

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of)	
Buckeye Wind, LLC for a Certificate)	
to Install Numerous Electricity	)	Case No. 08-666-EL-BGN
Generating Wind Turbines in)	
Champaign County to be Collected at	)	Case No. 13-360-EL-BGA
an Electrical Substation in)	
Union Township,)	
Champaign County, Ohio)	

**MEMORANDUM OF INTERVENORS UNION NEIGHBORS UNITED, ROBERT
AND DIANE McCONNELL, AND JULIA JOHNSON IN OPPOSITION TO THE
MOTION OF BUCKEYE WIND LLC FOR AN EXTENSION OF ITS CERTIFICATE**

Intervenors Union Neighbors United, Inc., Robert and Diane McConnell, and Julia F. Johnson (collectively, “UNU”) hereby file their response to the motion of Buckeye Wind LLC for a three-year extension of the deadline in its certificate for starting construction on the Buckeye Wind project (“BW I”). The Ohio Power Siting Board (“OPSB” or “Board”) should deny this motion, because it is both substantively and procedurally flawed.

Procedurally, Buckeye Wind may not use a mere motion to apply for this certificate extension. The deadline of March 22, 2015 for starting construction is a condition of the certificate. *See* Case No. 08-666-EL-BGN, Opinion, Order, and Certificate, p. 92, Condition 52 [Appx. 003] (relevant pages attached as Exhibit A).¹ Accordingly, Buckeye Wind seeks to use a motion to amend the certificate.

¹ Citations to the “Appx.” refer to the bates-numbered pages of the attached appendix at which the cited pages of the exhibits can be found.

Buckeye Wind's motion does not cite any authority for using a motion to apply for a certificate amendment. Ohio Admin. Code Section 4906-1-05 contains a general provision for extensions of time limits by motion:

For good cause shown, the board or the administrative law judge may extend or waive any time limit prescribed or allowed by Chapters 4906-1 to 4906-17 of the Administrative Code, except where precluded by statute. Any request for the extension or waiver of a time limit shall be made by motion.

Presumably, Buckeye Wind is relying on this rule as the authorization for its motion, since both the rule and Buckeye Wind's motion refer to "good cause" for the extension. However, although this rule generally allows time limits to be extended by motion, the Board has provided a more specific procedure in Ohio Admin. Code Section 4906-5-10 that governs certificate amendments:

(B) Applications for amendments to certificates shall be submitted in the same manner as if they were applications for a certificate, unless such amendment falls under a letter of notification or construction notice pursuant to the appendices to rule 4906-1-01 of the Administrative Code.

(1) The board staff shall review applications for amendments to certificates pursuant to rule 4906-5-05 of the Administrative Code and make appropriate recommendations to the board and the administrative law judge.

(a) If the board, its executive director, or the administrative law judge determines that the proposed change in the certified facility would result in any significant adverse environmental impact of the certified facility or a substantial change in the location of all or a portion of such certified facility other than as provided in the alternates set forth in the application, then a hearing shall be held in the same manner as a hearing is held on a certificate application.

(b) If the board, its executive director, or the administrative law judge determines that a hearing is not required, as defined in paragraph (B)(1)(a) of this rule, the applicant shall be directed to take such steps as are necessary to notify all parties of that determination.

(2) The applicant shall:

(a) Serve a copy of the application for amendment to a certificate upon:

(i) The persons entitled to service pursuant to rule 4906-5-06 of the Administrative Code.

(ii) All parties to the original certificate application proceedings.

(b) File with the board proof of service and, if required, proof of notice pursuant to rules 4906-5-06 to 4906-5-08 of the Administrative Code.

Emphasis added.

Well-established principles of statutory construction determine whether the general provision for motions in Ohio Admin. Code Section 4906-1-05 or the more specific provision for applications in Ohio Admin. Code Section 4906-5-10 applies. Administrative rules are subject to the same rules of interpretation as statutes. *McFee v. Nursing Care Mgt. of Am., Inc.*, 2010-Ohio-2744, 126 Ohio St. 3d 183, 189, 931 N.E.2d 1069, 1075; *State, ex rel. Miller Plumbing v. Industrial Commission*, 149 Ohio St. 493, 496-97 (1948). When a general statute and a specific statute cover the same subject matter, the specific provision must be construed as an exception to the general statute. *State ex rel. Motor Carrier Serv., Inc. v. Rankin*, 2013-Ohio-1505, 135 Ohio St. 3d 395, 400; *State ex rel. Elliott Co. v. Connar*, 123 Ohio St. 310, 314 (1931). Thus, a specific rule operates as an exception to a general rule covering the same subject. Since Ohio Admin. Code Section 4906-5-10 specifically requires certificate amendments to be obtained by application, Buckeye Wind cannot obtain a certificate amendment by motion.

Ohio Admin. Code Section 4906-5-10(B)(1) requires the staff to review applications for certificate amendments pursuant to Ohio Admin. Code Section 4906-5-05, which requires a completeness review and a staff report on the applications. Ohio Admin. Code Section 4906-5-10 mandates public notice of the application, and an adjudication hearing may also be required.

The governing statute, R.C. 4906.06, also provides for amendments of certificates:

(E) An application for an amendment of a certificate shall be in such form and contain such information as the board prescribes. Notice of such an application shall be given as required in divisions (B) and (C) of this section.

“Divisions (B) and (C) of this section,” as referenced in the foregoing passage, require the applicant for a certificate amendment to publish a public notice of the application:

(B) Each application shall be accompanied by proof of service of a copy of such application on the chief executive officer of each municipal corporation and county, and the head of each public agency charged with the duty of protecting the environment or of planning land use, in the area in which any portion of such facility is to be located.

(C) Each applicant within fifteen days after the date of the filing of the application shall give public notice to persons residing in the municipal corporations and counties entitled to receive notice under division (B) of this section, by the publication of a summary of the application in newspapers of general circulation in such area. Proof of such publication shall be filed with the office of the chairperson.

R.C. 4906.07 provides that applications for an amendment to a certificate are subject to an adjudicatory hearing in some situations and requires a staff investigation and report in all situations:

(B) On an application for an amendment of a certificate, the board shall hold a hearing in the same manner as a hearing is held on an application for a certificate if the proposed change in the facility would result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility other than as provided in the alternates set forth in the application.

(C) The chairperson of the power siting board shall cause each application filed with the board to be investigated and shall, not less than fifteen days prior to the date any application is set for hearing submit a written report to the board and to the applicant. A copy of such report shall be made available to any person upon request. Such report shall set forth the nature of the investigation, and shall contain recommended findings with regard to division (A) of section 4906.10 of the Revised Code and shall become part of the record and served upon all parties to the proceeding.

While OPSB has granted certificate extensions by motion in some cases, this practice is contrary to OPSB’s governing statutes and rules as explained above. Certificate amendments to modify deadlines for starting construction can be issued only after the applicant has submitted a complete application, notice has been provided to the public, the staff has investigated and issued

a report on the amendment's impact on the public, and, potentially, an adjudicatory hearing has been held.

In its rulings on past certificate extensions, OPSB has cautioned that it routinely includes deadlines for starting construction in its certificates to make sure that the information on which the Board relied in granting the certificates is still valid. *In re Lima Energy Company*, Case No. 00-513-EL-BGN, et seq., Entry of July 30, 2012, p. 7, ¶ 8 [Appx. 012] (attached as Exhibit B); *In re Norton Energy Storage, LLC*, Case No. 99-1626-EL-BGN, Entry of Sept. 30, 2013, p. 2, ¶ 9 [Appx. 016] (attached as Exhibit C). The BW I certificate was issued more than four years ago. OPSB must follow the procedures mandated by statute and its own rules to determine whether the information on which it relied in granting this certificate four years ago is still valid. Buckeye Wind must submit an application that deals with this question, and the staff must duly investigate and report on these issues. The public must be given the opportunity to submit comments to OPSB on the extension as contemplated by the statutory and regulatory requirements for public notice.

