

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Ohio Power Siting)
Board’s Consideration of Ohio Admin. Code) Case No: 19-778-GE-BRO
Chapter 4906-4.)

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

I. INTRODUCTION

On June 20, 2019, the Ohio Power Siting Board (“Board”) issued an entry requesting comments from interested persons on proposed revisions to Ohio Administrative Code (“O.A.C.”) Rule 4906-4-09 and newly proposed O.A.C. Rule 4906-4-10—both of which pertain to the regulation of wind farms (collectively, “Proposed Rules”). The Proposed Rules: 1) require wind farm “structures not involved in generation or transmission of electricity” to comply with state building code¹ regulations;² and 2) create additional reporting obligations for wind farm operators³ (hereinafter “Building Code Rule,” and “Reporting Rules,” respectively). Stakeholder comments on the Board’s proposed rule changes are due July 11, 2019. 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 developers/owners of wind projects in Ohio that are operational and projects that have received certificates from the Board but are not yet under construction, as well as projects that are currently under

¹ See O.A.C. Chapter 4901:1 (hereinafter, “Building Code”).

² Proposed O.A.C. Rule 4906-4-09 (A)(1).

³ Proposed O.A.C. Rule 4906-4-10.

construction. All are very familiar with the state's regulations associated with wind farm operations and building requirements in Ohio.

Initially, MAREC notes that the Proposed Rules conflict with the state's current statutory/regulatory framework governing the review and certification of wind farm projects. As a result, their implementation would cause significant confusion and uncertainty. Ohio law currently requires the Board's staff to conduct a robust investigation into any application for a certificate to construct a wind-powered (commercial-scale) electric generation facility, and to produce a report. If the (developer) applicant meets all applicable requirements, the Board may issue a certificate of approval, *along with conditions the applicant must continuously meet that ensure the proper construction, and safe ongoing operation and maintenance of the facility*. The certificate conditions can address (and have addressed) investigation and reporting obligations tied to turbine-related incidents, as well as the permitting and regulation of non-generation/transmission wind farm structures. As such, the Proposed Rules appear duplicative and unnecessary.

MAREC is also concerned with the ambiguity of the proposed language, and believes the lack of clarity warrants additional review, discussion, and consideration. As MAREC will explain in more detail below, the Building Code Rule fails to sufficiently identify the structures to which it applies, and the Reporting Rules fail to sufficiently identify the types of "incidents" that trigger the additional notice and reporting obligations. Such regulatory uncertainty can negatively impact the energy marketplace and reduce the ability of a developer/owner to obtain financing from lenders and equity investors—thereby jeopardizing the construction and operation of projects in Ohio.

MAREC asserts that, if the Proposed Rules are not revised or clarified, there will be an adverse impact to businesses in Ohio. In light of this negative impact, the Board should revise the Business Impact Analysis (“BIA”) and correctly set forth the estimated costs of compliance.⁴

In order to adequately and properly address stakeholder concerns raised in this proceeding, MAREC urges the Board to incorporate the recommendations below, and engage in additional discussion, review, and consideration prior to finalizing (or implementing) the Proposed Rules.

II. BACKGROUND

On March 29, 2019, the Board issued an entry scheduling a workshop to discuss the establishment of rules addressing wind-powered electric generators’ compliance with state building code regulations and incident reporting requirements. The workshop was held on April 30, 2019, at the Public Utilities Commission of Ohio. On June 20, 2019, the Board issued an entry requesting interested stakeholders to file comments with the Board regarding the proposed revisions to O.A.C. Rule 4906-4-09 and newly proposed O.A.C. Rule 4906-4-10, no later than July 11, 2019. MAREC submits the following comments:

III. DISCUSSION

A. Conflict with Existing Statutory/Regulatory Framework

The Proposed Rules conflict with the state’s decades-long existing statutory and regulatory framework governing wind-powered electric generation facilities. Under current law, the Board has jurisdiction to issue certificates for the construction of major utility facilities or economically significant wind farms.⁵ The 1- to 2-year certificate approval process represents a

⁴ Case No. 19-778-GE-BRO, Entry (June 20, 2019), Att. B at 5 (Question 14).

