

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Ohio Power Siting)
Board's Review of Rule 4906-4-08 of the)
Ohio Administrative Code.)

Case No. 16-1109-GE-BRO

**INITIAL COMMENTS OF
GREENWICH NEIGHBORS UNITED**

Samuel C. Randazzo (Reg. No. 0016386)
(Counsel of Record)
Scott E. Elisar (Reg. No. 0081877)
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
(willing to accept service by e-mail)
selisar@mwncmh.com
(willing to accept service by e-mail)

OCTOBER 24, 2016

ATTORNEYS FOR GREENWICH NEIGHBORS UNITED

**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.)

**INITIAL COMMENTS OF
GREENWICH NEIGHBORS UNITED**

I. BACKGROUND

On September 15, 2014, House Bill 483 ("H.B. 483") became effective, thus amending R.C. 4906.20 and 4906.201 with respect to the setback requirements applicable to applications that come before the Ohio Power Siting Board ("OPSB").

By Entry issued November 24, 2014 in Case No. 12-1981-GE-BRO, the OPSB requested comments on the OPSB Staff's proposed revisions to Rule 4906-4-08, Ohio Administrative Code ("O.A.C."), which, among other things, revised the setback requirements for applications to construct wind-powered electric generation facilities in light of the amendments to R.C. 4906.20 and 4906.201 made in H.B. 483.

In response to the November 24, 2014 Entry, comments were timely filed on January 16, 2015 by various stakeholders. But rather than addressing the commenters' recommendations, concerns and objections, the OPSB set the input aside for some future unspecified discussion and adopted the proposed rules which had promoted the concerns and objections. The OPSB also said (in an Order issued on November 12, 2015 – about one year after the OPSB requested comments and over 10 months after

comments were filed) that “[u]pon conclusion of those discussions, but no later than June 1, 2016, the Board will initiate a rulemaking docket for the purpose of issuing for formal comments the Staff’s proposed revisions to Ohio Admin.Code 4906-4-08 resulting from the stakeholder deliberations.”¹ Additionally, the OPSB stated that: “It is the Board’s expectation that Staff will strive to resolve the technical issues with the stakeholders and include the agreed-upon proposals in the revisions to be put out for comment.”² And the OPSB’s November 12, 2015 Order in Case No. 12-1981-GE-BRO identified certain issues that were to be included in the discussions leading up to the issuance of the proposed rules.

Since the issuance of the November 12, 2015 Order, the OPSB has issued two invitations to parties interested in attending a public meeting. Each invitation came without any meaningful guidance on the procedural or substantive purpose of the meeting.

After the first meeting which took place on January 29, 2016, and on February 12, 2016, the OPSB closed Case No. 12-1981-GE-BRO.

On May 18, 2016, the OPSB initiated a new rulemaking docket in Case No. 16-1109-GE-BRO for the purpose of issuing, for formal comment, proposed revisions to Rule 4906-4-08, O.A.C. Case No. 16-1109-GE-BRO was opened for the purposes of conducting a five-year review and was not focused on the substantive concerns that the

¹ *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, Second Finding and Order at 5 (November 12, 2015).

² *Id.* at 5-6.

OPSB had previously identified (in Case No. 12-1981-GE-BRO) as requiring further consideration.

A “rulemaking kickoff workshop” (the second meeting with the OPSB Staff) was held in Columbus on June 9, 2016. Again, this public meeting was scheduled and held without any advance guidance regarding the procedural or substantive purpose of the meeting. Nonetheless, several stakeholders attended the June 9, 2016 meeting and offered comments.

At no time during the January 29, 2016 or June 9, 2016 sessions did the OPSB Staff engage in discussions for the purpose of resolving “technical issues” or any other issues.

On September 22, 2016, the OPSB issued another Entry (in this case) inviting interested parties to submit comments on another set of proposed rules. The proposed rules and a misleading Business Impact Analysis³ were attached to the September 22, 2016 Entry in Case No. 16-1109-GE-BRO.

³ The Business Impact Analysis (“BIA”) is required by Ohio’s Common Sense Initiative (“CSI”). When issuing rules, the BIA element of the CSI requires the OPSB to respond to a standard set of questions. The OPSB’s BIA in this case ignores the substance of the questions and then inserts answers that are, at best, misleading. For example, and in response to a question asking the OPSB to explain how it will measure the success of the proposed regulation, the OPSB claims that “... rules in this package contain general provisions and procedural matters which will not have measureable outputs or outcomes.” BIA at 2. 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.” BIA at 2-3. As explained above, 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

The September 22, 2016 Entry rules contains no discussion of the issues that the OPSB previously flagged for further consideration and contains no reasoned explanation of how the latest proposed rules respond to or otherwise resolve such issues. In other words, issuance of the latest set of proposed rules amounts to another effort by the OPSB to slowly, very slowly, evade its duty to conduct a meaningful rulemaking process that is transparently responsive to statutory requirements that became part of Ohio law many years prior to the commencement of this proceeding.

II. ABOUT THE COMMENTERS

Greenwich Neighbors United (“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 Case No. 12-1981-GE-BRO, GNU or its members have actively participated in OPSB Case Nos. 13-990-EL-BGN and 15-1921-EL-BGA.

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 Union Neighbors United (“UNU”) in comments filed the

decommissioning, Greenwich Neighbors United (“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 farms trespassing are affected by the draft rules; these businesses are part of the business community impacted by the draft rules.

same day.⁴ 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 already explained above, the OPSB failed to address the substance of the issues, comments and recommendations of UNU⁵ 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. Accordingly, GNU incorporates, herein, the comments it filed on January 16, 2015 in Case No. 12-1981-GE-BRO and urges the OPSB to provide a meaningful substantive response.

