BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Ohio Power Siting Board's Review of Rules 4906-4-08 and 4906-4-09 of the Ohio Administrative Code	)))	Case No. 16-1109-GE-BRO

REPLY COMMENTS OF
6011 GREENWICH WINDPARK, LLC

I. INTRODUCTION

6011 Greenwich Windpark, LLC ("Greenwich"). Greenwich, a wholly owned subsidiary of Windlab Developments USA, Ltd., filed Comments in this proceeding, and submits its Reply to the Comments filed by the Ohio Farm Bureau Federation ("OFBF"), Mid-Atlantic Renewable Energy Coalition ("MAREC"), Greenwich Neighbors United ("GNU"), Ohio Environmental Council ("OEC"), Union Neighbors United, *et al.* (collectively "UNU"), Icebreaker Windpower, Inc. ("Windpower"), WIRE-Net, the Ohio State Historic Preservation Office ("SHPO"), State Senator Bill Seitz, Black Swamp Bird Observatory, Katie Elsasser, Gary J. Biglin, and Ms. Alicia Rodrian.

II. REPLY COMMENTS

Subsection (C)(3)(a) (iii) Setback waivers

As a general matter, Greenwich strongly agrees with the sentiments expressed by OEC concerning the immense and unreasonable harm to the wind industry caused by the property line setbacks enacted in Ohio House Bill 483 (Amstutz – 130th GA).[1]

[1] OEC Comments at 1-4.

UNU's suggestion that "[l]eases, options for leases, and setback waivers should be included in the applications for public review" is misplaced.[2] This request is redundant as leases and options are typically recorded and available to the public. The Board's proposed rule also requires that setback waivers be recorded and available to the public.

GNU wrongfully asserts that the Board must require even *uninvolved* property owners to waive the application of the minimum setback standards.[3] GNU's position that a developer must obtain waivers from uninvolved property owners offends longstanding notions of contract law and makes for poor public policy by allowing uninvolved property owners to interfere with other parties' right to contract. Stakeholders have repeatedly and thoroughly responded to GNU's interpretation on multiple occasions. For purposes of brevity and economy, Greenwich incorporates the comments on this subject it made along with American Wind Energy Association on February 13, 2015 in Case No. 12-1981-GE-BRO, and that it made along with MAREC, on February 8, 2016 as part of the workshop preceding this rulemaking, included as Attachment A[4] and Attachment B,[5] respectively.

GNU also urges the Board 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."[6] The Board should reject this recommendation. Again, GNU seeks to infringe on contracting rights between private parties. In effect, GNU requests that the Board prohibit the inclusion of assignment provisions in the agreement between the parties. If the contracting parties agree to include assignment provisions

[2] UNU Comments at 10.

[3] GNU Comments at 7-9.

[4] See pages 4-10.

[5] See pages 8-9.

[6] GNU Comments at 9.

in the waiver agreement, then that is for the parties to decide. GNU completely overlooks that if a property owner does not feel comfortable with an assignment provision, the property owner is under no obligation to enter into a waiver agreement at all. GNU seems eager to insert governmental control into the basic contracting rights of parties.

III. NEW RULE 4906-4-09 Regulations Associated with Wind Farms

Subsections (A)(5)(c) Change, reconstruction, alteration or enlargement

Several commenters made the point that, as written, this section adds a lengthy process in the circumstance where there are minor changes proposed that do not merit a full blown amendment. The Staff developed a procedure to address this circumstance, and while the concept is meritorious, the process proposed is lengthy and cumbersome. Rather than provide for a 21-day period, to object, the time should be shortened to 10 or 14 days. Moreover, if a single party objects to the modification, the Staff at some indeterminate time in the future, files its recommendation and thereafter, again at some indeterminate time, (it is not clear whether the time is 90 days or 180 days), the board will process the modification.

Because this procedure is lengthy and cumbersome, Greenwich proposes that subpart (c) be amended to state:

> An applicant may seek review of a proposed modification(s) sought under paragraph (A)(5)(b) of this rule by filing the proposed modification(s) I the public docket of the certificate case and shall provide written notification of such filing to staff and all landowners immediately adjacent to the site of the proposed modification(s) The notification shall reference and include a copy of paragraph (A)(5) of this rule. In the filing submitted in the public docket, the applicant shall present its rationale as to why the proposed modification(s) satisfied paragraph (A)(5)(b) of this rule. Staff or any interested party shall file objections to the applicant's proposal within ~~twenty-one~~ **fourteen** days. If no objections are filed within the ~~twenty-one~~ **fourteen** day period, the applicant may proceed with the proposed modification(s). If objections are filed within the ~~twenty-one~~ **fourteen** day period, board staff may ~~subsequently~~ docket its recommendations on the matter **within three business days after the**

fourteen day period has expired. The board will process proposed modification(s) **by automatic approval within thirty days after the staff recommendation is filed or it may suspend the modification(s) for no more than 90 days in order to issue a ruling on it.** ~~under the suspension process set forth for accelerated applications as outlined in rule 4906-6-09 of the Administrative Code.~~

IV. CONCLUSION

Greenwich respectfully requests that the Board adopt the changes to the Staff's proposed revisions consistent with its comments and the reply comments set forth above

Respectfully submitted on behalf of
6011 Greenwich Windpark, LLC

Sally W. Bloomfield (No. 0022038)
Dylan F. Borchers (No. 0090690)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-2368; 227-4914
Facsimile: (614) 227-2390
E-mail: sbloomfield@bricker.com
dborchers@bricker.com

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.