⁵ See Ohio Revised Code (“R.C.”) Sections 4906.04, 4906.20, and 4906.98.

multi-million dollar investment for a developer/owner of a project, and requires robust investigation, study, and review by the Board of all aspects of a proposed facility. It also allows members of the public to intervene in support of or opposition to a project, and to (more generally) submit comments. Once the Board's staff completes its investigation and docket its report, after hearing, the Board may issue a certificate of approval to construct the facility. In the certificate, the Board sets forth conditions to ensure the safe construction, operation, and maintenance of the wind farm—including those that pertain to notice and reporting of incidents that cause harm to persons or damage to property, and those that address requirements for a facility's associated (non-generation/transmission) structures.⁶

This well-established system already allows the Board to review, investigate, and rectify safety issues associated with wind farm structures and facilities. The flexibility inherent with developing (after a multi-year public permitting process) an independent certificate for each wind project is vital to developers/owners given the diverse array of issues that arise daily within the footprint of each unique large-scale wind farm. The Proposed Rules ignore this much-needed flexibility and, instead, appear to retroactively apply new regulations in blanket fashion to all wind projects, regardless of the certificate conditions under which they operate (or could operate).

B. Duplication of Existing Regulations

As a practical matter (and in part as a consequence of the above-described conflict with current law), implementation of the Proposed Rules would duplicate regulations that already

⁶ See, e.g., *In re Application of Paulding Wind Farm IV LLC*, Case No. 18-91-EL-BGN, Order (Feb. 21, 2019) at 34 (Condition 7) and 37 (Condition 21); *In re Application of Hardin Wind Energy, LLC*, Case No. 09-479-EL-BGN, Order (Mar. 22, 2010) at 30 (Condition 48) and 34 (Condition 55); and *In re Application of Northwest Ohio Wind Energy, LLC*, Case No. 13-197-EL-BGN, Order (Dec. 16, 2013) at 27 (Condition 35).

apply to wind farms and their developers/owners. In the recently approved *Paulding Wind Farm IV LLC* case, the Board issued a certificate which contained a condition requiring the developer/owner to: 1) notify the Board’s staff within 24 hours of an occurrence of any “extraordinary event”; 2) submit a written report within 30 days detailing the incident and corrective actions to be taken to avoid, prevent, mitigate, or minimize the occurrence; and 3) supplement the written report with any additional information obtained.⁷

The Reporting Rules would essentially duplicate this condition. Likewise, as discussed in more detail below, the Building Code Rule would duplicate existing permitting requirements that apply to wind farm operations and maintenance structures.⁸ As currently drafted, the Proposed Rules could even allow the Board to “circle-back” and re-litigate closed cases on which it has already issued a certificate. Although by law the Board may not apply its rules retroactively, it could attempt to “trump” or alter existing certificate conditions, each of which a wind farm developer established after lengthy deliberations with the Board’s staff and intervening stakeholders. Under this scenario, even developers of certificated, operationalized wind projects would need to consider whether (and how) to alter their internal operations for purposes of compliance—increasing costs and causing unnecessary delay.

At a minimum, implementation of the Proposed Rules would create confusion/uncertainty across the industry, harming wind energy businesses and the local communities. The lenders and equity investors upon whom developers rely need some degree of long-term regulatory and operational predictability to justify the significant up-front capital investment associated with large scale wind projects. Proposing unnecessary and duplicative rules on top of

⁷ *Id.* at 37 (Condition 21).

⁸ *See e.g., In re Application of Heartland Wind, LLC*, Case No. 09-1066-EL-BGN, Order (Aug. 23, 2010) at 29 (Condition 33).

the existing certificate approval process, and in addition to ongoing condition compliance obligations, would jeopardize the industry's ability to obtain such critical financing.

