

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of Firelands)
Wind, LLC for a Certificate of Environmental)
Compatibility and Public Need to Construct a) Case No. 18-1607-EL-BGN
Wind-Powered Electric Generation Facility in)
Huron and Erie Counties, Ohio.)

**MOTION *IN LIMINE* TO EXCLUDE TESTIMONY FROM K. SHAWN SMALLWOOD
OR, IN THE ALTERNATIVE, FOR LEAVE TO SUBMIT REBUTTAL TESTIMONY
AND MEMORANDUM IN SUPPORT OF FIRELANDS WIND, LLC**

Firelands Wind, LLC (“Firelands”) respectfully moves the Ohio Power Siting Board (“Board”) or its Administrative Law Judge (“ALJ”), pursuant Ohio Administrative Code (“OAC”) 4906-2-27, 4906-2-09(B)(8)(d), and 4906-2-14, *in limine* to exclude the prefiled direct testimony of K. Shawn Smallwood (“Smallwood”) on behalf of intervening local residents and Black Swamp Bird Observatory (“BSBO”) opposing the Firelands application (“Local Resident Intervenors”), which was filed on September 21, 2020. Smallwood was not disclosed to Firelands in response to its discovery requests to the Local Resident Intervenors or intervenor BSBO in violation of OAC 4906-2-14. He is a surprise witness and because Firelands already prefiled its direct testimony on September 11 and Smallwood’s testimony was not sprung upon Firelands until September 21, Firelands does not have an adequate and fair opportunity to address his testimony, which is prejudicial. Therefore, Smallwood’s testimony should be excluded from the evidentiary record and he should be precluded from testifying at the hearing.

In the alternative, Firelands respectfully requests leave to prefile additional written testimony in response and rebuttal to Smallwood’s testimony, and leave to call additional witnesses and/or submit rebuttal testimony at the hearing to fairly address Smallwood’s testimony.

This Motion is supported by the OAC, fundamental tenets of fair proceedings, and the Board's and ALJ's authority to assure orderly proceedings as set forth more fully in the attached Memorandum.

Respectfully submitted,

/s/ Christine M.T. Pirik
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(Counsel is willing to accept service via email.)

Attorneys for Firelands Wind, LLC

MEMORANDUM IN SUPPORT

I. LAW AND DISCUSSION

OAC 4906-2-09(B)(8)(d) gives the Board and ALJ the authority to take actions that are necessary to “[a]ssure the hearing proceeds in an orderly and expeditious manner.” These proceedings are adversarial in nature; thus, the Civil Rules are instructive even if not fully applicable. *See Ramsdell v. Ohio Civil Rights Comm.*, 56 Ohio St.3d 24, 27 (1990) (“[T]he Civil Rules will be applicable to special statutory proceedings adversary in nature unless there is a good and sufficient reason not to apply the rules.”). Particularly instructive here are the fundamental principles that “the civil rules are intended to eliminate surprise and prevent a ‘trial by ambush.’” *Bailey v. Bailey*, 12th Dist. Clermont No. CA2004-02-017, 2004-Ohio-6930, ¶ 31. Excluding Smallwood’s surprise testimony from the record and precluding him from testifying at the hearing ensures fundamentally fair and orderly proceedings.

As background, Firelands served discovery requests upon both the Local Resident Intervenors and BSBO in February and April 2020 requesting, *inter alia*, that they identify all expert and fact witnesses they intend to have testify in this matter. Neither disclosed Smallwood as a witness in their responses. For example, BSBO’s and Gerard Wensink’s answers to Firelands’s interrogatories are attached as Exhibit A as evidence. *Exhibit A* (Responses to Interrogatory Nos. 3-6).¹ Furthermore, Smallwood is a purported expert witness as reflected by his prefiled written testimony, and the Local Resident Intervenors and BSBO failed to supplement their interrogatory

¹ All the Local Resident Intervenors’ discovery responses are similar to Wensink’s responses with regard to witness disclosure; accordingly, only Wensink’s are provided as an example of the substance of all.

responses to disclose him as a witness in accordance with OAC 4906-2-14(C), (D) and (E), which state in pertinent part:

(C) Any party may, through interrogatories, require any other party to identify each expert witness expected to testify at the hearing and to state the subject matter on which the expert is expected to testify....

(D) Discovery responses which are complete when made need not be supplemented with subsequently acquired information unless:

(1) The response did not fully identify each expert witness expected to testify at the hearing and stated the subject matter upon which each expert was expected to testify.