The Board's rulings in *Lima Energy* and *Norton* also advise that certificate deadlines for starting construction are designed to avoid the indefinite encumbering of land. *Lima Energy* at p. 7, ¶ 9; *Norton* at p. 2, ¶ 9. The BW I certificate, for four years, has encumbered not only the land of Buckeye Wind's leaseholders, but also their nonparticipating neighbors. The Parello family is a good example of this ongoing harm. The testimony of Mary Jo Parello made at the public hearing of October 25, 2012 on the Champaign Wind (BW II) application describes the economic dilemma of the families who cannot sell their homes or use their equity in their homes for funding such needs as medical care, retirement, college, and elder care, because prospective home buyers or financial institutions will not invest in homes that may be impacted by nearby

wind turbines. *See* Ms. Parello's testimony, attached as Exhibit D [Appx. 023-029]. In BW I, she had testified that her community's property values would be ruined by the BW I turbines. *See* the transcript of her testimony in Case No. 08-666-EL-BGN, at page 22 (Exh. E) [Appx. 034]. This testimony has proven to be prophetic, since Ms. Parello's testimony in BW II reveals that her family had been trying to sell their property for 13 months prior to that testimony. Exh. D at pages 81-83 [Appx. 025-027]. UNU has learned recently that the Parellos still have not been able to find a buyer after two years and seven months of marketing it. Many hundreds of families in eastern Champaign County, including UNU's members, will be unable to sell or beneficially develop their properties as long as the wind project is pending. OPSB should not allow this intolerable situation to continue for another three years. At the very least, the Board should not rubberstamp Buckeye Wind's extension without properly examining the extension's effects on the community after Buckeye Wind files an application.

Moreover, Buckeye Wind has no excuse for attempting to use a motion to bypass the application process mandated by statute and rule. Buckeye Wind could have included its request for a certificate extension in its application for an amendment to the BW I certificate in OPSB Case No. 13-360-EL-BGA. Buckeye Wind applied for the amendment on March 19, 2013, and OPSB held a hearing on this amendment application on January 6, 2014. *See* the Board's Order on Certificate Amendment, attached as Exhibit F [Appx. 043]. The March 19, 2013 application for a certificate amendment occurred almost three years after the Ohio Supreme Court issued its decision on the intervenors' appeal of the BW I certificate on March 22, 2010. UNU's appeal of the ITP permit on or around September 19, 2013 (*see* Page 46 of Exhibit G [Appx. 100]) and its appeal of the BW II certificate to the Ohio Supreme Court on November 26, 2013 preceded OPSB's hearing on the certificate amendment on January 6, 2014. Accordingly, Buckeye Wind

could have added its request for a certificate extension to its application for a certificate amendment prior to the hearing on January 6, 2104, and OPSB could have heard evidence on the advisability of extending the certificate at that time. Consequently, the Board should deny Buckeye Wind's belated motion for an extension. Nevertheless, if OPSB is inclined to process Buckeye Wind's request for an extension, plenty of time remains for Buckeye Wind to submit the required application to amend the certificate and for the Board to process the application prior to the certificate's expiration on March 22, 2015.

Accordingly, OPSB should deny Buckeye Wind's motion for extension for both substantive and procedural reasons. Substantively, the motion should be denied, because another three years of uncertainty will continue to harm the community. Procedurally, Buckeye Wind may not bypass the process for the filing of an application, public notice, a staff investigation, a staff report, and potentially a hearing that has been established by the General Assembly's statutes and the Board's rules for examining the effects of a certificate amendment on the community. Consequently, OPSB should deny Buckeye Wind's motion for an extension.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 29, 2014, a copy of the foregoing Memorandum of Intervenor Union Neighbors United, Inc., Robert and Diane McConnell, and Julia F. Johnson and its Exhibits were served by electronic mail on the following counsel and party:

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/s/ Jack A. Van Kley
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**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of)	
Buckeye Wind, LLC for a Certificate)	
to Install Numerous Electricity	)	Case No. 08-666-EL-BGN
Generating Wind Turbines in)	
Champaign County to be Collected at	)	Case No. 13-360-EL-BGA
an Electrical Substation in)	
Union Township,)	
Champaign County, Ohio)	

**EXHIBITS IN SUPPORT OF THE
MEMORANDUM OF INTERVENORS UNION NEIGHBORS UNITED, ROBERT
AND DIANE McCONNELL, AND JULIA JOHNSON IN OPPOSITION TO THE
MOTION OF BUCKEYE WIND LLC FOR AN EXTENSION OF ITS CERTIFICATE**

EXHIBIT A

**EXCERPTS FROM OPINION, ORDER, AND CERTIFICATE IN
CASE NO. 08-666-EL-BGN (BUCKEYE WIND I)**

BEFORE

THE OHIO POWER SITING BOARD

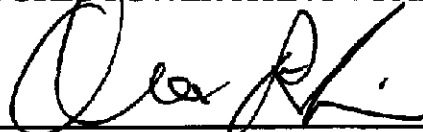
In the Matter of the Application of Buckeye)
Wind, LLC for a Certificate to Construct)
Wind-powered Electric Generation Facilities) Case No. 08-666-EL-BGN
in Champaign County, Ohio.)

OPINION, ORDER, AND CERTIFICATE

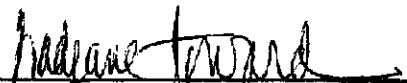
- (47) Buckeye shall comply with all setback requirements as prescribed by the Board.
- (48) Buckeye shall establish, maintain, and manage a toll-free phone number for public contacts regarding the facility's operation. Buckeye shall exercise reasonable efforts to inform local communities of the existence of this phone number. Buckeye shall further maintain records of contacts and share these records with staff upon request.
- (49) At least 60 days prior to construction, Buckeye shall file a letter with the Board that identifies which of the three turbine models listed in the application has been selected. If Buckeye selects a turbine model other than one of the three models listed in the application, in addition to the letter, Buckeye shall also: file copies of the safety manual for the turbine model selected and manufacturer contact information; and provide assurances that no additional negative impacts would be introduced by the model selected.
- (50) Within 30 days after completion of construction, Buckeye shall submit to staff a copy of the as-built plans and specifications.
- (51) Buckeye shall provide staff the following information, as it becomes known: the date on which construction will begin; the date on which construction was completed; and the date on which the facility began commercial operation.
- (52) The certificate shall become invalid if Buckeye has not commenced a continuous course of construction of the proposed facility within five years of the date of journalization of the certificate.
- (53) Buckeye shall be prohibited from locating a proposed turbine where: (1) the distance from the turbine to either of two towers owned by the Champaign Telephone Company located at 10955 Knoxville Road, Mechanicsburg, Ohio 43044 (LAT: 40-0-30.16 N; LONG: 83-35-14.39 W) and at 2733 Mutual Union Road, Cable, Ohio 43009 (LAT: 40-9-26.0 N; LONG: 83-37-52.0 W) is less than the total height of the turbine above ground level or (2) the turbine would be in the direct line of sight between the two towers.

ORDERED, That a copy of this opinion, order, and certificate be served upon each party of record and any other interested persons of record.

