.) Requiring additional maps is unnecessary, and wind developers already provide a significant amount of information from which identifying property is readily available. Further, it is unnecessary because OPSB will not approve any certificate that does not either (1) comply with minimum setback requirements, or (2) have waivers signed by all adjacent property owners prior to construction. GNU is trying to further complicate an already comprehensive process.

GNU next requests that all waivers of the minimum setback requirements be executed and filed with the application. (See GNU Initial Comments at 8-9.) Currently, a certificate may be approved subject to a condition that the developer obtain all necessary executed waivers to minimum setbacks prior to proceeding with the project. There is no reason to alter this rule. Negotiating waivers takes time, which may take longer than the period in which the developer gets a certificate. Further, no project is permitted to move forward without all necessary waivers, so GNU again is proposing something which only serves as a roadblock to an already thorough process.

It is unclear what GNU's request is in its discussion of situations in which setbacks more than the minimum are "necessary". (See GNU Initial Comments at 11-12.) The minimum setback distances, which are already overly restrictive, not based on scientific or health data, and were enacted (Am. Sub. House Bill 483 - 130th General Assembly) without any discussion, public input, or expert testimony on the topic prior to passage, are more than needed to ensure the safety and security of the public, and actually harm development of clean energy technologies in Ohio because of our overly restrictive setbacks. No additional rules are necessary to fill any alleged "gaps".

For proposed rules 4906-4-08(C)(1)(b)(i)-(ii), UNU recommends (at page 6 of their initial comments) changing "the structure or the property line" to "the structure and the property line". UNU's interpretation is incorrect. Retaining the "or" language would still require maps to show the distance between structures and property lines

from the equipment or nearest wind turbine (subsection (i)) or the associated facility (subsection ii)). Changing this to “and” would make the rule read as though developers were required to map the distance between the structure and property lines, instead of from the structure or property line and the generation equipment, nearest wind turbine, or associated facility, as the case may be.

All of the suggestions made by GNU and UNU as discussed in this section should be rejected. Senator Seitz’s critique of OEC’s and MAREC’s comments are indicative of an extreme, and acrimonious view of wind energy. It is “beyond ironic” that the Senator has unwavering support for increased setbacks for the wind industry, yet appears to have no qualms with the minimum setback for other energy infrastructure that has proven risks, documented incidences of health impacts, and injury and fatalities to individuals living and working in nearby occupied structures, such as oil and gas well heads, natural gas pipelines, compressor stations, etc. Senator Seitz’s “compendium” of wind setback requirements is “somewhat outdated” by his own admission. This list also cites extreme, out of the mainstream websites as a source for the data, and much of the information he points to comes from locations outside the United States, which makes for an inartful comparison to other nations’ and states’ energy policies that may have little to do with Ohio’s regulatory approach on wind energy development.

Moreover, Ohio’s overly restrictive setback distances *have* effectively zoned wind farms out of the state. It is no surprise that previously certificated projects have yet to move forward when Ohio law makes applications go through a lengthy and expensive process to make even a small adjustment to the location of a turbine or otherwise. If a business is deciding whether to make a multi-billion dollar investment in a state (even *after* the siting process), it should come as no surprise that it does not want to move forward where it sees no opportunity for future investment and a hostile climate toward its business. Ohio’s unnecessarily restrictive setback laws have caused the state to lose investments, jobs, and tax revenue, and we will continue to lose these and have dirtier air because of the negative business climate toward wind energy here in Ohio.

2. Noise (4906-4-09(F))

Like setbacks, OEC believes sound measurements should be taken from homes (receptors), and concurs with Greenwich Windpark, LLC’s comment that noise standards are more appropriately applied at the receptor, not the property line. (See OEC Initial Comments at 4-5.) OEC also concurs with Mid-Atlantic Renewable Energy Coalition’s (MAREC) comments on noise. The industry standard is vetted, and OPSB should use scientific data to ensure the standards applied are reasonable and appropriate, protecting the public health and safety and our environment.

The noise standards suggested by UNU are not based on concerns over health and safety, but instead seek to implement measurement techniques that do nothing

but make siting turbines extremely costly and even more restrictive. UNU provided no information that there was a health or safety reason to use the L90 level of background sound instead of Leq, which is the typical metric used in measuring sound from wind farms. Further, UNU provided no evidence that low frequency noise is a health hazard that needs to be addressed by rule.

Similarly, UNU suggests that OPSB use ambient Leq at the location of each neighbor's property only, instead of the lower of the ambient Leq at the location of each neighbor's property OR the project area ambient nighttime Leq, whichever is greater. Restricting this to only the ambient level at the adjacent property location is yet another way UNU is seeking requirements that further obstruct wind energy development. While UNU is correct that ambient sound levels can vary throughout an area, this standard uses the project area *nighttime* Leq, which would be lower than that measured for the area during the daytime. There is no evidence from UNU that this would cause certain areas to suffer from "intolerable noise conditions," and it should not be changed.