(2) The responding party later learned that the response was incorrect or otherwise materially deficient....

(E) The supplementation of responses required under paragraph (D)... shall be provided within five business days of discovery of the new information.

(Emphasis added). Clearly, the Local Resident Intervenors and BSBO knew that their expert witness disclosures pursuant to their discovery responses were deficient and they violated their duty to supplement their responses to identify Smallwood and state the subject matter of his testimony.

Smallwood's written testimony was filed on September 21, 2020, and he was not identified as a witness before that date. Accordingly, when Firelands prepared its presentation of evidence leading up to filing its written testimony on September 11, 2020, it did not know about Smallwood's opinions and the purported basis therefor. Firelands was ambushed with this additional purported expert witness close to the hearing and without an opportunity to rebut his testimony with Firelands's own written testimony, which is not fair and prejudicial to Firelands. That should not be abided, and the Board or ALJ should exclude Smallwood's written testimony from the evidentiary record and preclude him from testifying at the hearing.

In the alternative, Firelands respectfully requests leave to prefile additional written testimony in response and rebuttal to Smallwood's written testimony, and leave to call additional witnesses and/or submit rebuttal testimony at the hearing to fairly address Smallwood's testimony. Fundamental tenets of fair proceedings and the Board's and ALJ's authority to assure orderly proceedings support Firelands's requests. *See* OAC 4906-2-09(B)(8)(d); *see Bailey*, 2004-Ohio-6930 at ¶ 31.

II. CONCLUSION

Based upon the foregoing, Firelands respectfully requests that the Board or ALJ grant this Motion and exclude Smallwood's testimony from the evidentiary record and preclude him from testifying at the hearing. In the alternative, Firelands respectfully requests an order granting it leave to prefile additional written testimony in response and rebuttal to Smallwood's testimony, and leave to call additional witnesses and/or submit rebuttal testimony at the hearing to address Smallwood's testimony.

Respectfully submitted,

/s/ Christine M.T. Pirik
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Attorneys for Firelands Wind, LLC

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 these cases. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below this 9th day of October, 2020.

/s/ Christine M.T. Pirik

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**INTERVENOR GERARD WENSINK'S ANSWERS TO THE FIRST
SET OF INTERROGATORIES FROM FIRELANDS WIND LLC'S**

Intervenor Gerard A. Wensink ("Intervenor") hereby answers Firelands Wind, LLC's ("Firelands") First Set of Interrogatories.

OBJECTIONS

Intervenor objects to the definitions and instructions contained in Firelands' first set of discovery requests to the extent that they attempt to modify or enlarge Intervenor's obligations under the Power Siting Board's procedural rules, OAC Chapter 4906-2, and the Ohio Rules of Civil Procedure in responding to the interrogatories.

Furthermore, Intervenor objects to all interrogatories to the extent they seek information that is protected by the attorney-client privilege and/or under the attorney work-product doctrine. Intervenor answers and responds to the interrogatories without waiving the foregoing objections.

ANSWERS TO INTERROGATORIES

1. Please state whether you are aware that the law firm Benesch, Friedlander, Coplan & Aronoff, LLP also represents Murray Energy Holdings Co. and certain of its affiliates.

RESPONSE: Intervenor objects to this interrogatory on the grounds that it seeks information that is irrelevant and that is not reasonably calculated to lead to the discovery of

admissible evidence. Further objecting, Intervenor states that Benesch, Friedlander, Coplan & Aronoff, LLP no longer represents Intervenor.

2. Please state how you first learned of the Emerson Creek Project.

RESPONSE: I read an article in the Sandusky Register, saw anti-wind project signs, and discussed the project with an Oxford Township trustee.

3. Please state whether you are personally obligated to pay any legal fees incurred in relation to the Motion to Intervene and your participation in this proceeding involving the Emerson Creek Project.

RESPONSE: Intervenor objects to this interrogatory on the grounds that it seeks information that is irrelevant and that is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Intervenor states that the answer to this interrogatory is yes.

4. Please identify all others who are assisting you with paying any legal fees incurred in relation to your participation in this case involving the Emerson Creek Project.

RESPONSE: Intervenor objects to this interrogatory on the grounds that it seeks information that is irrelevant and that is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Intervenor states that the Resident Intervenor and some of their neighbors who will be harmed by the wind project are paying the attorney fees.

