

**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.)

**COMMENTS OF
THE MID-ATLANTIC RENEWABLE ENERGY COALITION**

I. INTRODUCTION

On January 18, 2018, the Ohio Power Siting Board (“Board”) issued an entry requesting comments from interested persons on a proposed revision to Ohio Administrative Code (“O.A.C”) Rule 4906-4-08(C)(3), which contains the regulations regarding wind turbine setback waivers (“Waiver Rule”). Stakeholder comments on the Board’s proposed rule change are due February 1, 2018. In accordance with the Board’s schedule, the Mid-Atlantic Renewable Energy Coalition (“MAREC”) submits the following comments. MAREC’s members participating in these comments include: Apex Clean Energy, Inc.; Invenergy LLC; American Wind Energy Association; and EDP Renewables North America. All are very familiar with the state’s setback waiver process as they are actively developing wind projects in Ohio, and two of these members own and operate operational wind farms in the state.

For the reasons detailed below, MAREC strongly opposes the proposed revision and respectfully recommends the following options with respect to the Waiver Rule:

1. Maintain the waiver language adopted in the Board's most recent August 17, 2017 Entry on Rehearing; or
2. Cite the waiver language as it currently exists in statute, verbatim; or

3. Include additional clarifying language to the Waiver Rule, incorporating recommendations described in more detail below.

Additionally, MAREC recommends that if the Board determines to move forward with this proposed rule, the revision first be sent to the Common Sense Initiative for a business impact analysis.

II. BACKGROUND

On September 22, 2016, the Board issued an entry requesting comments from interested persons on proposed revisions to O.A.C. Rule 4906-4-08 and new O.A.C. Rule 4906-4-09. On October 24, 2016, and November 8, 2016, MAREC filed comments and reply comments, respectively.

On May 4, 2017, the Board issued its Finding and Order (“Order”) amending O.A.C. Chapter 4906-4-08 and adopting new O.A.C. Chapter 4906-4-09. Subsequently, by Entry on Rehearing issued August 17, 2017 (“Entry on Rehearing”), the Board revised the previously adopted rule language to reflect changes recommended by various stakeholders in their respective applications for rehearing.

The rules adopted by the Board on August 17, 2017, were originally scheduled to be considered by the Joint Committee on Agency Rule Review (“JCARR”) on Monday, January 8, 2018. However, the rules were placed in “To Be Refiled” status after state representative Bill Seitz (R-Cincinnati) reportedly requested a change to the Waiver Rule.¹ It appears that Rep. Seitz put forward a regulatory re-write of Revised Code (“R.C.”) Section 4906.20(B)(2)(c) (the “Waiver Statute”) that would make wind farm development virtually impossible (even if the legislature adjusts Ohio’s statutory wind setback distances to more reasonable levels).

¹ See January 8, 2018 Gongwer article, available at https://www.gongwer-oh.com/programming/news.cfm?article_ID=870050209.

On January 18, 2018, the Board issued an entry requesting comments from interested persons on the Seitz proposal which would modify O.A.C. Rule 4906-4-08(C)(3) to place the word “all” in a strategic location within the rule, as follows:

“Setback waivers. The owner(s) of all property adjacent to any wind farm property may waive the minimum setback requirements by signing a waiver of their rights.”

III. DISCUSSION

MAREC supported the Board’s proposed rule because it “tracked the statute.” Seitz’s proposal, on the other hand, contradicts it. MAREC opposes the Seitz proposal because it is designed to require hundreds more setback waivers from landowners on whose property no setback is actually encroached. No project has been developed or constructed in Ohio under this interpretation since the statute was enacted in 2008, and the Board should reject the effort to codify it in rule.