Sally W. Bloomfield

cendsley@ofbf.org
lcurtis@ofbf.org
amilam@ofbf.org
sam@mwncmh.com
selisar@mwncmh.com
mleppla@theoec.org
cwalker@vankleywalker.com
jvankley@vankleywalker.com
todonnell@dickinsonwright.com
dsnyder@ohiohistory.org
seitz@ohiosenate.gov
kme_20@hotmail.com
smileyatme28@gmail.com

Gary J. Biglin
5331 SR 61 S
Shelby, OH 44875

John P. Colm
President & Executive Director
WIRE-Net
4855 W 130th Street
Cleveland, OH 44135

Kimberly Kaufman
Michael Hutchins, PhD
Black Swamp Bird Observatory
13551 W SR 2
Oak Harbor, OH 43449

ATTACHMENT A

BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Ohio Power Siting Board's Review of Chapters 4906-1, 4906-5, 4906-7, 4906-11, 4906-13, 4906-15, and 4906-17 of the Ohio Administrative Code	))))	Case No. 12-1981-GE-BRO

REPLY COMMENTS OF THE AMERICAN WIND ENERGY ASSOCIATION AND GREENWICH WINDPARK, LLC

I. INTRODUCTION

By Entry dated November 24, 2014, the Ohio Power Siting Board ("OPSB" or "Board") provided parties an opportunity to file comments regarding the proposed revisions of Ohio Administrative Code ("O.A.C.") Rule 4906-4-08 by January 16, 2013, and February 13, 2015. Due to the very narrow scope of the proposed changes to O.A.C. Rule 4906-4-08 to incorporate the setback requirements of House Bill ("H.B.") 483, neither the American Wind Energy Association ("AWEA") nor Greenwich Windpark, LLC ("Greenwich") filed initial comments.[1]

However, the initial comments filed by Greenwich Neighbors United ("GNU") propose changes to O.A.C. Rule 4906-4-08 that go beyond the changes proposed by the Board. As such, AWEA and Greenwich are compelled to reply. GNU's proposed changes not only exceed the scope of this rulemaking but are contrary to law and public policy.

[1] Although not required by OPSB rules, Greenwich filed a letter reserving the right to submit reply comments on January 16, 2013.

II. REPLY COMMENTS

GNU attempts to exploit this limited rulemaking to propose an unlawful and unreasonable change to the Board's interpretation of Ohio Revised Code ("R.C.") Section 4906.20(B)(2)(c). This statutory provision states:

> The setback shall apply in all cases except those in which 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.

The Board adopted O.A.C. Rule 4906-4-08(C)(2)(d) interpreting R.C. 4906.20(B)(2)(c):

> Minimum setbacks from property lines and residences may be waived in the event that all owners of property adjacent to the turbine agree to such waiver.

GNU argues that the Board's rule conflicts with Ohio law.[2] Specifically, GNU argues that the language of R.C. 4906.20(B)(2)(c) that "all owners adjacent to the wind farm property" must waive the setback means that every owner adjacent to the wind farm project footprint must waive the setback, regardless of their proximity to the particular turbine setback at issue.[3]

GNU's arguments are without merit. First, GNU's proposals exceed the scope of this rulemaking. Second, GNU's proposed reading of R.C. 4906.20(B)(2)(c) is contrary to well-established legal principles and basic tenants of statutory interpretation and relies on dubious support. Finally, the Board's interpretation of R.C. 4906.20(B)(2)(c) is reasonable and in accordance with Ohio law.

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[2] GNU Comments, page 3.

[3] *Id.*

A) GNU's proposed deletion of O.A.C. 4906-4-08(C)(2)(d) exceeds the scope this rulemaking.

By Entry on Rehearing issued May 15, 2014, the Board adopted, as revised by the Entry of Rehearing O.A.C. Chapter 4906-4.[4] Among the adopted rules was O.A.C. Rule 4906-4-08(C)(2)(d), as described above. After the adoption of O.A.C. Chapter 4906-4, including O.A.C. Rule 4906-4-08(C)(2)(d), the Ohio General Assembly passed H.B. 483, which modified the setback requirements for turbines. H.B. 483 did not modify the setback waiver provision of R.C. 4906.20(B)(2)(c).

The Board reopened the adopted rules of O.A.C. Chapter 4906-4-08 for the limited purpose of incorporating the changes of H.B. 483:

> In order ***to comply with the new law***, Staff has ***proposed further revisions*** to Ohio Adm. Code 4906-4-08 . . . . At this time, the Board requests comments from interested persons concerning the attached ***revisions*** to Ohio Adm. Code 4906-4-08. . . . [T]he proposed revisions attached to this Entry are contained in Ohio Adm. Code 4906-4-08(C)(2)(b), with the new language shaded in gray and the deletions reflected with strikethrough.[5]

Emphasis added.

The Board's Entry is clear that this rulemaking is limited to the *revisions* made to O.A.C. Chapter 4906-4-08. There was no proposed revision to the setback waiver rule of O.A.C. 4906-4-08(C)(2)(d). Therefore, GNU's proposal to modify that rule exceeds the scope of this rulemaking.

[4] Case No. 12-1981-GE-ORD.

[5] Entry, Case No. 12-1981-GE-ORD (November 24, 2014), ¶¶ 6-8.

B) GNU's proposed interpretation of R.C. 4906.20(B)(2)(c) is contrary to basic tenants of statutory interpretation and well established legal principles.

a. GNU's proposed interpretation ignores the statutory purpose of R.C. 4906.20

GNU contends that its interpretation of R.C. 4906.20(B)(2)(c) reflects the plain meaning of the statute.[6] However, it is GNU's interpretation that tortures the language of this provision. It is a cardinal rule of statutory construction that a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes:

> Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.[7]

Moreover, "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[8]

To adopt GNU's proposed interpretation requires that R.C. 4906.20(B)(2)(c) be read in a vacuum and not in the context of the statute as a whole. Specifically, the phrase in the waiver provision requiring that "all owners of property adjacent to the wind farm property waive application of the setback" must be read in the context and purpose of R.C. 4906.20 as a whole. In part, the purpose of R.C. 4906.20 is to "prescribe a minimum setback for a wind turbine" from "the property line of the wind farm property."[9]

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[6] GNU Comments, page 3.

[7] *United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988).

[8] *United States v. Boisdoré's Heirs*, 49 U.S. (8 How.) 113, 122 (1850); *see also*, *Brotherhood of Locomotove Engineers v. Atchison, T. & S.F.R.R.*, 516 U.S. 152, 157 (1996).

[9] R.C. 4906.20(B)(2).

