

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of an Application of to the	:
Ohio State University for a Certificate	:
of Environmental Compatibility and	:
Public Need to Construct a Combined	:
Heat and Power Facility in Franklin	:
County, Ohio	:

---

**REPLY BRIEF  
SUBMITTED ON BEHALF OF THE STAFF OF  
THE OHIO POWER SITING BOARD**

---

**Dave Yost**  
Ohio Attorney General

**Thomas G. Lindgren** (00392101)  
**Werner L. Margard** (0024858)  
Assistant Attorneys General  
Public Utilities Section  
30 E. Broad St., 16<sup>th</sup> Floor  
Columbus, OH 43215  
T: (614) 466-4395  
F: (614) 644-8764  
[thomas.lindgren@ohioattorneygeneral.gov](mailto:thomas.lindgren@ohioattorneygeneral.gov)  
[werner.margard@ohioattorneygeneral.gov](mailto:werner.margard@ohioattorneygeneral.gov)

**On Behalf of the Staff of the Ohio Power  
Siting Board**

**Brian A. Ball** (0078285)  
Assistant Attorney General  
Environmental Enforcement Section  
2045 Morse Road, Building A-3  
Columbus, Ohio 43229  
T: (614) 265.6804  
F: (614) 268.8871  
[brian.ball@ohioattorneygeneral.gov](mailto:brian.ball@ohioattorneygeneral.gov)

**On Behalf of the Ohio Department of  
Natural Resources**

**August 19, 2020**

## TABLE OF CONTENTS

### Page

I.	Introduction .....	1
II.	Sierra Club’s arguments on environmental impact are irrelevant to this proceeding. .....	1
III.	Sierra Club’s arguments concerning alternative technologies are irrelevant to this proceeding. ....	5
IV.	Conclusion.....	6

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of an Application of to the	:	
Ohio State University for a Certificate	:	Case No. 19-1641-EL-BGN
of Environmental Compatibility and	:	
Public Need to Construct a Combined	:	
Heat and Power Facility in Franklin	:	
County, Ohio	:	

---

**REPLY BRIEF  
SUBMITTED ON BEHALF OF THE STAFF OF  
THE OHIO POWER SITING BOARD**

---

**I. Introduction**

Pursuant to the procedural schedule established by the administrative law judge at the conclusion of the hearing, The Ohio State University (OSU or Applicant), Sierra Club, and Staff filed initial briefs on August 7, 2020. In this reply brief, Staff responds to certain arguments made by Sierra Club.

**II. Sierra Club’s arguments on environmental impact are irrelevant to this proceeding.**

Sierra Club airs its environmental grievances in the wrong forum. For starters, the group questions whether standards for nitrogen oxides (“NOx”) and fine particulate matter (“PM2.5”) protect the public health of Columbus residents. S.C.Br. at 20. But Sierra Club must direct that concern to U.S. EPA, not this Board. U.S. EPA, and only U.S. EPA, “establish[es] national ambient air quality standards (NAAQS) for pollutants” such as NOx and PM2.5. *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 498,

134 S.Ct. 1584, 188 L.Ed.2d 775 (2014) *citing to* 42 U.S.C. 7408, 7409; *see also* *Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1136 (9th Cir.2013) (six pollutants for which U.S. EPA sets NAAQS include NO<sub>x</sub> and PM<sub>2.5</sub>). And U.S. EPA sets those national standards “at levels that *will protect public health.*” *EME Homer City Generation*, 572 U.S. at 498 (emphasis added). As Congress put it, “the attainment and maintenance [of the national standards] are requisite to protect the public health with an adequate margin of safety.” *Whitman v. American Trucking Assns.*, 531 U.S. 457, 465, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) *quoting* 42 U.S.C. 7409(b)(1) (quotation marks omitted).

Once U.S. EPA imposes the health-based standards, Ohio, or more specifically, Ohio EPA, works to attain the national standards. *State ex rel. Ohio AG v. Shelly Holding Co.*, 135 Ohio St.3d 65, 2012-Ohio-5700, 984 N.E.2d 996, ¶ 16; *see* Ohio EPA’s State Implementation Plan program, <https://www.epa.state.oh.us/dapc/#118716021-state-implementation-plan> (last viewed Aug. 14, 2020); *see also* U.S. EPA’s approval of Ohio EPA’s program, <https://www.epa.gov/sips-oh/approved-air-quality-implementation-plans-ohio> (last viewed Aug. 14, 2020).