C. Building Code Rule

The Board's proposed requirement that wind farm structures "not involved in generation or transmission of electricity" comply with current building code requirements, lacks sufficient clarity and (separate and distinct from the discussion above) conflicts with current law. As a threshold matter, the Building Code Rule runs afoul of the existing Building Code, which exempts major utility facilities—including commercial scale wind farms—from compliance, oversight, and enforcement. Specifically, the Building Code provides that "structures on the premises of and directly related to the operation of a generating plant defined as a major utility facility regulated by the power siting board [are exempt from complying with the Building Code]," and "the building department may be requested to review and inspect these structures [omitted]... However, the building department has no enforcement authority."⁹

Importantly, the above-referenced Building Code provisions strategically align with the Board's certificate approval process; they allow the state Board of Building Standards to review and inspect wind farm structures "as a condition of [the Board's] approval," but (recognizing Board's jurisdiction) prohibit its actual enforcement of any certificate condition.¹⁰ Hence, the revisions proposed to O.A.C Rule 4906-4-09 (again) contravene current law. However, MAREC notes that failure to adopt the Building Code Rule does not mean safety concerns related to non-generation/transmission wind farm structures will go overlooked: the more appropriate method

⁹ O.A.C. Rule 4101:1-1-11. The term "major utility facility" includes wind farms designed for (or capable of) operating at a capacity of 50 megawatts or more. R.C. Section 4606.01(B)(1)(a).

¹⁰ O.A.C. Rule 4101:1-1-11.

of closely scrutinizing and enforcing applicable certificate conditions remains an effective option, and one that does not represent a significant deviation from long-held state policy.

Finally, the Building Code Rule is unclear and overly broad. Certificates currently held by wind farm developers require the developer to obtain all necessary state and local permits.¹¹ It has been the practice of developers to obtain a permit from the state and comply with the Building Code regulations for their operation and maintenance buildings; however, all other facilities are involved in the generation and transmission of electricity. Therefore, MAREC proposes that the Board either delete the proposed revision to O.A.C. Rule 4906-4-09(A)(1) or revise the language to narrowly focus on the operation and maintenance structure to the extent it is not involved in the generation or transmission of electricity.

D. Reporting Rules

Initially, MAREC points out that, as the impetus for the creation of the Reporting Rules, the Board generically mentions in their entries in this docket that there have been recent incidents. However, the Board has neither shown any evidence where the processes set forth in the certificate conditions have failed to work as envisioned by the Board when the Board approved the conditions nor any facts to support the need for the Reporting Rules.

Moreover, the Board's proposed Reporting Rules conflict with existing law and lack sufficient clarity. Newly proposed O.A.C. Rule 4906-4-10 would require wind farm operators to notify the "board's executive director or the executive director's designee as well as local law enforcement and first responders on all incidents involving a wind turbine, within thirty minutes

¹¹ See, e.g., *In re Application of JW Great Lakes Wind, LLC*, Case No 09-277-EL-BGN, Order (Mar. 22, 2010) at 27 (Condition 38); *In re Application of Hardin Wind Energy, LLC*, Case No. 09-479-EL-BGN (Mar. 22, 2010) at 34 (Condition 52); *In re Application of Paulding Wind Farm, LLC*, Order (Aug. 23, 2010) at 22 (Condition 4).

after discovery [omitted].”¹² It would also require wind farm operators to notify and submit two separate, detailed written reports within 30 days and 60 days, respectively.¹³ In addition, the proposed regulations state that “a wind farm operator shall not restart facilities involved in a reportable incident until such restart is approved by the Board’s executive director [omitted].”¹⁴

As previously discussed, these rules conflict with the Board’s existing oversight and investigatory responsibilities, which are set forth statutorily via the wind farm certificate approval/condition process.¹⁵ Ohio law grants the Board explicit jurisdiction over the construction and maintenance of wind farms and, through its certificate conditions, the Board is able to ensure their safe ongoing operation. The proposed mandatory incident reporting requirements serve the same purpose and achieve the same end as the Board’s statutorily issued certificate conditions—overseeing, investigating, and addressing operation failures and other incidents at wind farms that jeopardize the public health and safety.