As we stated in our previous comments, any attempt to rephrase the statute only creates new issues subject to debate.² After considering our concerns, the Board agreed with MAREC that stakeholders should “continue to have the opportunity to address the proper interpretation of the statutory language [Waiver Statute] in future Board proceedings, but a rulemaking proceeding is not the appropriate public forum for such a discussion.”³ Adopting Rep. Seitz’s proposed revision directly contradicts this statement by rewriting the rule language in a manner inconsistent with the statute and cutting off any such “discussion” in “future Board proceedings.”

² MAREC Reply Comments, Nov. 8, 2016, at 16.

³ Order at 26.

That said, MAREC would be supportive of language that ensures the continued execution of waivers by all impacted landowners whose property is encroached by a wind turbine, the location of which does not meet the setback distance required in statute.⁴

The Board has previously made clear that the purpose of the proposed revision to the Waiver Rule is to merely lay out the process to obtain the setback waiver—the Board does not intend to diverge from the prior interpretation of the rule in terms of from whom a waiver is required.⁵ MAREC agrees that the statutory intent should be preserved and, to that end, has previously recommended that the Waiver Rule more closely track existing language in the Ohio Revised Code.⁶ However, the proposed amendment to O.A.C. Rule 4906-4-08(C)(3) does not maintain the current directive in the rule’s authorizing statute regarding from whom a waiver is required. It actually conflicts with existing statutory provisions and alters the underlying effect of the rule itself. As such, MAREC opposes the proposed revision.

A. Conflict with Existing Waiver Statute

While the addition of the single word “all” to the Waiver Rule may appear insignificant, the strategic placement of the word before the word “property” creates a discrepancy between the Waiver Rule and the Waiver Statute. R.C. 4906.20(B)(2)(c) states:

“The setback shall apply in all cases except those in which **all owner(s)** of property adjacent to the wind farm property waive application of the setback to that property...”

In contrast, the language proposed by the Board for purposes of O.A.C. 4906-4-08(C)(3) states:

The owner(s) of **all property** adjacent to any wind farm property may waive the minimum setback requirements by signing a waiver of their rights.”

⁴ Note that Larry Wolpert, JCARR Executive Director, indicated that the Board pursued revisions to the rule “to ensure that all impacted property owners are required to sign the waiver in order to avoid the 1,125-foot setback requirement.” (emphasis added). See January 8, 2018 Gongwer article, available at https://www.gongwer-oh.com/programming/news.cfm?article_ID=870050209.

⁵ Order at 24.

⁶ MAREC Initial Comments, Oct. 24, 2016, at 7.

Clearly, the Seitz proposal deviates from the authorizing statute, because the word “all” would modify “property” instead of “owners.” This has enormous consequences—we believe intended—that defy Ohio law in an effort to make development impossible.

B. Varying and Conflicting Interpretations

In the statute, the word “all” modifies “owners” presumably to ensure that every owner of a multi-owner property located adjacent to a proposed wind turbine would be required to waive a setback that encroaches the minimum distance on their parcel of land. In other words, the inclusion of “all” was intended to ensure that one owner of a jointly-owned property could not override the other owners and single-handedly waive application of the minimum setback. This has been the industry’s interpretation from the statute’s inception, has governed all projects to date (including those that are operational), and is grounded in very simple logic: owners upon whose setback is encroached have the ability to waive.

Seitz’s proposed rule alters the location of the word “all,” modifying “property” instead of “owners.” In so doing, Rep. Seitz would require all non-participating property owners located adjacent to the encroached property (or even adjacent to the whole footprint of a wind farm) waive application of the minimum setback if a turbine encroaches upon the setback distance of any one property owner’s parcel of land. The result of such a flawed interpretation would devastate wind project development in Ohio because developers would need a waiver from virtually every single property owner located in or around a wind farm – even though they themselves have no encroached setback to waive. Often these property owners would live several miles away from the property actually encroached. This absurd result alone suggests the Seitz interpretation is misguided and the current prevailing interpretation is correct.