It is clear that setbacks apply to *a particular turbine* as it relates to *a particular point of a particular property*. The setbacks affect a particular parcel. A setback has no meaning as applied to property lines not adjacent to the relevant turbine. The setback waiver provision must be read in this context, and as such, the meaning is unambiguous: minimum setbacks from property lines and residences may be waived in the event that all owners of property adjacent to the particular turbine agree to such waiver.

In addition, properly reading the waiver provision as part of the statute as a whole makes clear the meaning of "wind farm property." As described above, GNU proposes an interpretation that conflates "wind farm property" to mean the entire wind farm project footprint. Under this interpretation, every adjacent property owner to the entire wind farm project footprint would have to waive the setback requirement pertaining to a single turbine.

As discussed in more detail below, defining the term "wind farm property" as used in R.C. 4906.20(B)(2)(c) to mean the entire wind farm project footprint leads to absurd results. It also ignores the use and meaning of terms throughout R.C. 4906.20 as a whole. When R.C. 4906.20 is read as a whole, it is clear that "wind farm property" refers to *a particular property* as it relates to *a particular turbine*, not the entire wind farm project footprint. Instead, R.C. 4906.20 uses the term "economically significant wind farm" when referring to a project as a whole.

Thus, GNU's proposed interpretation of the waiver provision is far from reflecting the plain meaning of the statutory language. GNU ignores R.C. 4906.20 as a whole in order to propose a warped interpretation of R.C. 4906.20(B)(2)(c).

b. GNU's proposed interpretation of R.C. 4906.20(B)(2)(c) leads to an absurd result.

It is a time-honored canon of statutory interpretation that if [a] statute can be so construed as to avoid absurdities, injustice, and great inconvenience, such construction must be given.[10] GNU's proposed interpretation of R.C. 4906.20(B)(2)(c) is the epitome of absurdity and should not be taken seriously.

The following hypothetical illustrates the absurd result of GNU's proposed interpretation of R.C. 4906.20(B)(2)(c):

> Landowner A is a non-leasing landowner adjacent to the wind farm project. Turbine 1 is placed 1,125 feet from the property line of Landowner A. Because Turbine 1's setback meets the required distance (1,125 ft.) from the property line, no waiver by Landowner A is needed, and Turbine 1 can be constructed regardless of Landowner A's objection. One mile (5,280 feet) away from Landowner A is Landowner B, another non-leasing landowner adjacent to the wind farm property. Landowner B wants to enter into a waiver agreement with the wind developer to allow Turbine 2 to be constructed 1,124 feet away from Landowner B's property line, encroaching upon the required setback. Under GNU's proposed interpretation, Landowner A would have the right to interfere with an agreement concerning Landowner B and Turbine 2, even though Turbine 2 is thousands of feet farther from Landowner A.

As discussed further below, other absurdities would flow from GNU's proposed interpretation of R.C. 4906.20(B)(2)(c). Thus, it must be rejected.

I. GNU's request should be denied because its requested setback waiver interpretation contradicts the legal principles of standing.

The interpretation of the setback waiver provision that GNU has requested the Board to adopt contradicts the very principles of standing under the U.S. Constitution. GNU's requested interpretation of the setback waiver would allow property owners unaffected by the placement of a wind turbine to challenge the enforcement of the setback waiver, although these property owners have suffered no *injury*.

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[10] *Martin v. State,* 70 Ohio St. 219 (1904).

The Supreme Court has declared that the constitutional minimum for standing contains the following three elements:

(1) *The plaintiff must have suffered an "injury in fact;"*[11] an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not "conjectural" or "hypothetical;"

(2) *There must be a causal connection between the injury and the conduct complained of*; the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and

(3) It must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[12]

In light of the elements of standing, a property owner wishing to challenge the enforcement of the setback waiver provision should, at the very least: (1) have to have suffered an injury in fact, (2) that was caused by the Board's enforcement or failure to properly enforce the setback waiver statute, and (3) have to have requested a remedy likely to redress the injury.

If the Board were to adopt GNU's proposed interpretation of the setback waiver provision, the Board would be giving unaffected property owners the right to challenge the enforcement of the setback waiver, although these property owners have suffered no "injury in fact."

The Board's current rule interpreting the setback wavier requires a wind farm developer to obtain consent from a property owner adjacent to the turbine in order to construct that turbine if it does not meet the setback distance. The Board's current rule simply does not require the developer to obtain a waiver from a property owner whose property is in no way situated near the wind turbine. In other words, the rule protects property owners who actually stand to be

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[11] The Ohio Legislature has defined the potential injury: a turbine that is not at least 1,125 feet away from an adjacent landowner's property line.

[12] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 557, 112 S. Ct. 2130, 2135, 119 L. Ed. 2d 351, 362, 1992 U.S. LEXIS 3543, 1, 60 U.S.L.W. 4495, 34 ERC (BNA) 1785, 92 Cal. Daily Op. Service 4985, 92 Daily Journal DAR 7876, 92 Daily Journal DAR 8967, 22 ELR 20913, 6 Fla. L. Weekly Fed. S 374 (U.S. 1992)

impacted by the presence of the wind turbine, without giving unaffected or *uninjured* property owners the power to enforce a setback that applies to a different property owner.

Moreover, under GNU's requested setback waiver interpretation, unaffected property owners would also fail to satisfy the second element of standing, "causation." If unaffected property owners have suffered no injury, in the first place, there can be *no causal connection* between the injury and the complained of conduct. In short, without an injury, there can be no cause of the injury.

Lastly, under GNU's requested interpretation of the setback waiver, unaffected property owners would also fail to satisfy the third element of standing, "redressability." Because the unaffected property owners would not have suffered an injury, the remedy that the property owners would seek would not likely redress their injury. In short, if there is no injury, there can be no reparations for the injury.

GNU's requested interpretation of the setback waiver provision contradicts the very notion of standing and should be rejected.

c. GNU's proposed interpretation of R.C. 4906.20(B)(2)(c) should be rejected because it offends longstanding notions of contracts law and makes for poor public policy.

GNU's proposed interpretation of the setback waiver should also be denied because it contradicts long-standing principles of contracts law and makes for bad public policy by enabling completely unaffected property owners to impede other parties' rights to contract. Indeed, the great irony of GNU's position is that although it purports to protect the rights of property owners, its proposed interpretation of the setback waiver provision unreasonably attacks the rights of property owners.