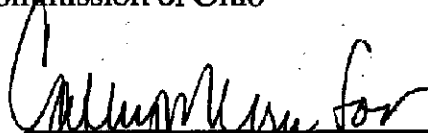
THE OHIO POWER SITING BOARD



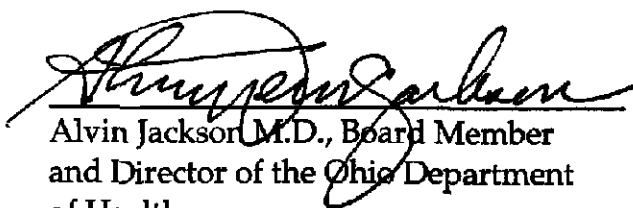
Alan R. Schriber, Chairman of the
Public Utilities Commission of Ohio



Lisa Patt-McDaniel, Board Member
and Director of the Ohio Department
of Development



Sean Logan, Board Member
and Director of the Ohio Department
of Natural Resources



Alvin Jackson M.D., Board Member
and Director of the Ohio Department
of Health



Christopher Korleski, Board Member
and Director of the Ohio
Environmental Protection Agency



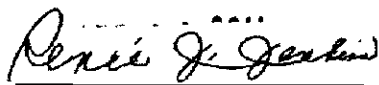
Robert Boggs, Board Member
and Director of the Ohio Department
of Agriculture

Board Member
and Public Member

GNS/KLS/vrm

Entered in the Journal

MAR 22 2010



Renee J. Jenkins
Secretary

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EXHIBIT B

ENTRY FROM *IN RE LIMA ENERGY*,
CASE NO. 00-513-EL-BGN

BEFORE

THE OHIO POWER SITING BOARD

In the Matter of the Application of Lima)
Energy Company for a Certificate of)
Environmental Compatibility and Public) Case No. 00-513-EL-BGN
Need to Construct a Power Plant in Allen)
County, Ohio.)

In the Matter of the Application of Lima)
Energy Company for an Amendment to its)
Certificate of Environmental Compatibility) Case No. 04-1011-EL-BGA
and Public Need to Construct a Power Plant)
in Allen County, Ohio.)

ENTRY

The Ohio Power Siting Board finds:

- (1) By opinion, order, and certificate (Certificate Order) issued on May 20, 2002, in Case No. 00-513-EL-BGN (00-513), the Ohio Power Siting Board (Board) approved a stipulation entered into between Lima Energy Company (Lima Energy or Company), Staff, and the city of Lima (Lima) and issued the Company a certificate to construct an electric generation facility in Allen County, Ohio, pursuant to Chapter 4906, Revised Code, and the provisions of Chapter 4906-13, Ohio Administrative Code. The certificate to construct the facility was subject to 29 specific conditions, which included the following:

The certificate shall become invalid if the Applicant has not commenced a continuous course of construction of the proposed facility within five years of the date of journalization of the certificate.

Therefore, pursuant to the Certificate Order, if Lima Energy had not commenced a continuous course of construction of the proposed facility by May 20, 2007, the certificate to construct the electric generation facility becomes invalid under the authority and jurisdiction of the Board.

- (2) By order issued on November 22, 2004, in Case No. 04-1011-EL-BGA (Amendment Order), the Board amended the

Certificate Order and granted Lima Energy's application to change the process for manufacturing synthetic gas at the proposed facility. As part of the Amendment Order, the Board revised the certificate to construct to incorporate two additional conditions. Notably, as part of the Amendment Order, Lima Energy did not request and the Board did not revise the date by which Lima Energy needed to commence a continuous course of construction, May 20, 2007.

- (3) On January 25, 2012, an entry was issued which provided that, in light of the fact that Lima Energy has not been engaged in a continuous course of construction on the proposed Allen County facility, Lima Energy was given until February 7, 2012, to file an application requesting an extension of the certificate to construct or it would be recommended to the Board that the certificate be found invalid and the associated cases closed of record.
- (4) On February 6, 2012, Lima Energy filed a motion requesting that the Board extend its certificate to construct the proposed facility for 30 months, until September 1, 2014. Lima Energy states that field construction began in 2005, and Lima Energy provided regular progress reports to the Board's Staff. According to Lima Energy, the contractor continued engineering and a site presence at the site into 2007, and, although site activity was temporarily suspended at that time, Lima Energy continued with the design-build development and engineering of the proposed facility while continuing to pursue financing. Lima Energy asserts that the delays on the project are the result of the withdrawal of financial support for gasification technology since the economic downturn of 2007. Since that time, the parent company of Lima Energy transferred Lima Energy to a new public company, USA Synthetic Fuel Corporation, which the Company contends will increase financing opportunities for the project. The Company also offers that, in April of 2010, the project renewed its bond resolution for bonds it plans to place in the coming year. Lima Energy notes that other projects, which were necessary for the flow of traffic in the area of the project and to meet the water requirements of the project, have recently been completed by

the city of Lima. For these reasons, Lima Energy requests an extension of the certificate.¹

- (5) On March 9, 2012, Lima filed a statement in support of Lima Energy's request for an extension. Lima states that it has supported the development and construction of the proposed project for the economic and societal benefits it offers the citizens of Lima and the county. Lima argues that denying Lima Energy's requests for an extension of the certificate would require the Company to start the regulatory, developmental, and financing process over again, in order to continue with the proposed project, for no legitimate reason. Lima reminds the Board that several generation facilities in the state are scheduled to be retired and the construction of the proposed facility will serve to off-set a portion of those retirements.
- (6) By entry issued on May 4, 2012, the administrative law judge found that Lima Energy had failed to provide sufficient information to evaluate the Company's request for an extension of the certificate. Therefore, Lima Energy was given until June 29, 2012, to file information responding to the nine items listed in the May 4, 2012, entry.
- (7) On June 20, 2012, Lima Energy filed its response to the information requests set forth in the May 4, 2012, entry and reiterated its request for an extension of the certificate. The following represents a brief summary of the questions posed and the Company's response:
 - (a) Provide a detailed explanation of the status of the electric grid interconnection for the proposed project. In response, the Company provided an update on the status of the electric grid interconnection for the proposed project, stating that it will initiate a completely new interconnection application with PJM Interconnection, LLC (PJM) when sufficient

¹ The Board notes that, while they are not parties to this case, the Sierra Club and the Natural Resources Defense Council filed comments in opposition to Lima Energy's request to extend the certificate on February 17, 2012. Lima Energy filed a response to the comments on March 1, 2012. Since these two entities are not parties to this case, their filings must be considered correspondence and not tantamount to pleadings.

funding is available, which is anticipated in the second half of 2012. Lima Energy expects that the new application with PJM will reflect export generation similar to its earlier work and, therefore, it does not expect materially altered results.

- (b) Provide a list and detailed description of the initial site preparation activities that have been completed and the activities to be undertaken prior to construction activities. Lima Energy provided the requisite list and details, noting that approximately \$7 million was spent in contractor activities during the initial field work in 2005 to 2007.
- (c) Provide a complete list of the federal, state, and local permits necessary to construct the proposed facility, along with a discussion of the status of each permit, related compliance requirements and the date when the permit will expire, expired, or when Lima Energy expects to obtain the permit. The Company submitted a list of the permits required to construct and operate the facility. With regard to the Ohio Environmental Protection Agency (OEPA) air permit to install, the Company estimates that it will need two months to draft a new permit application for submission to OEPA and it is confident that the permit approval process will be reasonable and timely.

Lima Energy believes it is still within the five-year continuous course of construction window, due to the fact that the engineering and project finance efforts continued into 2010 and 2011; however, it acknowledges that this window is coming to an end. The Company further agrees that, since it has developed an agreement with a customer to deliver synthetic natural gas once the plant is complete, it will need two months to prepare and file an application to amend its

certificate in order to account for additional gasification capacity and processing.