⁴ 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).

⁵ On February 13, 2015, UNU also filed reply comments in Case No. 12-1981-GE-BRO

As in Case No. 12-1981-GE-BRO, the proposed rules which have been issued for comment in this proceeding continue to ignore or rewrite the law while evading the OPSB's duty to substantively address the comments, recommendations and objections submitted by GNU and others. More importantly, the OPSB has again issued proposed rules which fail to meet the rulemaking requirements of R.C. 4906.20.

The balance of these comments will focus on the latest set of non-compliant proposed rules as they relate to: (1) 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) the statutory requirement that the OPSB 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) the unavailability of such a waiver in any case where the OPSB determines that something more than the minimum setbacks is warranted. Since they are closely related, items (1) and (2) will be jointly addressed.

A. The Population of Adjoining Property Owners Who Must Execute a Valid Waiver and the Statutory Requirement that the OPSB Establish, by Rule, the Procedure Which Must Be Followed to Secure Such a Waiver

The OPSB's package of draft rules includes proposed changes to Rule 4906-4-08, O.A.C., which mainly deals with the content of an application. The purpose of this rule (setting forth the content of an application) is not well suited to fully dealing with setback waivers and GNU urges the OPSB to address this subject (setback waivers) in a separate rule.

In any event, the proposed change to Rule 4906-04-08(C)(2)(d), O.A.C., involves deleting language that clearly conflicts with the controlling statute in favor of language that offers no identification at all. 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 establish 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 must be complied with 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."⁶ 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.

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 should respect the General Assembly's command that no waiver of the minimum setback requirements will be effective unless

⁶ R.C. 4906.20(B)(2)(c).

and until all owners of property adjacent to the wind farm property waive application of the minimum setback requirements.

There are a number of important and waiver-related issues that the proposed rules do not attempt to address. 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 who 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. 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 islands strategically selected to deprive all the property owners of the protection which the Ohio General Assembly has established for their 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 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 a 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.

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 contain 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.

B. The Unavailability of a Waiver of the Minimum Setback Requirements Where the OPSB Determines that Something More than the Minimum is Necessary

As already discussed, the controlling statutory language in R.C. 4906.20(B)(2)(c) states that the minimum setbacks must be complied with 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***”. (emphasis added). In other words, the statutory language which gives a wind farm developer an opportunity to evade, with adjoining property owners’ affirmative consent, the minimum setback requirements precludes any waiver-based evasion of setback requirements in excess of the minimum requirements which the OPSB finds to be necessary in a particular case.

The OPSB’s implementation of the statewide scheme of land use control that is enabled through R.C. 4906.20 and 4906.201 has, at times, suggested that the OPSB views the minimum setback requirements as being the default setback requirements (rather than the minimum). But the letter and spirit of the law requires the OPSB to set reasonable setback requirements. In particular cases, it can establish setback requirements that are greater than the minimum. The OPSB cannot establish reasonable setback requirements by directly defaulting to the minimum or indirectly doing so by imposing the burden of proof and persuasion upon any party asserting, in a particular case, that something more than the minimum is necessary.

In any event, the draft rules do not address or deal with the OPSB’s overarching duty to set reasonable setback requirements or the statutory language that precludes a

setback waiver in circumstances where the OPSB determines, in a particular case, that something greater than the minimum is necessary. The OPSB should fill these gaps both in its rules and their implementation.

Respectfully submitted,

/s/ Samuel C. Randazzo

Samuel C. Randazzo (Reg. No. 0016386)

(Counsel of Record)

Scott E. Elisar (Reg. No. 0081877)

McNEES WALLACE & NURICK LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

selisar@mwncmh.com

ATTORNEYS FOR GREENWICH NEIGHBORS UNITED

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Initial Comments of Greenwich Neighbors United* has been served via electronic mail or ordinary U.S. mail, postage prepaid, upon the following parties of record this 24th day of October 2016.

/s/ Samuel C. Randazzo

SAMUEL C. RANDAZZO

Sally W. Bloomfield (Reg. No. 0022038)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
sbloomfield@bricker.com

Monica Jensen
VP Development
Windlab Developments, USA, Ltd.
927 Wing Street
Plymouth, MI 48170

Christopher A. Walker (0040696)
Van Kley & Walker, LLC
137 N. Main St., Suite 316
Dayton, Ohio 45402
cwalker@vankleywalker.com

Julia F. Johnson
juliejohnson@ctcn.net

Richard R. James
Principal
E-Coustic Solutions
PO Box 1129
Okemos, MI 47795
RickJames@E-Coustic.com

Katie Elsasser
6051 Twp Rd 200
Belle Center OH 43310
Kme_20@hotmail.com

Chad A. Endsley (0080648)
Chief Legal Counsel
Leah F. Curtis (0086257)
Amy M. Milam (0082375)
Ohio Farm Bureau Federation
280 North High Street, P.O. Box 182383
Columbus, OH 43218-2383
cendsley@ofbf.org
lcurtis@ofbf.org
amilam@ofbf.org

Bill Wright
Section Chief
Office of the Attorney General of Ohio
Public Utilities Section
30 East Broad Street, 16th Floor
Columbus, OH 43215
william.wright@ohioattorneygeneral.gov

Megan Addison
Administrative Law Judge
Ohio Power Siting Board
180 East Broad Street, 12th Floor
Columbus, OH 43215
Megan.Addison@puco.ohio.gov

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

10/24/2016 10:06:13 AM

in

Case No(s). 16-1109-GE-BRO

Summary: Comments --Initial Comments of Greenwich Neighbors United electronically filed by Mr. Samuel C. Randazzo on behalf of Greenwich Neighbors United