Nevertheless, if the Board seeks to codify the Proposed Rules, at a minimum (and for clarity’s sake) it should consider the suggested revisions below. For ease of review, MAREC has also included its changes to proposed O.A.C. Rule 4906-4-10 in Attachment A to these comments.

1. 4906-4-10(A)(1): Wind Farm Operators’ Notification to the Board

MAREC believes it is unreasonable for the Board to require wind farm operators to provide notification within 30 minutes of discovering any incident. To be clear, MAREC fully understands the importance of reporting major operations failures for purposes of public safety

¹² Proposed O.A.C. Rule 4906-4-10(A)(1).

¹³ Proposed O.A.C. Rule 4906-4-10(B)(1-10).

¹⁴ *Id.*

¹⁵ *See* R.C. Sections 4906.04, 4906.20, and 4906.98.

and its members are committed to working with the Board when extraordinary incidents occur. Wind farm developers must include safety and emergency response plans as part of their certificate application, which the Board's staff reviews for sufficiency prior to approval. Developers must also follow safety protocols outlined in their certificate to ensure incidents are adequately addressed. MAREC emphasizes its ongoing willingness to cooperate with the Board and ensure timely responses to and public notice of all incidents that cause safety hazards.

However, the proposed 30-minute notification window appears arbitrary and does not allow operators sufficient flexibility in addressing the wide-range of issues that could occur in the footprint of a commercial-scale wind farm. Indeed, wind turbine and other structural incidents differ widely in terms of the danger they present to persons or property and, as such, require varying degrees of attention—some (but not all) immediate. Incidents can occur in the middle of the night, reducing the ability of a wind farm operator to notify Board personnel right away, within 30 minutes. Recognizing these realities, the Board should revise its proposed regulation to require a more reasonable notification timeframe, pursuant to the suggested language below:

***4906-4-10(A)(1):** Wind farm operators shall notify the board's executive director or the executive director's designee as well as local law enforcement and first responders on all extraordinary incidents involving a wind turbine. Notification shall occur as soon as practicable, but no later than one business day after discovery. ~~within thirty minutes after discovery unless notification within that time is impracticable under the circumstances.~~*

2. 4906-4-10(A)(2): Extraordinary Incidents

MAREC submits that portions of the Reporting Rules are also unclear and overly vague. Significantly, the provisions fail to sufficiently identify the types of "incidents" to which they apply. Considering the testimony and comments presented to date in this proceeding, MAREC

assumes the Board's overarching intent is to enhance notice/reporting obligations with respect to major incidents that cause actual damage to persons or property. But, as currently drafted, MAREC believes the rules would grant the Board's staff unfettered discretion to apply these heightened requirements to any minor turbine-related incident, exceeding the purported scope (and intent) of the initial proposal.

For example, new proposed O.A.C. Rule 4906-4-10(A)(2) outlines various "incidents" that could possibly trigger the enhanced notice/reporting obligations, but also includes an overly broad "catch-all" provision that would allow the Board's Executive Director to apply the reporting requirements to any minor incident whatsoever.¹⁶ The same section of the proposed rule includes the vague triggering incidents of "turbine failure" and "collector or feeder line failure."¹⁷ These terms are unclear and could encompass any minor technical issue – such as a computer glitch – that causes a turbine to temporarily shut down. Any number of minor, technical issues (with no associated damage), although possibly causing a turbine to temporarily cease operation, should not trigger the proposed three-pronged notice and written reporting requirements. As such, MAREC suggests the Board clarify this language and limit the scope of its application to those extraordinary incidents that result in harm to persons or property, pursuant to the following suggested revision:

4906-4-10(A)(2): For purposes of this rule, extraordinary incidents include, but are not limited to events such as tower collapse, turbine failure, thrown blade or hub, collector or feeder line failure, damaging ice throw, and nacelle fire, which cause or injury to any person or damage to others' property.

¹⁶ Proposed O.A.C. Rule 4906-4-10(A)(2) ("For purposes of this rule incidents include, **but are not limited to**, events such as ...") (emphasis added).