Because of this split in federal-state authority, Sierra Club’s concerns for PM<sub>2.5</sub> and NO<sub>x</sub> standards belong in a U.S. EPA hearing room, not an Ohio one. That is not to say that Ohio disagrees with Sierra Club’s general claim that more pollution (e.g. more particulate matter) is worse than less pollution. *See* S.C.Br. at 20. The purpose of Ohio’s Air Pollution Control Law is “[t]o protect and enhance the quality of the state’s air resources so as to promote the public health, welfare, economic vitality, and productive

capacity of the people of the state.” R.C. 3704.02. But only U.S. EPA is in a position to hear Sierra Club’s next claim: Increases in particulate matter “remain[ing] below” the national standard “will cause more adverse cardiovascular events.” S.C.Br. at 20. That argument challenges the effectiveness of U.S. EPA’s standard and has nothing to do with Ohio’s duty to attain that standard. Thus, Sierra Club should offer its opinions to U.S. EPA, not Ohio, and certainly not this Board.

Sierra Club next attacks OSU’s modeling, and again, it picks the wrong forum to do so. Ohio EPA is the state agency that reviews modeling to determine whether a new major stationary source, such as OSU’s proposed facility, “would not cause or contribute to air pollution in violation of” national standards or other parameters. Ohio Adm.Code 3745-31-16(B). Ohio EPA reviews modeling for this purpose, known formally as prevention of significant deterioration, through Ohio EPA’s permitting of the major stationary source. *Id.*; Ohio Adm.Code 3745-31-01(E). However, when “[t]he major stationary source would be or is a ... non-profit educational institution,” Ohio EPA’s Director, “at the [D]irector’s discretion, may exempt” the major stationary source from modeling and other conditions required for an Ohio EPA permit. Ohio Am. Code 3745-31-13(D)(1). And here, Ohio EPA’s Director used her discretion to exempt OSU’s proposed facility from the modeling requirements for prevention of significant deterioration. Proceedings Volume I at 270:6-17.

If Sierra Club disagreed with the Director’s exemption, it could have challenged the final permit, issued October 25, 2019, by the only means available—an appeal to the Environmental Review Appeals Commission. R.C. 3745.04(B) (“The environmental

review appeals commission has exclusive original jurisdiction over any matter that may, under this section, be brought before it” including an appeal of a final Ohio EPA permit). Sierra Club did not appeal or even comment on the permit.

Although exempt from major-stationary-source modeling requirements, OSU still performed incremental-impact modeling as a part of the Ohio EPA permitting process. Proceedings Volume I at 148:16-25, 149:1-2. But again, Sierra Club did not challenge that modeling and the Ohio EPA permit before the Ohio Environmental Review Appeals Commission. Instead, Sierra Club persuaded OSU to conduct additional modeling only to question OSU’s methods. *Id.* at 149:2-9; S.C.Br. at 17. Whether the modeling location was close enough to the Olentangy River, central campus, or State Route 315 to capture the meteorological conditions of the proposed site, these issues with the additional modeling were not even before Ohio EPA. *See* S.C.Br. at 21-22. The same is true for any missing scenarios in the modeling, like operating with less than 75% load, which Sierra Club claims OSU failed to model. *See id.* Sierra Club simply failed to challenge the modeling as required by Ohio law.

Finally, Sierra Club cannot point to an Ohio EPA rule that requires review of the alleged impacts from natural-gas extraction for permitting purposes. Proceedings Volume I at 329:18-25, 330:1-25, 331:1-11. That is because no such rule exists. Yet, Sierra Club spends an entire subsection of its brief on this very issue. S.C.Br. at 22-23. Like its challenges to PM<sub>2.5</sub> and NO<sub>x</sub> standards and the modeling in this case, Sierra Club has raised concerns for a different forum, not this Board

### **III. Sierra Club’s arguments concerning alternative technologies are irrelevant to this proceeding.**

Sierra’s Club avers that, ultimately, the OPSB should not adopt the Staff Report’s conclusion with respect to R.C. 4906.10(A)(3) on the grounds that “staff did not consider, or compare the proposed facility to, any other technology to assess whether it in fact ‘minimized adverse environmental impacts.’” (Sierra Club, p. 16.) Staff advances that it the perceived absence of comparative evidence or analysis is irrelevant and not dispositive of the conclusion that the facility, as presented in the application, does indeed represent “the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations.” R.C. 4906.10(A)(3).