5. Please identify all expert witnesses you intend to have testify in this matter and provide for each such witness:

a. Full name and contact information;

- b. All matters, including court actions, arbitrations, and administrative proceedings, for which they have been designated as expert witnesses;
- c. All matters, including court actions, arbitrations, and administrative proceedings, for which they have testified as an expert witness; and
- d. All facts or data you or your attorney(s) have provided to the witness.

RESPONSE: Intervenor objects to this interrogatory to the extent it exceeds the scope of the authorization in Ohio Civil Rule 26(B)(5)(b) for propounding interrogatories about expert witnesses. Without waiving this objection, Intervenor states that Intervenor currently intends to call the following persons as expert witnesses:

Ira Sasowsky of Sasowsky Earth Science Consultants, Ltd., 379 Bittersweet Road, Akron, OH 44333, on hydrogeological and geological issues, including karst, groundwater supply, groundwater pollution, and water pollution.

Mark Shieldcastle of Black Swamp Bird Observatory, 13551 West State Route 2, Oak Harbor, Ohio 43449, on birds, bats, and other wildlife issues.

Additional information about these experts' testimony will be provided in their written direct testimony filed in accordance with the Board's schedule.

6. Please provide the full name and contact information for all fact witnesses you intend to have testify in this matter.

RESPONSE: Intervenor objects to this interrogatory on the grounds that it calls for the production of attorney work product. Without waiving this objection, Intervenor states that this information will be provided in the fact witnesses' written direct testimony filed in accordance with the Board's schedule.

7. Identify "yes" or "no" as to whether you will be providing voluntary testimony at the evidentiary hearing in this matter, which is scheduled to commence at the offices of the Public Utilities Commission of Ohio in Columbus, Ohio on April 14, 2020.

RESPONSE: Intervenor objects to this interrogatory on the grounds that it calls for the production of attorney work product. Without waiving this objection, Intervenor states that Intervenor's witnesses will be identified in their written direct testimony filed in accordance with the Board's schedule.

8. Please identify the name of the individual that referred you to the law firm Benesch, Friedlander, Coplan & Aronoff, LLP.

RESPONSE: Intervenor objects to this interrogatory on the grounds that it seeks information that is irrelevant and that is not reasonably calculated to lead to the discovery of admissible evidence.

9. Please identify the name of the individual that referred you to the law firm Van Kley & Walker, LLC.

RESPONSE: Intervenor objects to this interrogatory on the grounds that it seeks information that is irrelevant and that is not reasonably calculated to lead to the discovery of admissible evidence.

10. Please identify all public hearings or meetings that you have attended in connection with the Emerson Creek Project.

RESPONSE: The following are the public hearings or meetings that Intervenor can recall attending:

A public meeting of the Erie County Commissioners about PILOT on February 27, 2019;

A public meeting of the Huron County Commissioners on March 13, 2019;

An Apex public meeting on April 3, 2019.

11. Please state whether you own property within the project area of the Emerson Creek Project. If not, please state whether a property you own abuts the project area of the Emerson Creek Project.

RESPONSE: Intervenor does not own property within the project area. Intervenor owns three properties that abut the project area.

12. Please state whether you reside on property within the project area of the Emerson Creek Project, and if so identify the address of your residence.

RESPONSE: No.

13. Please state whether you reside on property abutting the project area of the Emerson Creek Project, and if so identify the address of your residence.

RESPONSE: No.

VERIFICATION

STATE OF OHIO)
) ss:
COUNTY OF ERIE)

Gerard Wensink, being first duly cautioned and sworn, and having personal knowledge of the forgoing, deposes and says that the foregoing answers to Interrogatories are true and correct to the best of my knowledge.

Gerard Wensink

Sworn to before me and subscribed in my presence this _____ day of March, 2020.

Notary Public

As to Objections:
Respectfully submitted,

/s/ Jack A. Van Kley

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CERTIFICATE OF SERVICE

On June 3, 2020, I served a copy of the foregoing Interrogatory Answers on the following
counsel by electronic mail:

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Case No(s). 18-1607-EL-BGN

Summary: Motion in Limine to Exclude Testimony from K. Shawn Smallwood or, in the alternative, for Leave to Submit Rebuttal Testimony and Memorandum in Support of Firelands Wind, LLC electronically filed by Christine M.T. Pirik on behalf of Firelands Wind, LLC