- (d) Provide a list of the electric and gas facilities the proposed facility will interconnect to and a discussion of the extent to which Lima Energy has made preparation for construction of such facilities and the status of the associated necessary filings with the Board. Lima Energy states that two interconnection agreements, one for natural gas and one for electric, are involved. The Company believes that, while its agreement with Columbia Gas Transmission Company (CGTC) will need to be updated, it anticipates seeking renewal of the agreement once project development is completed, and expects that the update can be accomplished in a short period of time. Lima Energy plans to erect a pole route for electric transmission to the West Lima Substation. The Company expects the construction of the pole route to occur within the project timeline.
- (e) Discuss the erosion and sedimentation control activities to be undertaken prior to and during construction, and the status of those activities at the construction site. According to Lima Energy, periodic surveillance confirms ongoing conformity with these certificate requirements. The Company offers that, once a contractor is mobilized, these requirements will be retained in an updated document and discussed during a new preconstruction conference.
- (f) Discuss the hazardous soils, water, or debris encountered, to date, and any knowledge of the likelihood of encountering such materials during future construction activities at the construction site. According to Lima Energy, on the basis of the covenant not to sue for the OEPA, it does not anticipate contaminated or hazardous soils or water, and any that may be found will be managed in accordance with OPEA requirements.

Furthermore, the only debris anticipated will be concrete foundations that are being reused and, while it does not anticipate contaminated concrete, any found will be segregated and a determination will be made as to disposal or reuse.

- (g) Update of the status of compliance with National Fire Protection Association (NFPA) standards since issuance of the certificate and Lima Energy's coordination with fire, safety, and emergency personnel during all stages of the project. Lima Energy explains that the city of Lima Building Department will issue building permits that include the NFPA fire protection requirements and these requirements will be incorporated during the design of the facility to reflect federal and state requirements for safe plant operation. Furthermore, the Company notes that the contractor has an enforceable safety plan and policy. Once the project development is complete and construction has begun, the Company explains that the scope and nature of the facility will be shared with local public safety and industry organizations.
- (h) Discuss the arrangements made to assure necessary backup pressure is provided to the local natural gas system prior to the proposed facility's connection to the system. The Company explains that its interconnection agreement with CGTC affirms CGTC's ability to assure both capacity and pressure of delivered gas on a continuously reliable basis.
- (i) In its motion to extend its certificate, Lima Energy states that "...the facility may have to be reconfigured." Explain why and how the proposed facility would be reconfigured. Lima Energy explains that, in order to better manage costs and financing, the project will now consist of three primary phases. The first two phases are

being designed to consist of gasification and synthetic product manufacture, and the third phase will be a combined cycle unit fueled by natural gas. Lima Energy advocates that there is value in maintaining the continuity of the existing certificate process, including the amendment of the existing certificate, rather than submitting a new application to accomplish the reconfigurations described by the Company.

- (8) It is a long-standing policy of the Board to include as a condition of each certificate to construct a provision which requires the applicant to commence a continuous course of construction within the specified time period. The purpose of the provision is to encourage the efficient use of land and to limit the applicant's ability to hold the rights to construct on the property indefinitely. Furthermore, it is important to ensure that the information upon which the Board initially relied in granting the certificate is still valid and accurate. Thus, pursuant to the Certificate Order, if Lima Energy had not commenced a continuous course of construction of the proposed facility by May 20, 2007, the certificate to construct the electric generation facility was to become invalid. However, upon consideration of the motion for extension of the certificate filed by Lima Energy on February 6, 2012, as well as the detailed information submitted by the Company on June 20, 2012, and the supportive memorandum provided by Lima, the Board finds that Lima Energy's motion should be granted. Therefore, Lima Energy's certificate to construct the proposed facility should be extended until September 1, 2014. Furthermore, while Lima Energy appears to have committed to moving forward with this project in the near future, the Board finds that the Company must file information in these dockets by August 1, 2013, that updates the information filed on June 20, 2012.

It is, therefore,


ORDERED, That Lima Energy's motion for an extension of its certificate until September 1, 2014, to construct the Allen County generation facility is granted. It is, further,


ORDERED, That Lima Energy comply with the requirements set forth in finding (8). It is, further,

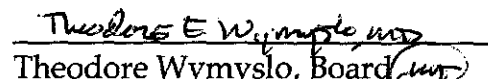
ORDERED, That copies of this entry be served upon Lima Energy and all other persons of record in these proceedings.


THE OHIO POWER SITING BOARD

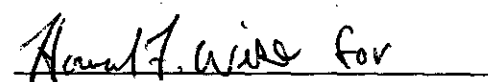

Todd A. Snitchler, Chairman
Public Utilities Commission of Ohio

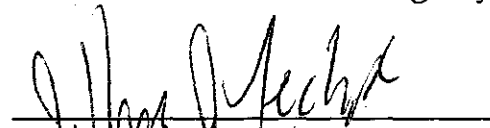

Christiane Schmenk, Board
Member and Director of the Ohio
Department of Development


James Zehringer, Board Member
and Director of the Ohio
Department of Natural Resources


Theodore Wymyslo, Board
Member and Director of the
Ohio Department of Health


Scott Nally, Board Member
and Director of the Ohio
Environmental Protection Agency


David Daniels, Board Member
and Director of the Ohio
Department of Agriculture


Jeffrey J. Lechak, Board Member
and Public Member

GNS/vrm

Entered in the Journal

JUL 30 2012



Barcy F. McNeal
Secretary

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of)	
Buckeye Wind, LLC for a Certificate)	
to Install Numerous Electricity	)	Case No. 08-666-EL-BGN
Generating Wind Turbines in)	
Champaign County to be Collected at	)	Case No. 13-360-EL-BGA
an Electrical Substation in)	
Union Township,)	
Champaign County, Ohio)	

**EXHIBITS IN SUPPORT OF THE
MEMORANDUM OF INTERVENORS UNION NEIGHBORS UNITED, ROBERT
AND DIANE McCONNELL, AND JULIA JOHNSON IN OPPOSITION TO THE
MOTION OF BUCKEYE WIND LLC FOR AN EXTENSION OF ITS CERTIFICATE**

EXHIBIT C

ENTRY FROM *IN RE NORTON ENERGY STORAGE*,
CASE NO. 99-1626-EL-BGN

BEFORE

THE OHIO POWER SITING BOARD

In the Matter of the Application of Norton)
Energy Storage, LLC for a Certificate of)
Environmental Compatibility and Public) Case No. 99-1626-EL-BGN
Need for an Electric Power Generating)
Facility in Norton, Ohio.)

ENTRY

The Ohio Power Siting Board finds:

- (1) On May 21, 2001, the Ohio Power Siting Board (Board) issued its opinion, order, and certificate (Certificate Order) granting the application of Norton Energy Storage, LLC (NES) for a certificate. With this certificate, NES was authorized to develop a 2,700-megawatt compressed air energy storage facility (facility) within the city of Norton, Summit County, Ohio, in accordance with the conditions identified in the Certificate Order. The NES certificate is subject to 24 specific conditions. One of the conditions of the certificate is:

The certificate shall become invalid if the applicant has not commenced a continuous course of construction of the proposed facility within five years of the date of journalization of the certificate.

- (2) On February 27, 2006, NES filed a motion to extend the validity dates of the certificate by 30 months. By entry issued on March 20, 2006, the Board granted an extension of the certificate through November 21, 2008, subject to two additional conditions: that any expired permits be updated as necessary to construct and operate the facility, as detailed in the original filing, prior to the commencement of construction; and that NES provide Board Staff with an annual update regarding the progress on the facility.
- (3) On May 16, 2008, NES filed a second motion to extend the validity dates of the certificate by an additional 30 months. By entry issued on June 2, 2008, the Board granted the motion for a second extension of the certificate through May 21, 2011, subject to all the prior conditions, plus a condition that changes

or modifications of the facility from the Certificate Order shall require NES to file an application for a certificate amendment with the Board.