C. The Proposed Language is Unconstitutional

Notwithstanding the absurd result of the Seitz interpretation and its potential to abolish wind farm development statewide, the proposed language is also unconstitutional. The U.S. Supreme Court has struck down state laws that require the consent of all adjoining landowners in order to obtain zoning variances.⁷ By requiring the approval of all adjacent property owners for purposes of a setback waiver, the state “leaves the ultimate determination of whether a [wind turbine] will be detrimental to the public welfare to the whim and caprice of neighboring property owners rather than to a reasoned decision by the [state].”⁸ Consequently, state and federal courts alike have ruled such laws unconstitutional.⁹ It is axiomatic that when given a choice between two interpretations of a statute—one constitutional and the other not--the interpretation consistent with constitutional law prevails.

D. Impact of Seitz Interpretation

The attached map depicts an actual operational wind farm in Ohio. Through this image, MAREC illustrates the devastating impact of the Seitz interpretation by highlighting the number of waivers potentially required under one possible interpretation of the proposed rule.

1. Existing Interpretation: Under the existing interpretation that has governed the waiver process to date, the law requires the developer to obtain 131 setback waivers from landowners whose property is actually encroached. These are shown in yellow on the attached map.

⁷ *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928).

⁸ *See Lakin v. City of Peoria*, 472 N.E.2d 1233 (Ill. App. 1984) (ruling consent requirement unconstitutional).

⁹ *See e.g. Janas v. Town of Fleming*, 382 N.Y.S.2d 394, 397 (N.Y. App. Div. 1976) (zoning permit requiring consent of majority of adjoining property owners held unconstitutional because it delegated authority to individual landowners who, by withholding their approval, may effectively prevent the board from considering an otherwise proper application); *Drovers Trust & Savings Bank v. City of Chicago*, 165 N.E.2d 314, 215 (Ill. 1960); *Lakin v. City of Peoria*, 472 N.E. 2d 1233 (Ill. App. 1984); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928).

2. Seitz Proposal: Under one possible interpretation of the Seitz proposal, all parcels adjacent to the parcel on which the encroaching turbine sits would also be required to waive the setback. Under this interpretation, the Board would require the developer to obtain 74 additional waivers, representing a 56% increase. These are shown in orange on the attached map.

A second possibility would be to require waivers from all property owners adjacent to the footprint of the entire wind farm, which while not depicted, would also add dozens of waivers to a project from owners whose land is not encroached.

Under either scenario, development becomes prohibitively expensive, if even possible at all. And as have been stated, the waivers would be required from landowners whose property is nowhere near even Ohio's extremely long setback distance from a turbine.

D. Common Sense Initiative

The detrimental impact this conflicting interpretation could have on statewide wind project development runs contrary to the Governor's Common Sense Initiative,¹⁰ because the rule would fail to balance the critical objectives of the regulation with the cost of compliance, and would be unnecessary and needlessly burdensome. Our analysis above demonstrates that differing interpretations could significantly impede business growth in the wind industry by delaying or even preventing the development of wind projects in Ohio. This comes at a time when many of the country's largest and most successful employers are purchasing wind energy to power their operations; last year in Ohio both Amazon and General Motors signed wind power purchase agreements for hundreds of megawatts, and the trend is only continuing.¹¹

¹⁰ "Establishing the Common Sense Initiative," Executive Order 2011-01K (Jan. 10, 2011).

¹¹ See <https://info.aee.net/growth-in-corporate-advanced-energy-demand-market-benefits-report>

MAREC also notes that, in accordance with R.C. 121.82, a business impact analysis (“BIA”)¹² regarding the proposed rules was included in Attachment C to the Board’s September 22, 2016 entry requesting comments. Item 14 of the BIA asked for the estimated cost of compliance with the rules and the scope of the impact to the business community. In light of the potential cost consequences to the wind industry in obtaining hundreds of unneeded, additional setback waivers, the statement in the BIA that costs with the revised rules will not vary and the business community will not be affected is rendered erroneous.