3. Shadow Flicker (4906-4-09(H))

As with sound measurements, OEC again notes that OPSB should use scientific data to ensure that the shadow flicker standards applied are reasonable and appropriate, protecting public health and our environment, and balanced with reasonable regulations. Shadow flicker analyses are most appropriately measured at habitable residences, rather than arbitrarily at the property line, and OEC concurs with MAREC's initial comments on the matter. UNU has requested that the Board adopt additional requirements regarding shadow flicker analyses, however. (See UNU Initial Comments at 2-5.)

First, UNU requests that shadow flicker standards be applied to *all areas* of nonparticipating properties, rather than measuring from habitable residences. (See UNU Initial Comments at 3; 7-10.) There is no precedent for such a standard. Requiring all non-participating properties to be analyzed for shadow flicker, without any limitation on distance or any reasoning as to why a particular property should be analyzed will significantly increase costs and will add marginal, if any, value to ensuring health, safety, and environmental protections.

UNU, as well as Senator Seitz, fail to recognize the rights of property owners who wish to lease property for the purpose of wind energy development, while paradoxically claiming their comments are intended to "protect" non-participating property owners from wind farms. With appropriate safeguards in place, Ohioans should have the ability to lease their land for wind development. The current setbacks, and the proposed noise and shadow flicker rules, all but eliminate the ability of certain Ohio landowners to exercise his or her right to lease, and earn revenue from, their land.

Additionally, UNU compares the restrictions in Ohio to those of Germany, yet fails to elucidate for the Board the large differences in the regulation of wind farms in the two jurisdictions. Germany has a very different process for wind farms than the comprehensive process required by state law and rule by OPSB. Though it may be useful as general information, comparisons between OPSB's siting and Germany's siting process should be limited.

As for UNU's suggestion that an applicant must re-model or re-evaluate shadow flicker impacts if the size of the turbine or blades changes, OPSB is permitted to require additional information when a modification is proposed and OEC sees no need for a separate rule on this.

4. Amending Certificates (4906-4-09(A)(5))

As OEC noted in its initial comments, the rule on amendments will cause more confusion for parties seeking a modification. GNU requests that if any proposed amendment would increase the "invasion of the minimum setback area" it should be deemed a new application and subject to a full hearing. (See GNU Initial Comments at 9.) Wind developers who request amendments are already subject to comprehensive and thorough review of their proposed changes, and considering it a new application would unduly add additional time and resources to the process. There is simply no basis to review the entire project when the requested amendments do not affect the entire application. OPSB is permitted to request additional information necessary to approve or deny the amendment as the law and rules currently stand.

Mr. Biglin requests that the OPSB be required to "verify that the Site footprint as certified at the time the certificate was issued is still current" for amendments or modifications to extend or change a certificate. There is no reason to revisit the entire site footprint in such a situation, and it only serves to further complicate the amendment process. This suggestion should be rejected.

Greenwich Windpark, LLC suggests that eliminating the proposed language for 4906-4-09(A)(5)(b), "would not create additional adverse impacts for any property owner," and would thereby would fix the proposed rule. Although eliminating this language in subsection (b) may reduce confusion over this section of the proposed rule, it would not alleviate the problems created by proposed subsection (c) of the rule. OEC maintains that subsection (c), (as OEC argued in its initial comments at pages 5-6), will cause confusion and uncertainty, as well as increased costs, as developers will be forced to go through another process for a proposed modification and possibly then an amendment process.

OEC agrees with the comments made by Icebreaker Windpower, Inc. and MAREC related to 4906-4-09(A)(5)(c), including their rationale regarding the Governor's Common Sense Initiative. The rules ultimately enacted by OPSB need to balance objectives of regulation--ensuring the public's health and safety and environmental protection of wildlife and habitat--with the need to permit the

industry to develop without unnecessary costs and hindrances. Icebreaker and MAREC correctly point out that no other electric generation facility is subject to the same type of rule, and OEC urges OPSB to recognize that the industry will suffer from this disparate treatment. As both Icebreaker and MAREC note, minor modifications are already permitted by the language of prior certificate conditions. Rather than writing an entirely new rule, defining exactly what constitutes a modification, as suggested, would be more beneficial. OEC also concurs with MAREC regarding the fact that an oppressive modification/amendment process would discourage developers' from using cutting edge technology. No rule should be implemented that discourages an applicant from using the most efficient and safe technology available.

5. Other topics

a. Construction Deadline

UNU asks OPSB to institute a rule that would not permit an applicant to extend the construction deadline for a certificated project by more than three years. (See UNU Initial Comments at 11-12.) With this request, UNU proves several points made by OEC and other intervenors. There *have* been lengthy delays, and there *have* been difficulties getting projects to the construction phase. Overly burdensome laws and red tape that delay progress (including the amendment process) are reasons the process has been so slow, and another major hurdle are challenges from some groups that raise issues not grounded in evidence, or broadly-accepted science. No additional limitations are necessary, and OPSB should reject UNU's request to limit the extension of certificated projects.

b. Mapping - 4906-4-08(D)(1); (3)-(4)

