

BLACK SWAMP BIRD OBSERVATORY

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October 21, 2016

PUCO Docketing
11th Floor, 180 East Broad Street
Columbus, OH 43215

Re: Case No.: 16-1109-GE-BRO

THE OHIO POWER SITING BOARD

Comments of the Black Swamp Bird Observatory and the American Bird Conservancy on Proposed Case No. 16-1109-GE-BRO, Amended Rule OAC 4906-4-08, and Proposed New Rule OAC 4906-4-09

The Black Swamp Bird Observatory (BSBO) and the American Bird Conservancy (ABC) appreciate the opportunity to provide comments on Ohio Power Siting Board's (OPSB's) proposed rules OAC 4906-4-08 and OAC 4906-4-09 in the hope of encouraging final rules which will serve the interests of all of the citizens of Ohio and protect the state's irreplaceable natural resources.

BSBO is a 501(c)(3) not-for-profit organization whose mission is to inspire the appreciation, enjoyment and conservation of birds and their habitats in Ohio through research, education, and outreach. ABC is a 501 (c)(3) not-for-profit membership organization whose mission is to conserve native birds and their habitats throughout the Americas. ABC acts by safeguarding the rarest species, conserving and restoring habitats and reducing threats, while building capacity in the bird conservation movement.

As set forth in Chapter 4906.03 (C) of the Ohio Revised Code (Powers and Duties of Power Siting Board) the OPSB is charged to "Adopt rules establishing criteria for evaluating the effects on environmental values of proposed and alternative sites and projected needs for electric power...". This statutory language, coupled with the fact that the Director of the Ohio Environmental Protection Agency and the Director of the Ohio Department of Natural Resources are members of the OPSB, strongly suggests that OPSB rules should balance the interests of Ohio's public trust resources, including federally and state protected wildlife, with the state's needs for clean, renewable electric power.

BSBO and ABC do not find that this balance has been struck in the proposed rules or by its specific proposed amendments that presumably seek to correct this perceived imbalance. The proposed rules deal with, among other things, certain requirements for the siting of wind energy facilities in sensitive areas that may adversely affect Ohio public trust resources such as our ecologically important native birds and bats and the habitats that support them.

BSBO's and ABC's comments and proposed amendments are intended to prevent adverse effects on our ecologically important bird and bat populations, rather than attempting to mitigate continuing adverse effects after the fact as the rules in their current form seem to do. In fact, a recent review of mitigation strategies showed that the only proven ways to reduce bird and bat kill are proper siting and turbine curtailment (Arnett and May 2016: <http://www.berrymaninstitute.org/files/uploads/pdf/journal/spring2016/MitigatingWindEnergyArnettMay.pdf>). BSBO and ABC hope OPSB will find the following proposed amendments and comments to be useful in its deliberations:

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As an initial matter, BSBO and ABC support renewable energy when it is responsibly designed and after careful consideration to the siting of those facilities. From the perspective of bird and bat conservation, it is clear that certain areas are not suitable for wind energy development. Foremost among these unsuitable areas are those where large numbers of birds and bats, live, congregate and travel through during certain times of the year, particularly, during fall and spring migration, or key breeding habitats.

Even small numbers of wind turbines in such areas can have devastating impacts on federally- or state-protected bird and bat species, especially those classified as Threatened or Endangered. Ohio has a number of such areas, notably along the southern shore of Lake Erie, extensive areas of which have been designated as Globally Important Bird Areas. Tens of millions of birds and bats, including protected species such as Kirtland's Warblers, Piping Plovers, Rufa Red Knots, Indiana Bats, Bald Eagles, and many others nest, rest and feed during migration, and otherwise utilize the habitats provided along the southern coast of the Lake. Organizations such as The Nature Conservancy (TNC), the U.S. Fish and Wildlife Service (FWS) and BSBO have conducted independent studies, all of which conclude that siting of wind turbines along the Lake Erie shoreline would have devastating impacts on bird and bat populations. The FWS currently recommends that no wind turbines be sited within three miles of the Great Lakes shorelines, while TNC recommends five miles. However, recent FWS advanced radar studies suggest that 5-10 miles would be more appropriate. (<https://www.fws.gov/radar/factsandfiles/index.html>)

BSBO and ABC strongly support such areas being off-limits to wind energy development and intend to pursue legislation in Ohio to avoid wind energy development in these critical areas. ABC and BSBO encourage OPSB to consider these potential impacts in its deliberations and would be happy to provide more detailed information if desired. In the interest of brevity, BSBO and ABC offer the following specific suggestions to the proposed rules at issue, rules which clearly are not sufficient to protect our irreplaceable wildlife.