Our society places great importance on one's freedom to enter into contracts. It is a well-established principle that "parties have the right to make their own contracts; and, in general, when they are satisfied, that is sufficient, and others have no right to complain."[13] It has also been stated that the construction of a contractual agreement depends upon the "will of the parties between whom it is formed,"[14] not some third unaffected party. And, "[a]ny law, then, which enlarges, abridges, or in any manner changes… [the intention of the two contracting parties], when it is discovered, necessarily *impairs* the contract itself.[15]

The importance that society places on the freedom to contract cannot be understated. The value that we ascribe to the freedom to contract is even memorialized in the federal Constitution which prohibits states from passing laws that impair the obligations of contracts.[16] Moreover, the well-established legal doctrine of "tortious interference with a contract" essentially prohibits third parties from acting in ways that impede others from exercising their right to contract and provides adversely affected parties with a legal cause of action.[17] This legal doctrine has been adopted by Ohio and other jurisdictions, reinforcing the importance that our society places on the freedom to contract.

Because the freedom to contract is so well-regarded, protected by our nation's Constitution and embodied in a legal cause of action, it is unreasonable for GNU to ask the Board to adopt an

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[13] *Barreda v. Silsbee*, 62 U.S. 146, 170, 16 L. Ed. 86, 94, 1858 U.S. LEXIS 630, 45, 21(U.S. 1859).

[14] *Ogden v. Saunders*, 25 U.S. 213, 254, 6 L. Ed. 606, 620, 1827 U.S. LEXIS 394, 2 (U.S. 1827).

[15] *Id.*

[16] U.S. Constitution, Article I, Section 9, cl. 1.

[17] *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St. 3d 171, 175, 707 N.E.2d 853, 858, 1999 Ohio LEXIS 828, 1, 1999-Ohio-260 (Ohio 1999).

interpretation of the setback wavier contained in R.C. § 4906.20(B)(2)(c) that would impede the rights of other parties to enter into a contractual agreement.

In the present case, were the Board to adopt GNU's proposed interpretation of the setback waiver, wind developers and property owners' rights to enter into contracts, including the right of a landowner to contract to waive the setback distances applicable to his or her own property, would be impeded. Not only does such a request offend well-established principles of contract law, but such an outcome would be against public policy because it would enable unaffected landowners to interfere with the ability of the affected landowner and wind developer to enter into a contract. Thus, the adoption of GNU's interpretation would be contrary to longstanding legal principles and constitute poor public policy for the State of Ohio.

d. Ohio Senator William Seitz does not speak for the Ohio Legislature and his letter does not equate to the Legislature's intent.

The sole support cited by GNU in support of its absurd interpretation of R.C. 4906.20(B)(2)(c) is a letter from Ohio Senator William Seitz.[18] The esteemed Senator from Cincinnati is entitled to his opinion. However, he does not speak for the Ohio Legislature, and his opinion cannot be given weight as legislative intent.

If legislative intent is to be considered, then there are two primary sources upon which courts may rely. [19] The first is "statements" made by legislators in reports issued by committees on pieces of legislation, or review actual statements made on the assembly or senate floor. Committee reports are often meant to represent the consensus view of a committee or legislature. The second primary type of legislative history referenced by judges are past drafts of bills or the

[18] GNU Comments, page 3.

[19] *See*, Kenneth R. Dortzback, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 Marq. L. Rev. (1996).

sequence of development of legislation. Bills can go through numerous revisions where certain terms or ideas are either developed or eliminated.

The statement by Senator Seitz cited by GNU cannot not be treated as indicative of the legislature's intent concerning the waiver of setbacks requirements. The statements were not part of the floor debate, nor do they represent the findings or consensus of any committee. It is also noteworthy that R.C. 4906.20 has been amended at least three times since its enactment in 2008 but not once has the waiver language in 4906.20(B)(2)(c) been modified, despite the Board's interpretation of the waiver provision.[20] As such, GNU's reliance on Senator Seitz's letter is misplaced.

C) <u>The Board's rule is supported by Ohio law.</u>

Read in the context of R.C. 4906.20, the setback waiver provision of R.C. 4906.20(B)(2)(c) is unambiguous: minimum setbacks from property lines and residences may be waived in the event that all owners of property adjacent *to the turbine* agree to such waiver.[21]

Assuming, *arguendo*, that the setback waiver is improperly read in a vacuum, as GNU proposes, then there is ambiguity concerning the meaning of the term of "wind farm property" as used in R.C. 4906.20(B)(2)(c).[22] Specifically, if read in a vacuum, the term could refer to the entire wind farm project footprint, as proposed by GNU, or the term could refer to a particular property as it relates to a particular turbine, as the broader context and purpose of R.C. 4906.20 makes clear.

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[20] R.C. 4906.20 was amended in 2012, 2013, and 2014.

[21] *See supra* pp. 4-5.

[22] A statute is ambiguous when its language is subject to more than one reasonable interpretation. *Bernard v. Unemployment Comp. Review Comm'n*, 136 Ohio St. (2013).

In instances where the statutory language is ambiguous, Ohio law defers to the interpretation of the administrative agency, in this case, the OPSB. "[C]ourts must give due deference to an in administrative interpretation formulated by an agency that has accumulated substantial expertise, and to which the General Assembly has delegated the responsibility of implementing the legislative command."[23]

The Board's current rule interpreting the setback waiver provision is reasonable, and, in practice, it addresses GNU's purported underlying concern. As stated in GNU's initial comments, GNU is a non-profit corporation formed for the "purpose of promoting the safety and well-being of the community."[24] This is precisely what the Board's current setback waiver rule accomplishes.

The current rule ensures that property owners who stand to be affected by a wind turbine adjacent to their property that does not meet the statutory setback requirements have the ability to withhold their consent to a waiver. Equally important is that the current rule is not overly broad to allow property owners who are unaffected by the wind turbine to impede the ability of other landowners to freely make decisions affecting their own land. In short, the current rule is reasonable because it addresses GNU's purported interest in protecting landowners by protecting those individuals who stand to be directly affected by the setback distance of a particular wind turbine—nothing more, but nothing less.

