

**BEFORE
THE OHIO POWER SITING BOARD**

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

**COMMENTS OF UNION NEIGHBORS UNITED,
ROBERT AND DIANE McCONNELL, AND JULIA F. JOHNSON
PRESENTED AT JANUARY 29, 2016 STAKEHOLDER MEETING**

Good morning. My name is Chris Walker. I am an attorney with Van Kley & Walker in Dayton, and I am here on behalf of four clients: Union Neighbors United, Robert and Diane McConnell, and Julia Johnson. I appreciate this opportunity to offer comments on the Board's Rule 4906-4-08.

These comments are consistent with those that my clients filed concerning the proposed rule in January of 2015. For today's purposes, I have reorganized those comments to follow the Board's itemization of issues in Finding (17) of its November 12, 2015 Order.

(a) Neither 4905-4-08 nor the remainder of the Board's rules contain "reasonable regulations" of certain topics mandated by Revised Code 4906.20(B)(2).

Revised Code 4906.20(B)(2) requires the Board to enact reasonable regulations regarding wind turbines and associated facilities. Neither this rule nor the remainder of the Board's rules address many of the topics for which the General Assembly has required the Board to enact reasonable regulations. For example, the Board's rules do not establish enforceable regulations

governing the reconstruction or enlargement of wind turbines, protection of recreational lands or wildlife, interconnection, decommissioning, or cooperation for site visits and enforcement investigations—all of which are specifically itemized by the General Assembly as topics to be regulated. Furthermore, the rules contain no enforceable standards for protection of the public from ice throw, wind turbine noise, blade shear, or shadow flicker.

By requiring “reasonable regulation” of these topics, the General Assembly contemplated enforceable standards, not merely a requirement that applicants submit relevant information for *ad hoc* adjudication by the Board. That adjudication process has yielded certificate conditions that are inconsistent from case to case and, I submit, lack practical enforceability when it comes to regulation of some topics—in particular, noise, safety, and decommissioning. Proper and enforceable regulation of wind turbine noise, shadow flicker, and safety issues such as blade and ice throw is essential not only for the protection of the public, but it is also important for the sake of predictability, consistency, and efficiency in the Board’s proceedings. These issues will continue to be litigated over and over again in evidentiary hearings until the Board develops consistent, protective, and enforceable standards.

(b) Applications should express all parcel-specific information in a manner that can be readily interpreted by members of the public.

In our experience, the format of past applications for wind farm certificates has often made it difficult or impossible for members of the public to find key information that is important to their properties and their community. For example, modeling reports have sometimes referenced surrounding properties using unintelligible codes rather than by address, parcel number, or other means that can be readily interpreted by the public. In other cases, members of the public have not been able to decipher modeling conclusions concerning a particular parcel without the purchase of expensive proprietary software. We urge the Board to

require that applications express all parcel-specific information, such as modeling inputs and results, in a manner that can be readily interpreted by members of the public.

(c) Manufacturer Safety Manuals and Recommended Setbacks (4906-4-08(A)(1)(c)):

We support the requirement that applicants provide copies of all manufacturer safety manuals and recommended manufacturer setbacks. However, in addition to formal safety manuals and setback recommendations, turbine manufacturers have also developed written recommendations concerning siting and “micro-siting” of turbines to address safety hazards and other siting considerations. These recommendations may be relevant to the Staff’s and Board’s review process. Therefore, we urge the Board to revise subsection (A)(1)(c) of this rule to read as follows: “Provide the generation equipment manufacturer’s safety standards, a complete copy of the manufacturer’s safety manual or similar document, any manufacturer-recommended setbacks, and any other manufacturer recommendations relating to safety, health, or turbine siting.”

(d) Noise, Health, and Safety Considerations (4906-4-08(A)):

UNU’s Merits Brief in the *Champaign Wind* certification proceeding (*Matter of Champaign Wind, LLC*, OPSB No. 12-160-EL-BGN) addresses the subject of wind turbine noise in great detail. Because of the importance and complexity of this subject, we urge the Staff to schedule additional stakeholder meetings to provide sufficient time to fully discuss and consider the subject. In summary, however, we recommend that the Board adopt the following requirements relating to wind turbine noise:

(i) **Background noise measurement:** To prevent annoyance and sleep deprivation from inherently intrusive wind turbine noise, operational noise levels of wind energy facilities should not exceed five dBA above the background sound level at nonparticipating properties. UNU

Brief at 22-25. In practice, applicants are often conducting background noise measurements on leaseholder properties. We believe this calls into question the objectivity of those measurements. The rule should require all background noise measurements to be taken on location at nonparticipating properties wherever possible.

Background noise assessments must be based on the L90 statistical standard, as universally acknowledged in the acoustical engineering profession. *Id.* at 30. The L90, known as the residual sound level, is the sound level exceeded during 90% of the measurement period. The L90 measures the quietest 10% of a time interval in order to identify the amount of background sound that is normally available to mask turbine noise that otherwise would awaken a person. By measuring the quietest 10% interval, the L90 statistic filters out the sporadic noise from noise events of short duration, such as passing cars. By removing brief noise spikes, the L90 metric eliminates short-term noise spikes that serve no purpose for masking the sound of a new noise source. *Id.*

(ii) Ambient noise standard: No nonparticipating resident or landowner should be exposed to noise levels greater than 35 dBA and 50 dBC at any time. UNU Brief at 35-40, 44. These standards should apply at the property lines of nonparticipating properties, not merely at neighboring residences. *Id.* at 44-45.