Proposed OAC 4906-4-08 (Amended) Health and Safety, Land Use and Ecological Information:

The proposed amendments to OAC 4906-4-08 add to the potentially useful information which an applicant, including a wind energy facility, is required to submit to OPSB. The rule, however, provides no indication of what is to be done with the submitted information or against what criteria the information is to be evaluated. Further, there is no indication in the rule of the qualifications of the persons who will conduct the evaluation of the submitted information and whether the public or other interested parties (e.g., concerned conservation organizations) will have an opportunity to review this information prior to a certificate being issued to permit construction. For example, would anyone evaluating the information on behalf of the OPSB have expertise in bird and bat migratory behavior, or at least be aware of studies of such behavior to include it in OPSB's assessment of the submitted information? As worded, the proposed rule does not provide any assurance of an appropriately rigorous review. Therefore, BSBO and ABC propose amending OAC 4906-4-08 by adding section (F) to read as follows:

“(F) The information submitted pursuant to this rule shall be evaluated by comparison with a set of scientific and engineering criteria found in 4906-4-__ which shall encompass every item required to be submitted in the foregoing paragraphs of this rule 4906-4-08. An assessment of the information submitted shall be conducted by independent, third-party individuals having expertise in the disciplines necessary to perform a rigorous review according to recognized scientific or engineering standards and compiled in a report or other like document. The report shall be made available for public review and comment for a period of at least 60 days after public notice is provided according to the procedures of the OPSB.”

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Proposed OAC 4906-4-09 (New) Regulations Associated with Wind Energy Projects:

As previously stated, BSBO and ABC strongly support areas where there are large concentrations of birds and bats in residence or during migration being off-limits to wind energy development. Siting of even a single wind turbine in these bird-sensitive areas can have significant adverse impacts. BSBO and ABC believe that if these valid and fact-based concerns are ignored and siting of wind turbines is permitted in such areas, that at a minimum, the requirements of OAC 4906-4-09 should apply to every single wind turbine, not just large-scale commercial installations such as “economically significant wind farms” or “a major utility facility consisting of wind powered generating units”. Accordingly, BSBO and ABC propose that the preamble to 4906-4-09 and section (A)(1) be amended to read as follows:

“For an economically significant wind farm, a major utility facility consisting of wind powered electric generating units, and any wind powered electric generating units located in the “coastal area” of Lake Erie as defined in ORC 1506.01 (A), the application shall state the applicant’s commitment to comply with the following regulations and the board shall require that each of the following requirements be satisfied.

(A) Construction, location, use, maintenance and change.

(1) Adherence to other regulations, construction and operation of all proposed wind farms and any wind powered electric generating units located within five (5) miles of the “coastal area” of Lake Erie as defined in ORC 1506.01 (A) shall be consistent with all applicable state and federal requirements, including all applicable safety, construction, environmental, electrical, communications, and federal aviation administration requirements.”

(3) Location. Except as otherwise required by the provisions of this 4906-4-09 ~~W~~ wind farms shall be sited in locations that comply with paragraph (C)(2) of rule 4906-4-08 of the Administrative Code and applicable provisions of this rule.

OAC 4906-4-09 (C) Aesthetics and recreational land use makes clear that the impact of wind energy facilities on a variety of state properties having significance to the citizens of Ohio should be considered as criteria in siting. Included among the categories of facilities are those having “scenic, natural or other cultural significance.” BSBO and ABC propose to clarify what is believed to be the clear intent of this language by adding in section (C)(5), line 10 after the words “cultural significance” the words “such as state parks, state wildlife refuges, state nature preserves, state wildlife sanctuaries, state and national lake shores and the like.”

BSBO and ABC commends OPSB for including measures for protection of wildlife such as section (D) Wildlife Protection in proposed 4906-4-09. Nonetheless, it appears that much more attention is given to plans and other non-specific remedies to mitigate impact to wildlife by wind turbines after the damage has been done than in preventing it from happening in the first place (i.e., proper siting). BSBO and ABC urge OPSB to undertake a complete review of section (D) with an increased emphasis on preventative measures in mind. BSBO and ABC would be willing to discuss a comprehensive re-writing of this section with OPSB but for the present offers the following specific amendments:

(D) Wildlife protection

(1) Add to the end of the section after the word “agency” the sentence “The applicant shall enumerate proven, effective measures to be taken to avoid impacts on resident and migratory bird and bat populations, particularly in high risk areas such as those designated as Important Bird Areas and Globally Important Bird Areas.”