II. CONCLUSION

For the reasons offered herein, the Board should reject GNU's proposed interpretation of R.C. 4906.20.

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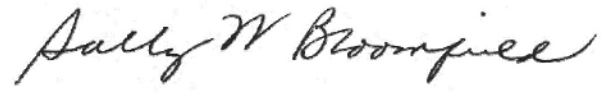
[23] *Bernard v. Unemployment Comp. Review Comm'n*, 136 Ohio St. 3d 264 (Ohio 2013).
[24] GNU's Initial Comments, p. 1.

Respectfully submitted on behalf of
AMERICAN WIND ENERGY ASSOCIATION and
GREENWICH WINDPARK, LLC



Sally W. Bloomfield (No. 0022038)
Dylan F. Borchers (No. 0090690)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-2368
(614) 227-4914
Facsimile: (614) 227-2390
E-mail: sbloomfield@bricker.com
dborchers@bricker.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Comments was served upon the parties of record listed below this 13th day of February *via* electronic mail.

Sally W. Bloomfield

Michael J. Settineri
Gretchen L Petrucci
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008

Attorneys for EverPower Wind Holdings, Inc.

Jeanne W. Kingery
Duke Energy Ohio, Inc.
139 E. Fourth Street, 1303-Main
P.O. Box 961
Cincinnati, OH 45201-0960
Jeanne.kingery@duke-energy.com

Erin C. Miller
Matthew J. Satterwhite
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
ecmiller1@aep.com
mjsatterwhite@aep.com

Bill Wright
Office of the Attorney General of Ohio
Public Utilities Section
180 East Broad Street
Columbus, OH 43215
william.wright@puc.state.oh.us

Christopher A. Walker
Van Kley & Walker, LLC
137 N. Main Street, Suite 316
Dayton, OH 45419
cwalker@vankleywalker.com

Samuel C. Randazzo
Scott E. Elisar
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215
sam@mwncmh.com
selisar@mwncmh.com

Justin Vickers
Environmental Law & Policy Center
1207 Grandview Avenue, Suite 201
Columbus, OH 43212
jvickers@elpc.org

Christopher R. Schraff
Robert J. Schmidt, Jr.
Porter, Wright, Morris & Arthur LLP
41 South High Street
Columbus, OH 43215
cschraff@porterwright.com
rschmidt@porterwright.com

Anne M. Juterbock
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
ajuterbock@firstenergycorp.com

brakes@watchtv.net

msbuettner@yahoo.com

Summary: Comments Reply comments of the American Wind Energy Association and Greenwich Windpark LLC electronically filed by Teresa Orahood on behalf of Sally Bloomfield

ATTACHMENT B

OHIO POWER SITING BOARD
STAKEHOLDER COLLABORATIVE ISSUES
SUBMISSION BY THE MID-ATLANTIC RENEWABLE ENERGY COALITION
February 11, 2016, Case No. 12-1981-GE-BRO

The Mid-Atlantic Renewable Energy Coalition submits these comments on behalf of Apex Clean Energy, EDP Renewables, EverPower Wind Holdings, Inc., Iberdrola Renewables, LLC, Windlab Developments, USA, Ltd; collectively "MAREC."

This information will follow the items set forth in the Second Finding and Order , Finding 18, issued on November 12, 2015 in Case No. 12-1981-GE-BRO.

a) UNU states that reasonable regulations should be outlined in the rules regarding topics such as wildlife regulation, ice throw, reconstruction, and enlargement.
   - *The current rules cover wildlife regulation, ice throw.*
   - *Applicants are required to evaluate and describe potential impacts and plans to minimize, if warranted.*
   - *The OPSB Staff consults with both the Ohio Department of Natural Resources and U.S. Fish and Wildlife Service before recommending approval of a project*
   - *UNU's suggestion that the rules as currently drafted do not constitute "reasonable regulations" are unfounded and unsupported.*

b) UNU asks that applicants be required to express parcel information, inclusive of modeling inputs, in a manner that can be easily interpreted by members of the public.
   - *Developers are required to submit an enormous amount of detailed data, and do appreciate the challenges of interpreting all of that data. Not knowing particular interests of specific parties, it is extremely difficult to provide data in a form that is easily accessible to all parties for all purposes.*
   - *Developers are generally very responsive to specific requests for information, and can provide the specific data formally in response to data requests, or informally in response to general inquiries.*
   - *MAREC believes the rules are currently constituted to provide ample information as well as a process whereby more specific data can be obtained by interested parties.*

c) **Ohio Adm. Code 4996-4-08(A)(1)(c)** requires an applicant to provide the generation equipment manufacturer's safety standards, including a complete copy of the manufacturers' safety manual or similar document and any recommended setbacks.

   UNU proposes this rule be expanded to include not only manufacturer recommended setbacks, but also other manufacturer recommendations regarding safety, health, or turbine siting.

   - *The rules require the submission of manufacturers' safety manuals.*
   - *The proposal adds the requirement that any setback recommendations from the manufacturer also be provided. To the extent recommendations on safety, health or turbine siting are available, we believe that would be included in what would be provided in the current rule.*

- *MAREC believes that the current rule allows for consideration of all turbine manufacturer recommendations and standards, should they exist, as requested by UNU. No revisions to the current rule are warranted.*

d) **Ohio Adm. Code 4906-4-08(A)(3)(b)(i)** requires an applicant to describe the operational noise levels expected at the nearest property boundary and cumulative operational noise levels at the property boundary for each nonparticipating property adjacent to or within the project area under both day and nighttime operations.

UNU proposes that the noise level of wind-powered facilities not exceed five decibels (dB) above the background sound level at nonparticipating properties and measurements should be taken at nonparticipating properties, and such measurements would be based on the L90 statistical standard.

In addition, UNU advocates that nonparticipating residents and landowners should not experience noise levels greater than 35 dBA and 50 dBC, and these standards should apply at property lines of nonparticipating residents and not merely neighboring residents.