(iii) Cumulative impacts: Subsection (C)(3)(B) requires that the application address “cumulative operational noise levels at the property boundary for each non-participating property adjacent to or within the project area, under both day and nighttime conditions.” As the Board is well aware, wind energy developers often plan their facilities in phases, while in other cases, one developer’s facility is proposed in or near the location of another developer’s facility. In order to assess the cumulative impact of multiple facilities, it is critical that such assessment take into

account impacts from other existing, proposed, or planned wind power facilities in addition to impacts from the facility that is the subject of the application. This comment applies not only to assessment of cumulative noise impacts, but also to visual impacts, shadow flicker, and other cumulative facility impacts.

(e) Wildlife Literature Survey (4906-4-08(B)(1)(c)):

The rule requires the applicant to provide the results of a “literature survey of the plant and animal life” within one-quarter mile of the project area. One-quarter mile is inadequate for mobile endangered species such as the Indiana bat, which may move freely in and out of the project area. We urge the Board to require a broader range for the initial literature survey.

(f)-(g) Wildlife Studies (4906-4-08(B)(1)(d)-(e)):

Subsections (B)(1)(d) and (e) call for submission of certain field studies, but do not require them. At a minimum, the rule should require submission of actual field studies for all endangered species identified in the literature survey, or where the applicant has knowledge of the presence of an endangered species within a specified distance of the project area.

As the Board is aware, wind developers have been known to purchase lease rights from other developers who may have conducted ecological surveys of the subject area. We are aware of at least one situation where the acquiring developer did not provide the Board with ecological studies conducted by its predecessor. Therefore, where the applicant is aware of and has access to studies (such as field studies) regarding the potential impact of the proposed facility, the Board’s rule should require the applicant to submit copies of all such studies with the application, regardless of whether the studies were performed “by or for the applicant.” 4906-4-08(B)(1)(e).

(h) Mitigation of Construction and Operational Impacts on Wildlife (4906-4-08(B)(2)(b)(viii)):

Subsection (B)(2)(b)(viii) of the rule requires that the applicant specify measures for avoiding construction impacts to “major species and their habitat.” The term “major species” appears to have carried over from the Board’s existing rules, but has not been defined in the current rules. That term should include, at a minimum, species of commercial or recreational value, or species listed or proposed for listing as endangered or threatened under federal or Ohio law.

(i) Mitigation of Construction and Operational Impacts on Wildlife (4906-4-08(B)(3)):

Subsection (B)(3)(c) requires applicants to provide information on plans for post-construction monitoring of wildlife impacts caused by operational or maintenance activities. For major species (as described above), the rule should also require a plan for mitigation or avoidance of such impacts. Both the monitoring and mitigation/avoidance plans should be mandatory, not optional. In order to avoid conflicts of interest, the Board should require all monitoring to be conducted by State employees or third –party contractors working on behalf of the OPSB, with all associated costs to be paid by the certificate holder.

(j) Land Use and Community Development (4906-4-08(C)):

Subsection (C)(1)(a) requires submission of a map showing specified information, such as prevailing land use, within one mile of the proposed facility. The Board’s previous rule required a map showing such information within five miles of the proposed facility. Ohio Adm. Code 4906-17-08(C)(1). A one-mile mapping area around the proposed facility may not pick up important land uses, such as airports, that would be affected by construction and operation of the facility. We urge the Board to retain the five-mile mapping distance set forth in its existing rule.

(k) Information regarding distance between turbines and adjacent properties. (4906-4-08(C)(1)(b)).

This rule calls for a table indicating, for each structure within 1,000 feet of a wind turbine, the distance between the structure and the turbine. Because all statutory setbacks are now to be measured from the nearest adjacent property, R.C. 4906.20(B)(2)(a), we submit that the distance to nearby structures is no longer of primary relevance. For purposes of the statutory setback requirements, the rule should require specification of distances from turbines and adjacent properties. In addition, for purposes of determining compliance with enforceable noise and safety standards, the Board should similarly require a table showing distances to all properties and public roads within 1,640 feet of each proposed turbine.

(l) Mapping of leased parcels (4906-4-08(C)(2)).

We strongly support the Board's proposal to require applicants to map all parcels leased by the applicant for the proposed facility. 4906-4-08(C)(2). Because applicants may be developing projects in stages, however, the rule should require the applicant to indicate all parcels it has leased for wind development—not just parcels it has leased for the facility that is the subject of the application. Identification of all leased properties is important to the Board, the Staff, and the public for the sake of assessing the potential for cumulative impacts from future wind energy development in the affected area.

(o) Visual Impact Study (4906-4-08(D)).

The rule provides no guidance for the number or selection of vantage points for visual simulations. We urge the Board to require visual simulations with north/south/east/west views for at least one location per square mile within one mile of the proposed project area.

Thank you for your consideration and for the opportunity to comment on this rule.