- (4) On November 23, 2009, NES notified the Board that FirstEnergy Solutions Corporation purchased the membership interest of NES and, thus, NES is a wholly-owned subsidiary of FirstEnergy Generation Corporation.
- (5) By letter dated May 10, 2011, NES provided notice that the start of construction of the initial preliminary phase of the multi-phase facility would commence on or about May 16, 2011.
- (6) On December 11, 2012, NES notified the Board that it is continuing to evaluate the viability of this project; however, due to current and foreseeable market conditions, construction activities on the facility had been suspended.
- (7) By entry issued June 17, 2013, NES was directed to file an affidavit by June 27, 2013, evidencing that the construction of the facility is no longer suspended and is currently or will be moving forward in compliance with the conditions of the certificate, or it would be recommended that the Board invalidate the certificate.
- (8) To date, NES has not filed an affidavit or any other pleading in this docket regarding the continuous course of construction of the facility.
- (9) It is a long-standing policy of the Board to include, as a condition of each certificate, a provision which requires the applicant to commence a continuous course of construction within the specified validity dates of the certificate. The purpose of this condition is to encourage the efficient use of land and to limit the applicant's ability to hold the rights to construct on the property indefinitely. Furthermore, it is important to ensure that the information upon which the Board initially relied in granting the certificate is still valid and accurate. In this case, although NES notified the Board in May 2011, that construction activities would commence on or about May 16, 2011, which is just prior to the close of the certificate validity date, to date, NES has failed to provide evidence on the record that construction has, in fact, commenced. In addition, NES subsequently notified the Board that, as of December 2012,

it was still evaluating the viability of the project and that any construction activities on the facility had been suspended. Moreover, when directed to provide an affidavit or other appropriate pleading updating the status of construction, NES failed to respond. Accordingly, the Board finds the certificate granted to NES for the construction of the energy storage facility should be invalidated as of the date of this entry and this case should be closed of record.


It is, therefore,

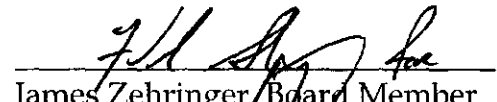
ORDERED, That the certificate granted to NES for the construction of the proposed facility is invalid as of the date this entry and this case is closed of record. It is, further,

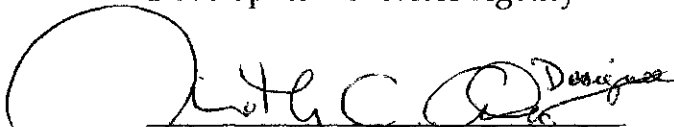
ORDERED, That a copy of this entry be served upon NES and its counsel, and all other interested persons of record in this proceeding.


THE OHIO POWER SITING BOARD

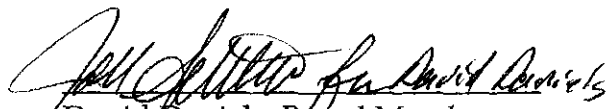

 Todd A. Snitchler, Chairman
 Public Utilities Commission of Ohio


 FOR
 David Goodman, Board Member
 and Director of the Ohio
 Development Services Agency

 FOR
 James Zehringer, Board Member
 and Director of the Ohio
 Department of Natural Resources

 Designated
 Theodore Wymyslo, Board
 Member and Director of the
 Ohio Department of Health

 FOR
 Scott Nally, Board Member
 and Director of the Ohio
 Environmental Protection Agency

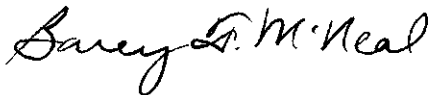
 FOR David Daniels
 David Daniels, Board Member
 and Director of the Ohio
 Department of Agriculture


 Jeffrey J. Lechak, Board Member
 and Public Member

GNS/vrm

Entered in the Journal

SEP 30 2013



Barcy F. McNeal
 Secretary

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of)	
Buckeye Wind, LLC for a Certificate)	
to Install Numerous Electricity	)	Case No. 08-666-EL-BGN
Generating Wind Turbines in)	
Champaign County to be Collected at	)	Case No. 13-360-EL-BGA
an Electrical Substation in)	
Union Township,)	
Champaign County, Ohio)	

**EXHIBITS IN SUPPORT OF THE
MEMORANDUM OF INTERVENORS UNION NEIGHBORS UNITED, ROBERT
AND DIANE McCONNELL, AND JULIA JOHNSON IN OPPOSITION TO THE
MOTION OF BUCKEYE WIND LLC FOR AN EXTENSION OF ITS CERTIFICATE**

EXHIBIT D

PARELLO TESTIMONY FROM *IN RE CHAMPAIGN WIND*,
CASE NO. 12-160-EL-BGN (BUCKEYE WIND II)

Large Filing Separator Sheet

Case Number: 12-160-EL-BGN

File Date: 12/3/2012

Section: 1 of 3

Number of Pages: 150

Description of Document: Public Hearing

FILE

1
2
3 THE MATTER OF THE APPLICATION OF
4 CHAMPAIGNE WIND, LLC FOR A CERTIFICATE TO
5 CONSTRUCT A WIND-POWERED ELECTRIC GENERATING
6 FACILITY IN CHAMPAIGN COUNTY, OHIO.

7
8 Cas No. 12-160-EL-BGN
9

10 Hearing before
11 Jonathan Tauber
12 Bryce McKenney

13 October 25, 2012

14 6:00 p.m.

15
16 Taken at:

17 Triad High School
18 8099 Brush Lake Road
19 North Lewisburg, OH 43060

20
21 Court Reporter:

22 Katrina Dearborn
23
24
25

PUCO

2012 DEC -3 PM 3:06

RECEIVED-DOCKETING DIV

1 hereinafter certified, was examined and testified
2 as follows:

3

- - - - -

4

MS. FRICK: My name is Nancy

5

Frick. I live at 3657 Singing Wind Way

6

in Urbana. And if I'm understanding

7

everything correctly, I will be three

8

miles as the crow flies from four wind

9

turbines. I've already put my house up

10

for sale four months ago, and I'm hoping

11

to get out before the wind turbines get

12

in. Thank you.

13

MR. MCKENNEY: Thank you.

14

Mary Jo Parello.

15

MARY JO PARELLO,

16

After having been first duly sworn, as

17

hereinafter certified, was examined and testified

18

as follows:

19

- - - - -

20

MS. PARELLO: My name is Mary Jo

21

Parello and I'm a resident of Champaign

22

County. I live in Mechanicsburg, 2469

23

S. Parkview Road. I'm a property owner

24

but I'm not a leaseholder. I stood

25

here, right here, when the first wind

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1 factory was applying for siting of
2 turbines in Champaign County. I offered
3 all the reasons why it was a horrible
4 idea to put them here, yet we are now
5 considering doubling down on a bad
6 decision by yet a second wind factory.
7 Will there be no end to turbines here?

8 I'm not going to dwell on the
9 adverse effects of industrial turbines.
10 If I did, I'd up here a very, very long
11 time. Instead, I would like to talk
12 about one thing, one issue, which I
13 personally connected with, and that's my
14 property. I own property here and I
15 want to address one issue, and that is,
16 property values -- or the values of
17 homes of people who are unfortunate
18 enough to be located within the
19 footprint of an industrial wind
20 factory.

21 The loss of property values to
22 areas around wind factories is well
23 documented. Canadian property was
24 devalued anywhere from 30 to 50
25 percent. In Wisconsin, homes in the

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1 footprint of a 22-wind complex went from
2 selling at 104 percent of the assessed
3 value to 78 percent of the assessed
4 value. In New Jersey, a homeowner
5 couldn't even get anyone to come look at
6 his property. In Illinois, values
7 dropped anywhere from 25 to 40 percent.
8 And these are only a few of the many
9 example. In fact, property in the
10 footprint of a wind complex may very
11 well be totally worthless if there are
12 no buyers who are willing to live next
13 to 500-foot turbines. I wouldn't choose
14 to, and I'm sure no one here would
15 either. Yet that is what Everpower is
16 asking you to approve, to approve the
17 devastation of more than 1,000 families
18 that live here. There's a very simple
19 cure for this problem: Don't build wind
20 turbines in populated areas.