OEC agrees with the comments made by Greenwich Windpark, LLC related to increasing the distance for mapping of landmarks, recreation and scenic areas, and visual impacts from a wind facility from five miles to ten miles. There is no policy reason related to safety, health, or environmental protection that would necessitate doubling the mapping area for these requirements. Similar to other proposed rules, it appears to increase costs for the wind developers without adding any benefit to the community.

c. Impacts on Wildlife

i. Black Swamp Bird Observatory and American Bird Conservancy: Proposed 4906-4-08(F)

OEC strongly agrees with Black Swamp Bird Observatory (BSBO) and American Bird Conservancy's (ABC) comment that "OPSB rules should balance the interests of Ohio's public trust resources, including federally and state protected wildlife, with the state's needs for clean, renewable power." (See BSBO Initial Comments, at 1.) However, OEC does not agree that BSBO/ABC's proposed subsection (F) is necessary. BSBO/ABC's proposal to include specific criteria for comparison in the OAC rules could lead to using outdated data when reviewing applications because BSBO/ABC's proposed rule includes no information about how often the scientific and engineering criteria in "4906-4-___" would be updated. Further, it would be extremely difficult to ensure this criteria is constantly the most up to date criteria if codified in an OAC rule.

BSBO/ABC also propose third party analyses in the rule. U.S. Fish and Wildlife Service (USFWS) and Ohio Department of Natural Resources (ODNR) already have a significant role in developing a siting plan that will have minimal impact on federal or state listed species. Most importantly, wind developers are required to provide information regarding ecological impacts, both pre- and post-construction as well as operational impacts, and significant review by USFWS, ODNR, and board staff is required throughout the process. There are rules specific to monitoring bird and bat populations, mussels, fish, and more. Both of these agencies are tasked with monitoring and avoiding impacts to specific species (see Proposed OAC 4906-4-09(D)), and are experts at those tasks. Additionally, current OPSB processes allow for intervening parties to present third-party examinations of applicants' studies, and/or any independent analysis of potential impacts to wildlife. In this sense, third-party review and evaluation is already allowable, and provides for a robust review of data- and science-backed evidence.

ii. Black Swamp Bird Observatory and American Bird Conservancy's Comments on 4906-4-09

BSBO and ABC request that section (A)(1) be amended to include "any wind generating units" within the "coastal area" of Lake Erie, which would mean, based upon O.R.C. 1506.01(A), "waters of Lake Erie, the islands in the lake, and the lands under and adjacent to the lake, including transitional areas, wetlands, and beaches", and extend to all wind powered electric generating units within five miles of Lake Erie. Currently, OPSB regulates the siting of all wind farms with a generating capacity of five or more megawatts, and as such, the current review of 4906-4-08 and proposed 4906-4-09 addresses only those projects. This change would pull smaller

wind generation projects that are not currently covered by OPSB rules into regulation. Because the current rules under review do not address these smaller generating capacities, OPSB should reserve debate on such a suggestion for another venue, and not address smaller turbine projects in this proposed rule.

iii. Mid-Atlantic Renewable Energy Coalition: Proposed 4906-4-09

Though OEC agrees with most of MAREC's comments, OEC has concerns with MAREC's suggestion to remove federally-listed species from certain subsections of 4906-4-09(D), and its other comments related to proposed Rule 4906-4-09. Federal and state wildlife regulatory agencies overlap on many aspects of enforcement related to wildlife protection. If MAREC's requests stem from concerns over implementation of monitoring or coordination between the federal and state agencies, OEC believes a broader discussion to ensure we are using appropriate safeguards for listed species is necessary before entirely removing federally-listed species from the proposed language.

III. Conclusion

Ohio Environmental Council's mission is to create a healthier, more sustainable Ohio. Ohio's power sector is still largely reliant on energy sources that contribute to climate change and negatively impact public health. Ohio policy should strike a balance between the expedient development of clean, renewable technology and ensuring the health and safety of humans and wildlife. Further, the Governor's Common Sense Initiative ("CSI") was established to ensure balance between regulations and costs of compliance. CSI requires that agencies promote compliance over punishment, and several sets of comments on this rule, if applied by the Board, would increase adverse impacts to the wind business.

If Ohio continues to lag in reducing carbon pollution from the power sector, we will have failed to protect birds and bats from the most onerous threat to their populations - climate change. A study by the Audubon from 2014¹, predicts that nearly half of all living bird species on earth will lose fifty percent of their habitats by 2080 if we fail to address climate change. Ohio must balance our need for renewable energy (including careful siting with minimal impact on our wildlife) with a business environment that welcomes wind companies to develop these much needed renewable technologies, ensuring a safe and healthy future for our communities and wildlife.

¹ Audubon's *Birds and Climate Change Report*, http://climate.audubon.org/sites/default/files/NAS_EXTBIRD_V1.3_9.2.15%20lb.pdf ("Of the 588 North American bird species Audubon studied, more than half are likely to be in trouble. Our models indicate that 314 species will lose more than 50 percent of their current climatic range by 2080.").

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Reply Comments were served by electronic mail or first class mail this 8th day of November 2016.



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electronically filed by Ms. Miranda R Leppla on behalf of Ohio Environmental Council