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(2) In line 2, after the word “during” add the words “pre-construction or...”

(5) In line 2 after the word “species” add the words “migratory periods,”

(7) “At least 60 days prior to the first turbine becoming operational the applicant shall submit to the board an Initial Avian and Bat Mortality Mitigation Plan detailing proven, effective measures to be taken to minimize avian and bat mortality from the onset of operation. A detailed avian and bat mortality monitoring program shall also be submitted to the board and immediately implemented with any revisions required by the board. Based on the publicly available results of the mortality monitoring program during the first one year of operation of the facility, if significant mortality occurs, the applicant will develop an Enhanced Mitigation Plan and submit same to the board for in-depth review. The Enhanced Mitigation Plan incorporating any additional proven, effective measures recommended by the board shall be promptly implemented by applicant.”

*It is important to note that the only proven forms of mitigation known to decrease bird mortality at wind turbines are proper siting and curtailment (see Arnett and May 2016: <http://www.berrymaninstitute.org/files/uploads/pdf/journal/spring2016/MitigatingWindEnergyArnettMay.pdf>). Only well-tested and proven mitigation techniques should qualify as mitigation.

(9) If construction activities result in significant adverse impact to wildlife species, then compensatory mitigation measures shall be prescribed to the applicant.

BSBO and ABC would also like to register the following position on collecting post-construction mortality data. These data should be collected by independent, third party experts using standardized methods and reported directly to regulatory authorities. Letting paid consultants to the wind industry collect and report this data is a violation of the first principle of scientific integrity (i.e., those who have a vested interest in the outcome should not collect the data) and such industry self-reporting is a direct conflict of interest (as violating wildlife law can result in fines and prosecution).

As loud and/or persistent noise can have very disruptive effects on wildlife, including bird and bat populations in residence or during migration BSBO and ABC recommend that noise be considered as part of the assessment and mitigation measures with regard to protection of wildlife. Accordingly, BSBO and ABC propose to amend section (F) Noise as follows:

(1) Add the following sentence to the end of subsection 1: “Notwithstanding the foregoing, all construction activities shall comply with the requirements of section (D)(1)-(6) of this rule.”

While it is certainly necessary to address requirements for decommissioning of wind turbines, BSBO and ABC note with dismay that more considerably more verbiage is devoted to decommissioning in the proposed rule than is devoted to requirements for responsible siting of the same wind turbines in the first instance. BSBO and ABC offer only the following amendment to section (I) Decommissioning and removal as follows:

(I)(3) Amend the last sentence of the subsection to read: “The board shall also require decommissioning of individual wind turbines due to health, safety, wildlife impact, or other concerns that prevent the turbine from operation within the terms of the certificate and all applicable regulations of the U.S. and the State of Ohio.”

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BSBO and ABC would also bring to OPSB's attention in the context of OPSB's process for approving wind facilities that there appears to be a failure to take into account serious problems with the applicant's compliance with applicable wildlife protection standards in granting a certificate to that applicant for a major expansion of that facility. More specifically, in March 2016 BSBO was informed that the U.S. Fish and Wildlife Service Office of Law Enforcement was rejecting a FOIA request for bird and bat mortality data at the Timber Road Wind Project in Paulding County, Ohio on the basis that disclosure of the information "could reasonably be expected to interfere with enforcement proceedings". As recently as August 2016, BSBO was advised that the enforcement proceedings were ongoing and that the requested data could still not be released.

Yet during this same period of time, OPSB approved an expansion of the Timber Road Wind Project that could at a future date triple the number of wind turbines at that facility. It seems to BSBO and ABC that OPSB's rules should clearly and definitively prevent such an approval when that facility is the subject of an active federal investigation. OPSB's explanation as to how this could have occurred would be greatly appreciated.

Finally, during this election season, OPSB and ABC would draw OPSB's attention to the results of a recent poll (September 2016) conducted by the National Audubon Society and published on its website indicating that nearly two thirds of registered voters supported regulations to reduce bird deaths caused by energy production, including wind energy. Among the results, 65% of registered voters nationwide would support regulations requiring wind farms to minimize harm to birds, for example, to Bald Eagles and Golden Eagles. This poll would seem to suggest that OPSB is well justified in taking stronger measures to protect public trust resources like birds and that the amendments proposed herein by BSBO and ABC to better achieve such protection should be adopted.

For all of the reasons set out in the foregoing comments, BSBO and ABC urge the OPSB to adopt the proposed amendments to OAC 4906-4-08 and OAC 4906-4-09.

Respectfully submitted,



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