UNU asserts that, to properly assess the cumulative impact of multiple facilities, the impact from both existing and potentially existing wind-powered facilities should be considered. According to UNU, this suggestion should apply to noise impacts, visual impacts, shadow flicker, and other related consequences.

- *Wind turbine sound issues have long been debated. The issues have been presented and minutely examined on the project, local, state, federal and international levels. Extensive studies have been and are being carried out and the OPSB Board has access to all of this information. In particular, recent large studies have been completed that continue to support the same basic conclusion: there is no evidence of a link between wind turbine noise and physical illness or chronic conditions. For the Board's consideration, we provide the following documents:*
  1) *In 2014, Health Canada and Statistics Canada published the most comprehensive multi-disciplinary field study to-date[1]. The study found no connection between wind turbine noise and an array of studied health conditions.*
     This report was published in a peer-reviewed journal.

  2) *In 2014, the Massachusetts Institute of Technology completed an extensive review of the scientific literature on wind turbine sound and health. The report found that among the varied and complex factors that are associated with annoyance, sound from wind turbines plays a minor role[2].*
     This report was published in a peer-reviewed journal

[1] http://www.hc-sc.gc.ca/ewh-semt/noise-bruit/turbine-eoliennes/summary-resume-eng.php
[2] http://journals.lww.com/joem/Fulltext/2014/11000/Wind_Turbines_and_Health__A_Critical_Review_of_the.9.aspx

3) *In January 2016, Health Canada published an article on the effects of wind turbine noise on sleep. The study found no support for an association between exposure to wind turbine noise up to 46 dBA and an increased prevalence of disturbed sleep*[3].
This report was published in a peer-reviewed journal.

4) *The American Wind Energy Association (AWEA) recently submitted a summary of wind turbine noise related research to the Brown County Health Department in Wisconsin. That summary, with a host of study references, is attached.*

- *Shadow flicker, visual impacts, and other siting considerations are addressed in the current application process and considered by the OPSB Staff.*
- *The track record to-date of the State's operating wind farms suggests OPSB Staff has capably regulated this matter.*
- *The OPSB has evaluated sound issues in each case. For all generation facilities (regardless of type), the OPSB evaluates the sound based on a number of factors and as a result a specific rule on sound standards singling out wind energy from other sources is unnecessary and unwarranted.*
- *Selecting often remote and unoccupied property lines as measuring points for a significant siting criterion is unwarranted. As with any form of land-use on an adjacent property, the property owner should discuss concerns of future uses on their land with a developer on the adjacent parcel and determine if there is a need and opportunity to make adjustments to avoid conflicts.*
- *Cumulative noise modeling due to multiple wind farms is appropriate, with a common-sense seniority approach for facilities, and is already required under the existing rules. For example, the Buckeye II was proposed to be located immediately adjacent to the Buckeye Wind Farm. Developers presented, as part of the application, a report that included the modeled sound levels throughout the project that included sound emanating from BOTH Buckeye and Buckeye II turbines.*
- *The need for a dBC standard has also been considered in the context of OPSB certificate applications, and – considering extensive expert input and analysis – the Board has repeatedly found that restrictions on dBC levels are not warranted.*
- *In particular, the OPSB should not adopt a standard that has been rejected by the OPSB as well as the Supreme Court of Ohio on multiple previous occasions.*
- *Shadow flicker projections and experience demonstrate that 10x rotor diameter is an accurate limit for flicker projection and with wind industry best practices of avoiding competitive turbines often by well more than 10x rotor diameter, cumulative impact assessments for shadow flicker are not necessary.*

[3] http://journalsleep.org/ViewAbstract.aspx?pid=30394

- *Because turbine spacing and concentration is a function of land constraints (including setbacks) and technical optimization (designers need to avoid "wake" effects), cumulative impact evaluations are largely related to the scale of impact, rather than the type of impact. Like shadow flicker and sound, cumulative visual impacts are also readily available and are provided under the current rules (again, see Buckeye II case).*
- *We believe that the adopted rule as currently written is adequate for this section.*

e) **Ohio Adm. Code 4906-4-08(B)(l)(c)** requires an applicant to provide results of a literature survey of plant and animal life within at least one-fourth mile of the project area boundary, including results of aquatic and terrestrial plant and animal species that are of commercial or recreational value, or species that are designated as endangered or threatened.

UNU argues that this would be inadequate for mobile endangered species inclusive of the Indiana bat that may move in and out of the area; therefore, a broader range for a literature survey should be adopted.

- *With respect to mobile species, the literature search does consider the mobility of species relative to a given project area, whether the search area includes suitable habitat and is within the ranges of threatened or endangered species. In these instances, the literature search adequately alerts developers and agencies about the potential need for additional surveys and studies.*
- *Wind energy development is subject to numerous and extensive federal and state wildlife regulations, which are administered by the U.S. Fish and Wildlife Service and Ohio Department of Natural Resources.*
- *Applicants are required to comply with the wildlife survey standards set by these agencies, present the results of studies, and coordinate with them throughout the development process. These studies and the comments by the state and federal agencies are submitted to the OPSB for consideration during the permitting process.*
- *These agencies have the expertise which the OPSB relies on and incorporates in its investigation and it is unnecessary to add additional specificity to the regulations when the Staff presently consults these agencies.*
- *Further, the Ohio Department of Natural Resources is represented on the OPSB as a Board member.*
- *The foregoing aside, duplicative regulation over the same subject matter is a violation of the Governor's Common Sense Initiative.*
- *We believe that the adopted rule as currently written is adequate for this section.*

f) **Ohio Adm. Code 4906-4-08(B)(1)(d)** requires an applicant to provide results of field surveys of plant and animal species identified in the literature survey.

UNU proposes that these field studies be required for all endangered species identified in the

survey or when the applicant has knowledge of an endangered species within a specified distance of the project area.

- *The comments enumerated above with respect to Ohio Adm. Code 4906-4-08 (B) (1) (c) concerning the expertise of U.S. Fish and Wildlife Service and Ohio Department of Natural Resources and the Common Sense Initiative apply to this issue as well.*
- *We believe that the adopted rule as currently written is adequate for this section.*

g) **Ohio Adm. Code 4906-4-08(B)(1)(e)** requires an applicant to provide a summary of any additional studies that have been made by or for the applicant addressing the ecological impact of the proposed facility.