¹⁷ *Id.*

3. 4906-4-10(D)(1): Staff's Initial Site Visit

“[E]xcept as necessary for public safety,” the Reporting Rules prohibit a wind farm operator from disturbing any damaged facilities until the Board’s staff has made an initial site visit; however, there is no timeframe within which staff must make the initial site visit. Shutdown of any part of the wind farm facility could have far-reaching detrimental effects on the owner of the wind farm, the offtaker, and the community at large. Therefore, it is essential that the technical experts from the operator and manufacturer review the site of an extraordinary incident as soon as possible in order to ascertain the cause of the incident. To that end, it is paramount that the Board’s staff make their initial site visit expeditiously. Therefore, MAREC proposes the following revision to the Reporting Rules, which would require the Board’s staff to make its initial visit to the site within 72 hours or two business days (whichever is less):

4906-4-10(D)(1): Staff shall investigate every extraordinary incident that results in a report being submitted pursuant to this rule. Staff shall make an initial site visit within seventy-two hours or two business days, whichever is less, from the time staff is notified of the extraordinary incident...

4. 4906-4-10(D)(2): Notice of Restart of Individual Turbines

The proposed Reporting Rules prohibit an operator from restarting “facilities involved in a reportable incident until such restart is approved by the board’s executive director.”¹⁸ MAREC recommends that the rule be revised to provide for notice from the operator prior to restart, and to clarify that only the individual turbines involved in the extraordinary incident could be shut down during the review.

MAREC submits that, given the strict protocol in the emergency plans provided in the applications, and reviewed and approved by the Board in the certificate conditions, the experts

¹⁸ See proposed O.A.C. Rule 4906-4-10(D)(2).

from the operator and manufacturers are in the best position to evaluate and determine when the involved facilities are prepared to go back online. Thus, the process should provide for reasonable notice from the operator to the Board's Executive Director prior to the restart of the involved facilities. Should the Board have any questions with regard to the timing of the restart, such inquiry can be discussed and resolved between the time notification is given and when the facility is scheduled to restart. Given that every incident should be reviewed and evaluated on a case-by-case basis, this notification process is much more efficient and appropriate.

MAREC also urges the Board to clarify that only the individual turbines involved in the incident could be subject to shut down. As proposed, varying interpretations could be applied to the term "facility" in this rule — and one could presumably read the language to allow a shutdown of an entire wind farm in the event of any incident involving one individual turbine. MAREC believes this far-reaching interpretation would exceed the scope and intent of the Proposed Rules.

Thus, MAREC recommends that the rule be revised as follows to provide for notice from the operator prior to restart, and to clarify that only the individual turbines involved in the extraordinary incident could be shut down during the review:

4906-4-10(D)(2): A wind farm operator shall notify the board's executive director or the executive director's designee no less than three business days before the operatornot restarts the individual turbine(s)facilities involved in a reportable incident until such restart is approved by the board's executive director or the executive director's designee.

5. Chilling Effect of Proposed Reporting Rules

Finally, MAREC once again emphasizes the chilling effect the Proposed Rules (as currently drafted) would have on financing projects moving forward. In an industry that is dependent on financing—both equity and debt—it is incumbent upon developers to present long-

term plans with some degree of certainty and clarity to their lenders and investors. The Proposed Rules would pull financing away from wind projects based on perceived operational uncertainty, and the objective possibility of never-ending delays and closures.

E. Common Sense Initiative – Business Impact Analysis

The detrimental impact these Proposed Rules could have on statewide wind project development runs contrary to the Governor’s Common Sense Initiative,¹⁹ because the rules would fail to balance the critical objectives of the regulation with the cost of compliance.

MAREC also notes that, in accordance with R.C. Section 121.82, a BIA²⁰ regarding the Proposed Rules was included in Attachment B to the Board’s June 20, 2019 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 these potential cost consequences to wind farm owners and developers, the statement in the BIA that costs associated with the Proposed Rules would only include the time and expense of notifying the Board of an incident and reporting the results, is incorrect.