These additional waivers would collectively add millions of dollars in cost to wind projects, costs that would need to be recuperated in the price of the electricity. Given state law requires electric utilities to purchase a percentage of their power from renewable energy, the Seitz proposal has the real potential to drive up costs to Ohio ratepayers (residential, commercial, and industrial) statewide. Moreover, landowners and communities that support these wind projects will lose out on millions of dollars in tax dollars, as well as jobs, if the developers are not able to move forward with their business-to-business projects; thus, they too will be negatively affected.

Given the obvious business impacts of the Seitz proposal, MAREC recommends that if the Board is even considering moving this rule forward, it first obtain an updated analysis from CSI to attempt to quantify the harm so that the agency and JCARR members can make an informed decision.

¹² Under R.C. 121.82, the Board must conduct a BIA regarding the rules and provide the draft rules and the BIA to Ohio’s Common Sense Initiative office. Led by Lt. Governor Mary Taylor, this office “was established to create a regulatory framework that promotes economic development, is transparent and responsive to regulated businesses, makes compliance as easy as possible, and provides predictability for businesses.” <http://governor/ohio.gov/prioritiesandinitiatives/commonsenseinitiative.aspx>.

E. MAREC Recommendations

In order to ensure clarity in the rules and to avoid conflicting interpretations of the Waiver Rule and the Waiver Statute, MAREC submits the following recommended options for the Board's consideration.

1. Maintain Language as Adopted in Board's Order: On August 17, 2017, the Board finalized rule language to reflect changes recommended by various stakeholders throughout the rulemaking process. MAREC would support maintaining this language, which states:
 - a. **"The owner(s) of property adjacent to any wind farm property may waive the minimum setback requirements by signing a waiver of their rights."**
2. Quote the Waiver Language as it Exists in Statute: If the Board seeks to replicate the Waiver Statute, MAREC would support doing so by directly quoting the applicable statutory language, as follows:
 - a. **"The setback shall apply in all cases except those in which all owner(s) of property adjacent to the wind farm property waive application of the setback to that property."**
3. Include Additional Clarifying Language: If the Board chooses to modify the rule at all, the Board should include additional clarifying language to avoid deviation from prior interpretation in terms of from whom a waiver is required. MAREC would recommend the following clarification:
 - a. **"The owner(s) of all property adjacent to any wind farm property within the minimum setback for a wind turbine may waive the minimum setback requirements by signing a waiver of their rights."**

IV. CONCLUSION

The Seitz proposal conflicts with the statute. It is patently unconstitutional. It would introduce significant uncertainty in the marketplace, which has a chilling effect on investment. The state's largest wind farm (Blue Creek in Van Wert County) was a \$600 million project, the largest capital investment in Ohio the year it was constructed. Sophisticated financiers and lenders will simply not fund projects of this magnitude without regulatory certainty that all

required waivers have been obtained. It is no understatement to suggest that if Ohio adopts this rule, the regulatory chaos over how many waivers are required and “from whom” will cause the capital markets to close the door on Ohio development. This would be true even if the General Assembly reduces the onerous setback requirement in current law.

In light of the fact that the Board has not called for reply comments, MAREC does not intend to file them. However, in the event other commenters choose to ignore the process established by the Board in its January 18, 2018 Entry, MAREC would reserve the right to respond.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below via electronic mail or regular mail, as designated below, this 1st day of February, 2018.

