

**BEFORE THE OHIO POWER SITING BOARD**

<b>In the Matter of the Ohio Power Siting</b>	)	
<b>Board's Review of Rule 4906-4-08 of the</b>	)	<b>Case No. 16-1109-GE-BRO</b>
<b>Ohio Administrative Code.</b>	)	

**COMMENTS BY BLACK FORK WIND ENERGY, LLC**

Black Fork Wind Energy, LLC ("Black Fork") as an interested party and wind farm developer in Ohio submits these comments pursuant to the Ohio Power Siting Board's January 18, 2018 entry. That entry requested comments on the inclusion of the word "all" in Rule 4906-4-08(C)(3) so that the rule would state "Setback waivers. The owner(s) of all property adjacent to any wind farm property may waive the minimum setback requirements by signing a waiver of their rights." Black Fork submits to the Board that the word "all" should not be included in the rule as it would contradict the language of R.C. 4906.20(B)(2)(c) and create ambiguity.

R.C. 4906.20(B)(2)(c) unambiguously provides that all owners of a property must sign a setback waiver – not just one of the owners. The statute states "[t]he 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." R.C. 4906.20(B)(2)(c) (emphasis added). In other words, a developer cannot obtain a setback waiver from one owner of a property without obtaining the consent of all other owners of the property. For example, both spouses as joint owners of real estate would need to execute the setback waiver, not just one spouse.

The Board has previously held that the statutory language used in 4906.20(B)(2)(c) is unambiguous. *See In re Rules to Implement Certification Requirements for Electric Generating*

*Wind Facilities*, Case No. 08-1024-EL-ORD, Entry on Rehearing at 5-6 (Jan. 26, 2009) (interpreting 4906.20(B)(2). With unambiguous language, a logical and practical application of the statute is that a setback waiver is only valid if signed by all owners of a property. See R.C. 1.47(C) (“[i]n enacting a statute, it is presumed that ... [a] just and reasonable result is intended”). An illogical interpretation would be that all owners of all properties adjacent to a wind turbine property must sign setback waivers regardless whether their properties are within or beyond the applicable turbine setback. See *State ex rel. Dispatch Printing Co. v. Wells*, 18 Ohio St.3d 382, 384, (1985) (cardinal rule of statutory construction that a statute should not be interpreted to yield an absurd result). Indeed, to reach that illogical interpretation would require an impermissible rewrite by the Board of the statutory language to state that the owners of all properties adjacent to the wind farm property must sign a setback waiver. See *In re Collier*, 85 Ohio App.3d 232, 236-237 (1993) (where statute clear and unambiguous, agency must give effect to the words in the statute without deleting words used or inserting words not used in the statute).

Given that the intent and purpose of the statute is clear, the Board should ensure its rules do not create ambiguity. The insertion of “all” into the rule would not only contradict the statute but create ambiguity. The better result is to keep the Board’s original rule language that stated “Setback waivers. The owner(s) of property adjacent to any wind farm property may waive the minimum setback requirements by signing a waiver of their rights.” This language avoids ambiguity and is consistent with the Board’s long standing application of the statutory language on setback waivers.

The Board may also wish to consider language that leaves no doubt as to the Board’s interpretation of the statute. For example, Rule 4906-4-08(C)(3) could be revised to read

“Setback waivers. The owner(s) of a property adjacent to any wind farm property may waive the minimum setback requirements as to the owner(s)’s property by signing a waiver of the minimum setback requirements.” This language would make clear the Board’s interpretation of the statute, an interpretation that the Supreme Court will defer to so long as it is not unreasonable. *See State ex rel. Clark v. Great Lakes Constr. Co.*, 99 Ohio St.3d 320, 2003-Ohio-3802, ¶ 10 (“...fundamental tenet of administrative law that an agency's interpretation of a statute that it has the duty to enforce will not be overturned unless the interpretation is unreasonable.”)

Black Fork, appreciates the opportunity to comment on this issue and respectfully requests that the Board not revise the rule as proposed in the January 18, 2018 Entry.

Respectfully submitted,

/s/ Michael J. Settineri

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## **CERTIFICATE OF SERVICE**

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Summary: Comments electronically filed by Mr. Michael J. Settineri on behalf of Black Fork Wind Energy LLC