UNU proposes the applicant be required to submit copies of all studies that the developer has knowledge of and access to even if they were not completed specifically for the developer.

- *The OPSB rules require that the applicant provide all studies they have conducted. To the extent that applicants do not provide studies or data that support the application, the OPSB Staff can recommend denial.*
- *This recommendation is overly broad and would not add to information about the specific application.*
- *This position could extend to studies about the positive environmental benefits of a wind farm including, for example, documentation of the environmental risks of CO_2 and other pollutants, which are voluminous.*
- *"All" studies would be unreasonably voluminous and practicably impossible to amass.*
- *Furthermore, there is no objective way to determine when "all" studies in existence have been collected and submitted.*
- *This suggestion improperly treats all studies, even outdated, irrelevant, or otherwise inaccurate as meaningful.*
- *We believe that the adopted rule as currently written is adequate for this section.*

h) **Ohio Adm. Code 4906-4-08(B)(2)(b)(vii)** requires an applicant to provide avoidance measures for major species and their habitat.

UNU proposes that the term "major species" be defined in the rules to, at a minimum; include species of commercial or recreational value or an endangered or threatened species.

- *The comments enumerated above with respect to Ohio Adm. Code 4906-4-08 (B) (1) (c) concerning the expertise of U.S. Fish and Wildlife and Ohio Department of Natural Resources and the Common Sense Initiative apply to this issue as well.*
- *The Ohio Department of Natural Resources has a rule pertaining to designation of species and UNU should not be adding new qualifiers to the Ohio Department of Natural Resources' designations (OAC Rule 1501:18-1-02).*

- *We believe that the adopted rule as currently written is adequate for this section.*

i) **Ohio Adm. Code 4906-4-08(B)(3)(c)** requires an applicant to describe any plans for post construction monitoring of wildlife impacts.

UNU proposes an applicant be required to specify measures for mitigation and construction avoidance regarding these species.

In addition, UNU proposes that mitigation be mandatory and all monitoring be done by state employees or third-party contractors working on behalf of the OPSB with the costs to be paid by the certificate holder.

- *Existing rules require applicants to set forth mitigation and avoidance measures in their applications.*
- *Post-construction avoidance and mitigation are governed by the requirements of the Ohio Department of Natural Resources.*
- *The comments enumerated above with respect to Ohio Adm. Code 4906-4-08 (B) (1) (c) concerning the expertise of U.S. Fish and Wildlife and the Ohio Department of Natural Resources apply to this issue as well.*
- *U.S. Fish and Wildlife Service and the Ohio Department of Natural Resources review all studies by 3rd party consultants employed by developers or applicants, and comment on them. UNU suggests no valid reason to change this practice, and to do so for wind energy and no other energy source or form of development would be arbitrary and capricious.*
- *The OPSB regularly requires the credentials of environmental specialists in its conditions to a certificate in order to assure competence and objectivity. This practice addresses UNU's concerns.*
- *We believe that the adopted rule as currently written is adequate for this section.*

j) **Ohio Adm. Code 4906-4-08(C)(1)(a)** requires an applicant to provide a map of at least 1:24,000 scale showing land use, structures, and incorporated areas and population centers within one-mile of the project area boundary.

UNU notes that the new rule requires submission of a map with information inclusive of prevailing land use; however, the existing rule requires a five mile mapping area. UNU requests that the five mile requirement of the existing rule be retained.

- *The five mile requirement in the previous rule was untested when it was implemented. It has become apparent through the implementation of the rule that showing the prevailing land use and other items is not necessary for a five mile radius from a wind farm.*
- *For the reason noted previously, MAREC agrees with the adopted rule.*

k) **Ohio Adm. Code 4906-4-08(C)(l)(b)(i)** requires an applicant to provide, for the types of structures identified on the map in paragraph (C)(1)(a) of this rule, a table showing all structures within 1,000 feet of the generation equipment or wind turbine, the distance between the structure and the equipment or nearest wind turbine.

UNU asserts the distance to nearby structures is no longer relevant; rather, the rule should require specific distances from turbines to adjacent properties and the nearest public road.

- *The information UNU requests is readily available via the many scaled maps included in applications.*
- *We believe that the adopted rule as currently written is adequate for this section.*

l) **Ohio Adm. Code 4906-4-08(C)(2)** requires an applicant to provide a map of at least 1:24,000 scale showing the proposed facility, habitable residences, and parcel boundaries of all parcels within a half-mile of the project area. The map is to indicate, for each parcel, whether the parcel is being leased by the applicant for the proposed facility. In addition, it is to include the setbacks for wind turbines in relation to property lines, habitable residential structures, electric transmission lines, gas pipelines, and state and federal highways.

UNU supports the proposal to require applicants to map all parcels leased by the applicant for the facility. In addition, UNU requests that the applicant indicate all land that it has leased for wind development given that wind projects develop in stages and having knowledge of all leased properties for wind development would assist in assessing any potential impact.

EverPower states that, because the location of many low pressure distribution systems are generally not available from utilities and mapping these pipelines would be extremely difficult, the gas pipeline setback should be modified.

At a minimum, EverPower states the rule should be amended so that "gas pipelines" is changed to "high pressure gas transmission pipelines," due to the difficulty in mapping the gas systems.

- *UNU's suggestion is overly broad and is not relevant because additional leased parcels outside of a wind farm application are not up for consideration for any wind energy development at that time and thus the suggestion should not be considered.*
- *MAREC agrees that the term "gas pipeline" should be modified to state "high pressure gas transmission pipelines" for the reasons set forth in EverPower's comments.*

m) **Ohio Adm. Code 4906-4-08(C)(2)(c)** requires an applicant to include on a map the setbacks for wind turbines. The setbacks shall be no less than 1.1 times the turbine height to electric transmission lines, gas pipelines, hazardous liquid pipelines, or state or federal highways. EverPower asserts that mandatory setbacks for gas pipelines and hazardous liquid pipelines are not necessary due to the extremely low likelihood that a turbine collapse could rupture a line.