21 You might accuse me of one who
22 doesn't want wind turbines in my
23 backyard. Well, then you would be
24 right. However, I would go further to
25 say that they don't belong in anyone's

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1 backyard. People and turbines just
2 don't mix.

3 When I bought my property here, I
4 was overwhelmed with the peaceful beauty
5 of it all, the night noises of nature,
6 and dark star-filled night skies were
7 enough for me to want to live out my
8 retirement here. I felt this investment
9 was safe because my property came with
10 restrictions on it. This was a good
11 thing. It was zoned agricultural-
12 residential, and I felt confident that
13 there would never be any project here
14 that would even come close to the
15 industrial nature of the Ohio Valley
16 that I moved out of. I find it hard to
17 understand, then, why my neighbors who
18 hold leases where I used to live -- I'm
19 sorry -- my neighbors who hold leases
20 can be allowed to turn this area into an
21 industrial complex. If it were zoned
22 industrial, there would be no
23 residential property here. We wouldn't
24 be permitted to live in an industrial
25 area. I know from personal experience

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1 that property in the footprint of these
2 wind factories will be worth
3 considerably less, because I've had my
4 own house up for sale for the past 13
5 months. I have a beautiful home. I've
6 made more than \$100,000 worth of
7 improvements in it since I moved in it.
8 And during this time that my house has
9 been up for sale, I have changed
10 realtors twice. He sends me a printout
11 on the computer. So I look at that.
12 And there have been over 6,000 actions
13 on my property on the Internet, yet I
14 have had only one showing in 13 months
15 and, needless to say, no offers. I'm
16 not alone in this situation. I know of
17 seven or eight properties located within
18 a mile of my home that are less
19 expensive than mine and have built in
20 Champaign County and their property has
21 been on the market for probably as long
22 as mine. It seems the only people
23 interested in building or living in
24 Champaign County want to be far away
25 from these intrusive turbines.

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1 People have done their homework.
2 The wind factory is in the news. It's
3 already killed our housing market. So I
4 suggest that those who believe that this
5 project will benefit their tax base,
6 take a closer look. You may gain wind
7 turbines, but you'll surely lose
8 population, and with it, tax base and
9 property values. Blame the economy,
10 slow housing markets, the elections, if
11 you want to, but I think we're ignoring
12 the elephant in the room, and those
13 elephants are those ugly, costly and
14 inefficient 500-foot turbines.

15 Does the wind company -- this is
16 something else I just can't understand.
17 Does the wind company have the right to
18 make private property unlivable and
19 unsalable? Is it okay to ruin the lives
20 of ordinary people because they don't
21 have the money to hire a whole fleet of
22 lawyers? Where are my rights? I feel
23 my civil rights are being violated. If
24 I want to use the equity in my home, for
25 example, to pay medical bills, to fund

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1 some of my retirement, I can't. If I
2 want to take care of, maybe, my elderly
3 parents, I can't. If I want to borrow
4 money to fund college for my children, I
5 can't. There is something very wrong
6 with this picture. No private company
7 or neighboring landowner should have the
8 right to deny me the right to enjoy my
9 property or use it for my own needs.
10 Buying a home is the single largest
11 investment that a person can make.
12 Ruining the value of that purchase is
13 akin to dealing the neighbor or the
14 property owner an economic destruction.
15 How can any private company, neighboring
16 landowner or government change the rules
17 in the middle of the game. Leaseholders
18 argue that they should be able to use
19 the land as they see fit since. They
20 own it. Then shouldn't I be given the
21 same privilege? Shouldn't these wind
22 companies be required to give property
23 owners a guarantee of value for their
24 property after these factories are
25 operational and we suffer economic death

1 blows? This has been advocated in
2 Illinois to protect non participating
3 neighbors. I think that it is fair and
4 just and the right thing to do.

5 When it's all said and done, the
6 big question is, is this worth the
7 sacrifice? Is nothing sacred in this
8 country anymore? I ask this board to
9 consider if this wind development is
10 worth what it's costing the area and its
11 residents? I urge you to deny the
12 petition to site more turbines here,
13 making a bad problem even worse. When I
14 was writing this opinion, I couldn't
15 help but think of an old saying that
16 still rings true, and that is, the road
17 to destruction is often paved with good
18 intentions.

19 I offer -- I ask you, please, to
20 think this through. Thank you.

21 MR. MCKENNEY: Thank you. I would
22 just like to ask everyone to please hold
23 applause until the end of each speaker,
24 just to make sure that everybody can
25 hear what the person testifying is

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**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of)	
Buckeye Wind, LLC for a Certificate)	
to Install Numerous Electricity	)	Case No. 08-666-EL-BGN
Generating Wind Turbines in)	
Champaign County to be Collected at	)	Case No. 13-360-EL-BGA
an Electrical Substation in)	
Union Township,)	
Champaign County, Ohio)	

**EXHIBITS IN SUPPORT OF THE
MEMORANDUM OF INTERVENORS UNION NEIGHBORS UNITED, ROBERT
AND DIANE McCONNELL, AND JULIA JOHNSON IN OPPOSITION TO THE
MOTION OF BUCKEYE WIND LLC FOR AN EXTENSION OF ITS CERTIFICATE**

EXHIBIT E

PARELLO TESTIMONY FROM *IN RE BUCKEYE WIND*,
CASE NO. 08-666-EL-BGN (BUCKEYE WIND I)

BEFORE THE OHIO POWER SITING BOARD

- - -

In the Matter of the :
Application of Buckeye :
Wind, LLC for a :
Certificate to Install :
Numerous Electricity :
Generating Wind Turbines : Case No. 08-666-EL-BGN
in Champaign County to be :
Collected at an Electric :
Substation in Union :
Township, Champaign :
County. :

- - -

PROCEEDINGS

before Ms. Greta See and Ms. Katie Stenman,
Administrative Law Judges, at Triad High School, 8099
Brush Lake Road, North Lewisburg, Ohio, called at
6:00 p.m. on Wednesday, October 28, 2009.

- - -

ARMSTRONG & OKEY, INC.
185 South Fifth Street, Suite 101
Columbus, Ohio 43215-5201
(614) 224-9481 - (800) 223-9481
Fax - (614) 224-5724

- - -

1 MS. PARELLO: That's correct.

2 ADMINISTRATIVE LAW JUDGE SEE: Okay.

3 Would you please raise your right hand.

4 (Witness sworn.)

5 ADMINISTRATIVE LAW JUDGE SEE: State and
6 spell your name and provide us your address.

7 THE WITNESS: M-a-r-y J-o P-a-r-e-l-l-o.
8 I live at 2469 South Parkview in Mechanicsburg, Ohio.

9 ADMINISTRATIVE LAW JUDGE SEE: Proceed.

10 - - -

11 MARY JO PARELLO

12 being first duly sworn, as prescribed by law,
13 testified as follows:

14 DIRECT TESTIMONY

15 THE WITNESS: I wish that I could state
16 this as eloquently as Mr. Stacy, but I'm going to do
17 my best. I am just one small voice but I must use
18 that voice to oppose the siting of industrial wind
19 turbines in Champaign County.

20 Every argument that the wind companies
21 have made to our elected officials are totally
22 unsubstantiated. They will reduce dependence on
23 foreign oil. Wrong. Wind turbines produce
24 electricity, but only 1 percent of American
25 electricity comes from oil. Producing electricity

1 with wind doesn't help because electricity isn't
2 coming from oil. Even if wind could produce all of
3 our electricity, it wouldn't impact oil.