Staff must only investigate each application filed with the OPSB. This obligation relates only to “each application.” (*See also* Ohio Adm.Code 4906-3-06(C) “Staff shall conduct an investigation of [the] application and submit a written report.”) Staff must only investigate what is before it.

Assuming *arguendo*, Sierra Club’s reading of R.C. 4906.10(A)(3) contemplates a myriad of comparative evidence or analysis, then the scope of investigation would be a constantly moving target. The inclusion of this comparative evidence or analysis would entail continual investigation and necessary and inclusion of said comparative evidence or analysis in numerous, subsequent, staff reports.

Sierra Club’s averment that *In re Am. Mun Power-Ohio, Inc.*, stands for the proposition that the board should asses how the fuel selection and the basic design of the

proposed facility” compare to alternatives is not relevant to the matter at bar. First, in the present case, Sierra Club uses this proposition to place an obligation on the Staff (and the OPSB) to investigate all other technologies. In *In re Am. Mun. Power, Inc.*, the evidence sought to be introduced was incidental to the facility itself, namely an electric generation facility consisting of pulverized coal, and some natural gas, as the heat source. *In re AM. Mun. Power, Inc.* p. 16. In the case *sub judice*, Sierra Club seeks the introduction of a standard requiring applicants, and in turn Staff, to introduce an endless stream of comparative evidence and analysis. Under this standard, it would prove impossible to have any application approved.

It is Staff’s duty to investigate the application as filed and recommend conditions necessary to minimize the adverse impacts of the proposed facility. Staff has performed those duties. Whether any other technology could possibly meet the Applicant’s needs is simply irrelevant.

#### **IV. Conclusion**

The record demonstrates that, with Staff’s recommended conditions, the proposed CHP facility satisfies all of the statutory criteria. The Board should approve the application, subject to Staff’s recommended conditions.



Respectfully submitted,

**Dave Yost**  
Ohio Attorney General

**John Jones**  
Section Chief

*/s/ Thomas G. Lindgren*

---

**Thomas G. Lindgren**

**Werner L. Margard**

Assistant Attorneys General

Public Utilities Section

30 E. Broad St., 16<sup>th</sup> Floor

Columbus, OH 43215

T: (614) 466-4395

F: (614) 644-8764

thomas.lindgren@ohioattorneygeneral.gov

werner.margard@ohioattorneygeneral.gov

**On Behalf of the Staff of the Ohio Power  
Siting Board**

**Brian A. Ball** (0078285)

Assistant Attorney General

Environmental Enforcement Section

2045 Morse Road, Building A-3

Columbus, Ohio 43229

T: (614) 265.6804

F: (614) 268.8871

brian.ball@ohioattorneygeneral.gov

**On Behalf of the Ohio Department of  
Natural Resources**

## **PROOF OF SERVICE**

I hereby certify that a true copy of the foregoing Reply Brief, submitted on behalf of the Staff of the Ohio Power Siting Board, was served by electronic mail, upon the following parties of record, this 19<sup>th</sup> day of August, 2020.

/s/ Thomas G. Lindgren

**Thomas G. Lindgren**

Assistant Attorney General

### **Parties of Record:**

**N. Trevor Alexander**

**Steven D. Lesser**

Calfee, Halter & Griswold LLP

1200 Huntington Center

41 South High Street

Columbus, Ohio 43215

talexander@calfee.com

slesser@calfee.com

*Attorneys for The Ohio State University*

**Richard C. Sahli**

334 Evergreen Lane

Yreka, CA 96097

ricksahli@outlook.com

**Tony Mendoza**

**Megan Wachspress**

Sierra Club

2101 Webster St., 13th Floor

Oakland, CA 94612

tony.mendoza@sierraclub.org

Megan.wachspress@sierraclub.org

*Attorneys for Sierra Club*

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**8/19/2020 3:02:19 PM**

**in**

**Case No(s). 19-1641-EL-BGN**

Summary: Reply Brief Submitted On Behalf Of The Staff Of The Ohio Power Siting Board  
electronically filed by Mrs. Kimberly M Naeder on behalf of OPSB