If this is not removed, EverPower suggests that "gas pipeline" at least be changed to "gas transmission pipelines."

UNU counters EverPower's assertion that the General Assembly has not granted the Board "express authority" to establish regulatory setbacks from pipelines, transmission lines, and roadways, stating R.C. 4906.20(B)(2) clearly allows the Board to enact reasonable rules regarding wind turbines.

- *MAREC agrees that the term "gas pipeline" should be modified to state "high pressure gas transmission pipelines" for the reasons set forth in EverPower's comments.*

n) **Ohio Adm. Code 4906-4-08(C)(2)(d)** provides that minimum setbacks from property lines and residences may be waived in the event that all owners of property adjacent to the turbine agree to such waiver.

Greenwich Neighbors United (GNU) believes the proposed rules, which assert a wind farm developer can avoid the setback requirement by securing a waiver from property owners adjacent to the turbine, is not in alignment with the both the letter and spirit of Ohio law. According to GNU, the rules do not satisfy HB 483 and R.C. 4906.20(B)(2)(c), which requires the Board establish the procedure by which a proper waiver may be secured.

AWEA and Greenwich counter the notion that HB 483 modified the setback waiver provision of R.C. 4906.20(B)(2)(c). They assert this rulemaking is limited to revisions made to Ohio Adm. Code 4906-4-08 and that there was no proposed revision to the setback waiver rule of Ohio Adm. Code 4906-4-08(C)(2)(d).

AWEA and Greenwich also contend that GNU does not look at R.C. 4906.20(B)(2)(c) as a "harmonious whole" and that GNU's interpretation would only be possible if the statute was read in a vacuum.

AWEA and Greenwich believe the proper interpretation is "minimum setbacks from property lines and residences may be waived in the event that all owners of property adjacent to the particular turbine agree to such waiver." In addition, they assert the term wind farm property refers to a particular property and not the entire wind farm footprint.

AWEA and Greenwich believe the Board's interpretation of the waiver provision is reasonable, given it protects rights of both landowners who want turbines and adjacent landowners who may not.

- *MAREC agrees with AWEA and Greenwich on this provision as stated in their Reply Comments submitted on February 15, 2015.*
- *The exact placement of a wind turbine can only be determined after complying with myriad siting criteria and most specifically, compliance with setback requirements from features like public roads, property lines of non-participating properties and, as described below, features such as high pressure gas transmission lines and electric transmission lines. To the extent a wind turbine is to be placed within a specific setback "zone" from a specific project area feature, for example, a parcel of*

land, the holder of the property rights of that specific parcel must consent to its placement, or grant a waiver. If such a waiver is granted, the parcel is said to be involved with the placement of that turbine. If the turbine is not within the setback zone of adjacent parcels, they are not involved.

- *Property owners who are adjacent to the turbine but whose properties are outside of the setback zone are not involved.*
- *Assuming the setbacks are observed, there is no setback for the adjacent property owner to waive.*
- *Only involved property owners with setbacks that are being "infringed" should be required to sign or approve waivers. Adjacent and "un-infringed" or un-involved landowners do not need to agree to a waiver given by another property owner.*
- *Requiring a developer to obtain agreements for waivers from uninvolved property owners offends long standing notions of contract law and makes for poor public policy by allowing uninvolved property owners to interfere with other parties' rights to contract.*
- *Property owners who are uninvolved with a wind turbine's placement should not interfere with the ability of other landowners to freely make decisions affecting their own lands, particularly when all other aspects of the placement of those turbines are carefully considered as described above and elsewhere to take into account neighboring, uninvolved landowners.*
- *Wind developers and property owners have a right to enter into contracts, including the right of a landowner to waive the setback distances applicable to his or her own property without receiving permission from uninvolved adjacent property owners.*
- *Allowing adjacent property owners who are not within the setback distance impedes this right.*
- *We believe that the adopted rule as currently written is adequate for this section. However, in order to clarify the regulatory intent and the property rights of landowners, AWEA would support a change that would state that minimum setbacks from property lines and residences may be waived in the event that all <u>involved</u> owners of property adjacent to the turbine agree to such waiver.*

o) **Ohio Adm. Code 4906-4-08(D)(4)** requires an applicant to evaluate the visual impact of the proposed facility within at least a five-mile radius from the project area.

UNU notes that the rule does not provide recommendations for the number of vantage points for visual simulations. Thus, UNU proposes that north/south/east/west views be required for at least one location per square mile within one mile of the proposed project area.

- *MAREC believes the adopted rule is appropriate and is consistent with the old rule.*
- *To the extent that an applicant submits an inadequate visual impact study, the OPSB Staff has the ability to demand a better study, and it has used this authority in the past.*

- *Analyses of the visual impacts are performed by 3rd party professionals that employ commonly accepted methodologies. The UNU proposal is not based on any stated deficiency to these approaches and should be rejected.*

p) **Ohio Adm. Code 4906-4-08(E)(2)(c)(ii)** requires an applicant to provide a description of mitigation procedures to be utilized by the applicant during construction, operation, and maintenance to reduce impacts to agricultural land, structures, and practices that will achieve timely repair of damaged field tile systems to at least original conditions, at the applicant's expense.

This rule mandates repair of damaged field tile systems at the "applicant's expense" and EverPower acknowledges that the applicant should have this responsibility.

However, due to a variety of potential landowner and lease arrangements that may result in the landowner agreeing to do the repair, EverPower proposes that "applicant's expense" be changed to "in a manner agreeable to the landowner."

UNU disagrees with EverPower's recommendation, stating that there is no guarantee that a repair agreement between a wind development and landowner would protect those interests of neighboring landowners whose land may be negatively impacted by wind power.

- *MAREC agrees with EverPower's comments.*
- *UNU cannot show that there is a need for a drain tile "fix" that affects neighboring properties. Real world experience has not revealed the necessity for additional regulation.*

Summary: Comments of Mid-Atlantic Renewable Energy Coalition electronically filed by Teresa Orahood on behalf of Sally Bloomfield

Summary: Reply Comments of 6011 Greenwich Windpark, LLC electronically filed by Teresa Orahood on behalf of Sally W. Bloomfield