March 8, 2022

Written Opponent Testimony on H.B. 490
Andrew Gohn, Eastern Region Director of State Affairs with American Clean Power Association
Bruce Burcat, Executive Director of Mid-Atlantic Renewable Energy Coalition

Dear Chairman Baldridge, Vice Chair McClain, Ranking Member Sheehy, and Members of the House Transportation and Public Safety Committee,

On behalf of the **American Clean Power Association (ACP)** and **Mid-Atlantic Renewable Energy Coalition (MAREC)**, we offer written testimony today to express strong opposition to H.B. 490, which would impose an unnecessary and duplicative layer of regulatory burden on Ohio's wind industry (and all other industries with tall structures for that matter) by expanding the Ohio Department of Transportation (ODOT) authority to regulate navigable airspace where the Federal Aviation Administration (FAA) already has regulatory purview. The bill results in double regulation of industries, harms business certainty given the potential for getting different answers on the same questions from federal and state regulators, erodes the property rights of Ohioans wanting to host renewable energy facilities (or other tall structures), and is arguably unconstitutional. We believe the bill would significantly hinder the wind industry in Ohio and stymy the ability for energy consumers to procure in-state clean energy. Further, all these harms are completely unnecessary to impose on Ohioans given the existing FAA review process acknowledged in H.B. 490, which already ensures protection of airports and navigable airspace.

ACP is the voice of the clean power industry that is powering America's future, creating jobs, and driving high-tech innovation across the nation. MAREC is a member organization helping advance opportunities for renewable energy in the region. Many of our members have developed and are actively developing projects in Ohio.

We have several concerns regarding H.B. 490 as it does more than merely conform Ohio law to federal law; it expands ODOT's current authority to regulate navigable airspace where federal regulations already apply to tall structures. Current law specifically limits ODOT's authority and jurisdiction over regulating the construction of tall structures near airports to those proposed structures that would penetrate an airport's "clear zone surface, horizontal surface, conical surface, primary surface, approach surface, or transitional surface."[1]

This legislation would expand ODOT's authority beyond these surfaces to veto any potential obstructions to the navigable airspace of an airport, potentially resulting in conflicting federal and state decisions. The FAA already regulates matters of air navigation and safety within the national airspace.[2] Their expert analysis is technical and science-based, prioritizes air navigation and safety, evaluates the needs of local airports and protects for those needs, and evaluates potential impacts to imaginary surfaces and navigable airspace. This bill could result in business uncertainty as FAA decisions grounded in sound technical analysis could be essentially vetoed based on unclear standards by ODOT. Considering the courts have already overturned ODOT's attempts to claim this authority under current law, this unchecked authority is particularly problematic.[3]

Finally, H.B. 490 is arguably unconstitutional under the federal "field preemption doctrine"[4] for the following reasons:

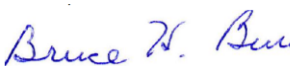
[1] See *One Energy Enterprises LLC, et al. v. Ohio Department of Transportation*, Franklin C.P. No 17CV 5513 (Mar. 2., 2020) (holding that "ODOT has no authority or jurisdiction under the OAPA [Ohio Airport Protection Act, R.C. 4561.30 to 4561.39] to regulate or otherwise take any actions with respect to structures or proposed structures that will not penetrate and are not reasonably expected to penetrate any of the six Imaginary Surfaces").
[2] FAA statutory authority over airspace matters is defined in 49 United States Code 44718 and the regulations implementing the statutory provisions can be found at 14 Code of Federal Regulations Part 77.
[3] *Id*.
[4] Field preemption exists where federal law so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it, or where an Act of Congress touches a field in which the interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990).

- Congress gave the FAA the exclusive responsibility for evaluating and issuing determinations regarding potential air safety and navigation hazards.[5]
- Considering the comprehensive federal system established by Congress, courts have invariably found state or local regulation of aviation safety, such as the one proposed in H.B. 490, preempted by federal regulation because the FAA occupies the entire "field" of aviation safety. For example, in an analogous case to wind turbine siting, a federal court concluded that a state's determination that a radio broadcast tower would be a hazard to air navigation was preempted because: "Congress has given the FAA the duty to determine what constitutes an efficient use of the airspace and what broadcast towers present hazards to air traffic."[6]

We do not believe the General Assembly should impose new regulatory restrictions that add cost and uncertainty to the development process—especially at a time when demand for renewables from Ohio's employer community is at an all-time high. Finally, in light of S.B. 52's passage to allow greater local control of the siting of wind projects, this tremendous regulatory expansion is unnecessary.

We appreciate the opportunity to submit written testimony today. Thank you.

Sincerely,



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[5] 49 USC 40103.
[6] Big Stone Broadcasting, Inc. v. Lindbloom, 161 F. Supp. 2d 1009 (D.S.D. 2001).