The potential for a shutdown of turbines not involved an incident would be costly and detrimental to the wind farm owner, offtaker, and the community. Given the obvious business impacts of the Proposed Rules, MAREC recommends the BIA be revised to accurately reflect the true cost of hundreds of thousands of dollars to the wind industry and the various impacted community across Ohio if these regulations are implemented and enforced as proposed.

¹⁹ “Establishing the Common Sense Initiative,” Executive Order 2011-01K (Jan. 10, 2011).

²⁰ Under R.C. Section 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. 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>.

IV. CONCLUSION

MAREC urges the Board to conduct additional review and discussion surrounding the Proposed Rules. As currently drafted, they conflict with existing law and levy an unreasonable burden on wind farm developers. If implemented, these rules would introduce significant uncertainty in the marketplace, causing a chilling effect on investments in and the development of wind energy. Furthermore, if the Proposed Rules are implemented in whole or in part, MAREC respectfully requests that the Board revised the rules to incorporate the recommendations set forth by MAREC herein.

Respectfully Submitted,

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4906-04-10 Notice and reports of extraordinary incidents involving wind farm facilities.

(A) Telephone notice of extraordinary incidents.

- (1) Wind farm operators shall notify the board's executive director or the executive director's designee as well as local law enforcement and first responders on all extraordinary incidents involving a wind turbine. Notification shall occur as soon as practicable, but no later than one business day after discovery. ~~within thirty minutes after discovery unless notification within that time is impracticable under the circumstances.~~
- (2) For purposes of this rule, extraordinary incidents include, ~~but are not limited to~~ events such as tower collapse, turbine failure, thrown blade or hub, collector or feeder line failure, damaging ice throw, and nacelle fire, which cause or injury to any person or damage to others' property.

(B) Written reports extraordinary regarding incidents.

- (1) Within thirty days after the extraordinary incident is discovered, a wind farm operator shall submit a written report to the executive director describing the cause of the incident, where ascertainable, and any damage to the wind farm facility or to neighboring properties or persons, on a form provided by the board.
- (2) Each wind farm operator shall also docket, in the wind farm certificate case, a final written report on a form provided by the board within sixty days after discovery of the extraordinary incident, unless the wind farm operator:
 - (a) For good cause shown, demonstrates more time is needed; and
 - (b) Submits interim reports to the executive director at intervals of not more than sixty days until a final report is docketed.

(C) Each final written report shall address:

- (1) Cause of the extraordinary incident:
- (2) Date and time the extraordinary incident occurred and date and time it was discovered:
- (3) If the extraordinary incident involved a turbine, the distance between debris and the wind turbine base;
- (4) If the extraordinary incident involved a turbine, the distance between debris to habitable structures and property lines, and photographs of the debris field:

- (5) A narrative description of the extraordinary incident and actions taken by the wind farm operator, including a timeline of events:
 - (6) What, if any damage occurred to the other wind farm facilities;
 - (7) What steps were necessary to repair, rebuild, or replace damage to the wind farm facilities;
 - (8) What, if any personal injury was caused by, or related to, the extraordinary incident.
 - (9) What, if any damage to properties within or adjacent to the wind farm project area was caused by, or related to, the extraordinary incident;
 - (10) What, if any, steps were, or will be, taken to prevent future extraordinary incidents.
- (D) Staff investigation and restart
- (1) Staff shall investigate every extraordinary incident that results in a report being submitted pursuant to this rule. Staff shall make an initial site visit within seventy-two hours or two business days, whichever is less, from the time staff is notified of the extraordinary incident. Except as necessary for public safety, a wind farm operator shall not disturb any damaged facilities or the site of a reportable incident until after staff has made an initial site visit.
 - (2) A wind farm operator shall notify the board's executive director or the executive director's designee no less than three business days before the operator not restarts the individual turbine(s) facilities involved in a reportable incident, until such restart is approved by the board's executive director or the executive director's designee.

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