4 Conclusion: Wind power has no impact on
5 foreign oil dependence or consumption.

6 2) It will reduce carbon emission which
7 is causing global warming, a threat to our planet.
8 Wrong. When wind blows, traditional power plants are
9 throttled back slightly, but not shut off. They need
10 to be kept running because they are dependable,
11 unlike wind energy. Therefore, fuel consumption and
12 CO2 emissions continue even as wind turbines produce
13 electricity.

14 Conclusion: Industrial wind power has no
15 meaningful impact on carbon emissions and zero impact
16 in areas serviced by hydro or nuclear power.

17 3) Wind power is clean and renewable
18 energy. Wrong. Pollution is pollution in any form.
19 Wind turbines pollute with noise, light, stray
20 electricity, and with their very size as they destroy
21 the beauty and tranquility of the land they sit on.

22 Conclusion: Industrial wind turbines are
23 polluters, they destroy nature and destroy the lives
24 of the people who have to live near them; they
25 destroy ecosystems and animal habitats; they cause

1 numerous health problems that are only now becoming
2 evident; they cause economic problems because they
3 ruin property values of homeowners as well as the
4 value of recreational and vacation locations. Who
5 would want to vacation near these monstrosities?

6 Wind power creates clean jobs, number 4.
7 Wrong. On the average there's only about one
8 low-paid employee for every 12 to 15 turbines.
9 Turbines are manufactured overseas and assembled on
10 site by specialized firms. Industrial wind power
11 creates jobs in foreign countries, but not at wind
12 factories.

13 Wind power is overblown, and I have to
14 excuse myself because I borrowed that from somebody,
15 but here is how I see it as a lowly tax paying
16 citizen: My taxes and the taxes of future
17 generations are being used to supply a private
18 industry with capital to come into my community
19 without my knowledge or consent and lobby my elected
20 officials supported, again, by my taxes to ruin my
21 quality of life and the quality of life of my
22 neighbors.

23 Furthermore, this out-of-state industry
24 will be responsible for a loss of our private
25 property values and, as evidenced in other

1 communities where they have erected their giant, ugly
2 machines, they will also be responsible for serious
3 health problems suffered by residents here.

4 I ask, then, why would any elected
5 officials supported by my tax dollar or any entity
6 charged with decisions about the location of these
7 monsters have any other recourse but to just say
8 "No." No, you cannot locate these destructive things
9 close to places where people make their homes and
10 raise their families.

11 American citizens have a right to enjoy
12 property that they have bought and paid for with
13 their own money and they should not have that right
14 taken away by giant corporations using money from
15 those same citizens. This is downright criminal.

16 What are we? Are we sheep to be sheared
17 over and over again for the good of government and
18 corporate greed? There's no good argument for the
19 installation of giant wind turbines in Champaign
20 County or anywhere near residential property.

21 Furthermore, I cannot in good conscious
22 understand why our country can't learn from the
23 mistakes of other countries. Europe has indulged in
24 the quest for green energy in the form of wind
25 turbines for the past 20 years, yet nowhere in

1 Europe, or in the world for that matter, has wind
2 energy displaced coal or nuclear energy. Also, there
3 has been no impact on carbon emissions. Europe is
4 just as dependent on coal and nuclear energy as it
5 ever was. In fact, Europe is building 50 new
6 coal-fired plants in the next ten years.

7 So in 20 years of tax subsidized and
8 expensive wind energy Europe has not reduced carbon
9 emissions by a single gram. Do we think the result
10 will be any different here? Do we have to see for
11 ourselves that wind energy is not the answer to our
12 problems?

13 When this latest fad finally fizzles out,
14 will we be stuck with these giant, ugly monuments to
15 our stupidity? When the dust clears, will our little
16 communities that were once pristine and beautiful be
17 wastelands where nobody wants to live?

18 I ask the Board to take all of these
19 points into consideration and examine all the
20 ramifications of industrial wind plants -- I refuse
21 to call them "farms" -- in our rural community. I
22 ask you to thoroughly examine all of the evidence
23 against siting them here.

24 We are not the first community to be
25 invaded by wind companies. There are investigations

1 and ongoing litigations in process in many parts of
2 the country and in the world as well. I should hope
3 that we could learn by their examples. Send these
4 carpetbaggers packing and allow us to lead our lives
5 in peace. I ask the Board to just say "No."

6 ADMINISTRATIVE LAW JUDGE SEE: Thank you.
7 (Applause.)

8 ADMINISTRATIVE LAW JUDGE SEE: Daniel C.
9 Dye. Sir, I need you to raise your right hand.

10 (Witness sworn.)

11 ADMINISTRATIVE LAW JUDGE SEE: Please
12 state and spell your name and give us your address
13 for the record.

14 THE WITNESS: Daniel C. Dye. D-a-n-i-e-l
15 C. D-y-e. My address is 1791 Madden Road,
16 M-a-d-d-e-n, that's Cable, Ohio 43009.

17 ADMINISTRATIVE LAW JUDGE SEE: Go ahead
18 with your statement.

19 THE WITNESS: Thank you.

20 - - -

21 DANIEL C. DYE
22 being first duly sworn, as prescribed by law,
23 testified as follows:

24 DIRECT TESTIMONY

25 THE WITNESS: As I said, my name is

CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Wednesday, October 28, 2009, and carefully compared with my original stenographic notes.

Maria DiPaolo Jones, Registered
Diplomate Reporter and CRR and
Notary Public in and for the
State of Ohio.

My commission expires June 19, 2011.

(MDJ-3462)

- - -

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

11/12/2009 9:14:53 AM

in

Case No(s). 08-0666-EL-BGN

Summary: Transcript Transcript from hearing held on 10/28/09 electronically filed by Mrs. Jennifer Duffer on behalf of Armstrong & Okey, Inc. and Jones, Maria DiPaolo Mrs.

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of)	
Buckeye Wind, LLC for a Certificate)	
to Install Numerous Electricity	)	Case No. 08-666-EL-BGN
Generating Wind Turbines in)	
Champaign County to be Collected at	)	Case No. 13-360-EL-BGA
an Electrical Substation in)	
Union Township,)	
Champaign County, Ohio)	

**EXHIBITS IN SUPPORT OF THE
MEMORANDUM OF INTERVENORS UNION NEIGHBORS UNITED, ROBERT
AND DIANE McCONNELL, AND JULIA JOHNSON IN OPPOSITION TO THE
MOTION OF BUCKEYE WIND LLC FOR AN EXTENSION OF ITS CERTIFICATE**

EXHIBIT F

**ENTRY OF AMENDMENT FROM *IN RE BUCKEYE WIND*,
CASE NO. 13-360-EL-BGA (BUCKEYE WIND I)**

BEFORE

THE OHIO POWER SITING BOARD

In the Matter of the Application of Buckeye)
Wind, LLC, to Amend its Certificate Issued) Case No. 13-360-EL-BGA
in Case No. 08-666-EL-BGN.)

ORDER ON CERTIFICATE AMENDMENT

The Ohio Power Siting Board, coming now to consider the above-entitled matter, having appointed an administrative law judge (ALJ) to conduct the hearing, having reviewed the exhibits introduced into evidence, and being otherwise fully advised, hereby issues its Order on Certificate Amendment in accordance with R.C. Chapter 4906.

APPEARANCES:

Vorys, Sater, Seymour and Pease LLP, by M. Howard Petricoff, Michael J. Settineri, and Miranda R. Leppla, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216-1008, on behalf of Buckeye Wind, LLC.