/s/ Christine M.T. Pirik
Christine M.T. Pirik (0029759)

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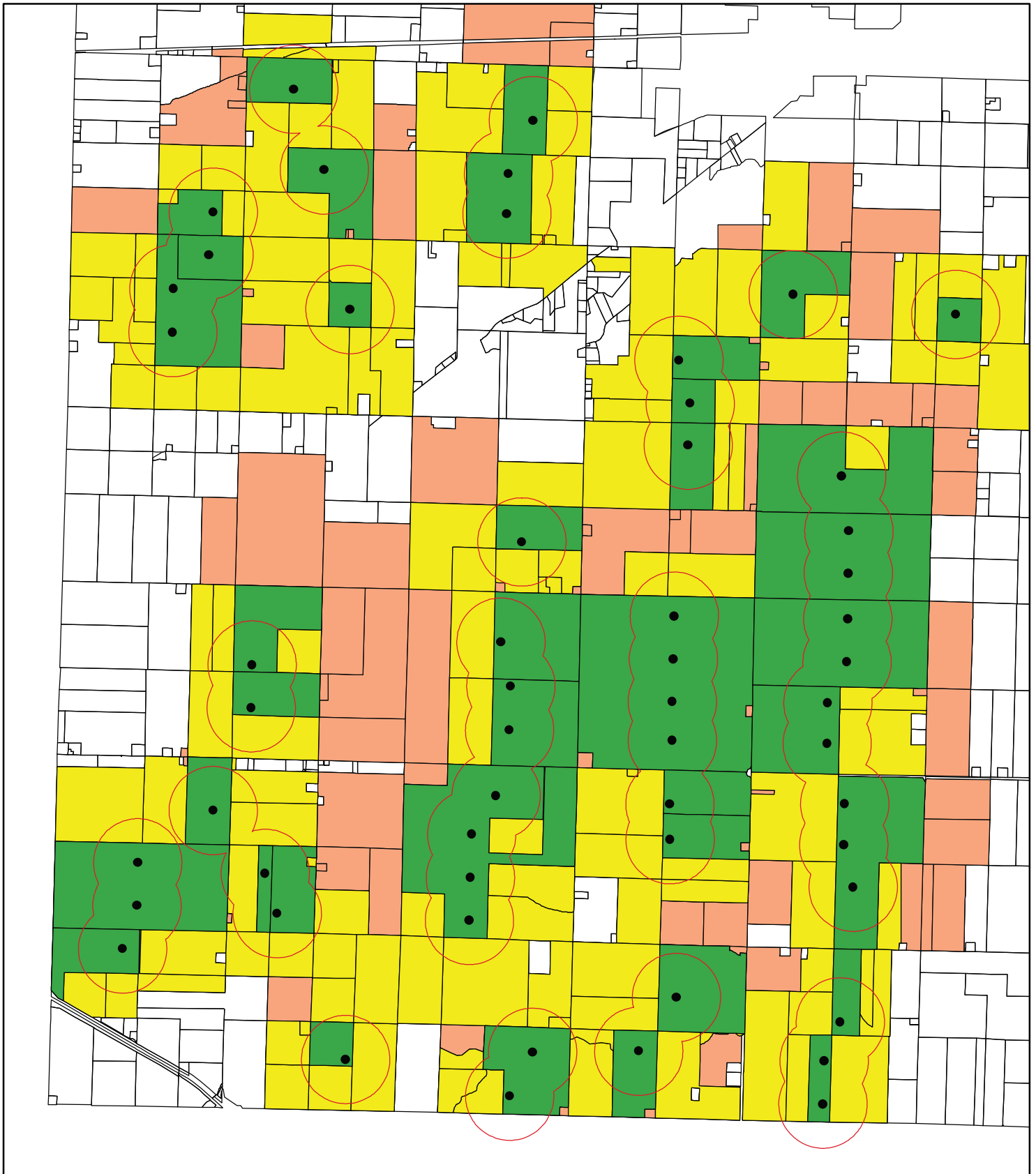
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Legend

- Turbine
- 1,348ft turbine buffer = 1,125ft + 223ft blade length
- Turbine Parcel
- Setback Waivers Required--Current Law (131)
- Seitz Proposal (205)
- (One Interpretation) (74 additional Waivers)

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Summary: Comments of Mid-Atlantic Renewable Energy Coalition electronically filed by Christine M.T. Pirik on behalf of The Mid-Atlantic Renewable Energy Coalition