Mike DeWine, Ohio Attorney General, Werner Margard and John H. Jones, Assistant Attorneys General, Public Utilities Section, 180 East Broad Street, Columbus, Ohio 43215, and Sarah Anderson and Summer Plantz, Assistant Attorneys General, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215, on behalf of Staff.

Van Kley & Walker, LLC, by Jack A. Van Kley, 132 Northwoods Blvd., Suite C-1, Columbus, Ohio 43235 and by Christopher A. Walker, 137 North Main Street, Suite 316, Dayton, Ohio 45402, on behalf of Diane McConnell, Robert McConnell, and Julia F. Johnson.

Kevin S. Talebi and Jane A. Napier, Assistant Prosecuting Attorneys, 200 North Main Street, Urbana, Ohio 43078, on behalf of Champaign County Board of Commissioners, and Union and Urbana Township Boards of Trustees.

Breanne Parcels, 205 South Main Street, Urbana, Ohio 43078, on behalf of the city of Urbana.

Chad A. Endsley, Chief Legal Counsel, 280 North High Street, P.O. Box 182383, Columbus, Ohio 43215-2383, on behalf of the Ohio Farm Bureau Federation.

OPINION:I. Summary of the Proceeding

On March 22, 2006, the Board issued an Opinion, Order, and Certificate granting the application of Buckeye Wind, LLC (Buckeye or Applicant) for a certificate to construct a wind-powered electric generating facility in Champaign County, Ohio. *In re Buckeye Wind, LLC*, Case No. 08-666-EL-BGN (*Buckeye I*). On May 28, 2013, the Board issued an Opinion, Order, and Certificate granting the application of Champaign Wind, LLC for a certificate to construct a wind-powered electric generating facility in Champaign County, Ohio. *In re Champaign Wind LLC*, Case No. 12-160-EL-BGN (*Buckeye II*).

On March 19, 2013, Buckeye filed an application to amend the certificate issued in *Buckeye I*. In its amendment application, Buckeye proposes six changes to the certificate issued by the Board in *Buckeye I* including: adjusting the construction staging areas; moving one staging area 1.3 miles west; shifting the project substation by 1,000 feet; adding a new access road; modifying four previously approved access roads; and moving the electric collection line system underground. On February 6, 2013, as amended on March 15 and 19, 2013, Buckeye filed a motion for waivers of Ohio Adm.Code 4906-17-02, 03, 04, 05, 06, 07, 08(A), 08(B), 08(C), 08(D), 08(E), 08(F).

On March 22, 2013, Buckeye filed proof of service with the Board indicating that copies of the amendment application had been served upon local government officials and an area library, in accordance with R.C. 4906.06 and Ohio Adm.Code 4906-5-10(B). On May 16, 2013, Buckeye filed proof of public notice of the amendment application that was published in Champaign County on April 1, 2013, in the *Urbana Daily Citizen*. On November 1, 2013, Staff filed a report (Staff Report) evaluating the amendment application (Staff Ex. 1).

By Entry issued November 21, 2013, the ALJ found that none of the six proposed changes in the amendment application would result in a material increase in any environmental impact of the facility. The ALJ also found that the following three proposed changes in the amendment application did not require a hearing under R.C. 4906.07(B), because they did not result in a substantial change in the location of all or a portion of the facility: adjustments to the construction staging areas; modifications to four previously approved access roads; and the movement of the electric collection line system underground. However, the ALJ found that the changes in the amendment application relating to the movement of one staging area 1.3 miles west, shifting the project substation by 1,000 feet, and the addition of a new access road, required a hearing under R.C.

4906.07(B), because they may result in a substantial change in the location of all or a portion of the facility. Therefore, the ALJ scheduled a hearing on January 6, 2014, solely to consider the portion of the amendment application related to the movement of one staging area 1.3 miles west, shifting the project substation by 1,000 feet, and the addition of a new access road. The November 21, 2013 Entry also granted the motions to intervene filed by the Board of Commissioners of Champaign County (Champaign), Boards of Trustees of Union and Urbana townships (Townships), the Ohio Farm Bureau Federation (Farm Federation), city of Urbana (Urbana), and Diane McConnell, Robert McConnell, and Julia Johnson (Citizen Intervenors), and granted Buckeye's motion for waivers of Ohio Adm.Code 4906-17-02, 03, 04, 05, 06, 07, 08(A), 08(B), 08(C), 08(D), 08(E), 08(F).

On December 16, 2013, Buckeye filed a notice of withdrawal of its request to shift the western construction staging area as proposed in its amendment application. On December 23, 2013, Urbana filed a response to Buckeye's notice of withdrawal of its request to shift the western construction staging area. Urbana noted that, given Buckeye's withdrawal of the portion of its amendment application for the relocation of the western construction staging area, which was its principal reason for intervening in this case, Urbana had no other issues to address at the hearing.

On December 23, 2013, Staff filed the testimony of Stuart M. Siegfried and the Applicant filed the testimony of Michael Speerschneider. No other parties filed testimony. The hearing was held as scheduled on January 6, 2014.

II. Applicable Law

Buckeye is a corporation and a person under R.C. 4906.01(A) and is certificated to construct, operate, and maintain a major utility facility under R.C. 4906.10, in accordance with the Board's Order in *Buckeye I*.

Pursuant to R.C. 4906.10, the Board's authority applies to major utility facilities and provides that such entities must be certified by the Board prior to commencing construction of a facility. In accordance with R.C. Chapter 4906, the Board promulgated rules, which are set forth in Ohio Adm.Code Chapter 4906-5, prescribing regulations regarding applications for major utility facilities and amendments to certificates.

R.C. 4906.07 requires that, when considering an application for amendment of a certificate, the Board shall hold a hearing "if the proposed change in the facility would result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility other than as provided in the alternates set forth in the application." In conformance with this statutory provision, Ohio

Adm.Code 4906-5-10(B)(1)(a) provides that the ALJ shall schedule a hearing in an amendment case, if the proposed change would result in any significant adverse environmental impact of the certified facility or a substantial change in the location of all or a portion of such certified facility. An applicant is required to provide notice of its application for amendment in accordance with R.C. 4906.06(B) and (C), and Ohio Adm.Code 4906-5-10(B).

By Entry of November 21, 2013, the ALJ found that none of the six proposed changes in the amendment application would result in a material increase in any environmental impact of the facility. The ALJ also found that the portions of the amendment application related to the construction staging areas, modifications to four previously approved access roads, and the movement of the electric collection line system underground did not require a hearing under R.C. 4906.07(B), because they did not result in a substantial change in the location of all or a portion of the facility.

However, the ALJ found that the three remaining proposed changes in the amendment application required a hearing under R.C. 4906.07(B), because they may result in a substantial change in the location of all or a portion of the facility including: the movement of one staging area 1.3 miles west, shifting the project substation by 1,000 feet, and the addition of a new access road. In accordance with these findings, the ALJ scheduled a hearing on January 6, 2014, solely to consider the portion of the amendment application related to these three changes under the provision in R.C. 4906.07(B).

III. Hearing

At the commencement of the January 6, 2014 hearing, the Citizen Intervenors entered an objection to the scope of the hearing and moved to allow questions regarding the portion of the amendment application that includes the relocation and burial of the electrical lines. The Applicant opposed the motion. While noting that the Citizen Intervenors failed to file an interlocutory appeal of the November 21, 2013 Entry that established the scope of the hearing, the ALJ denied the motion. At the hearing, Michael Speerschneider testified on behalf of the Applicant and Stuart Siegfried testified on behalf of Staff. No other witnesses testified on behalf of any parties.

Michael Speerschneider, chief permitting and public policy officer for EverPower Wind Holdings, Inc., and an officer of Buckeye, described the proposed amendments to the certificate issued in *Buckeye I* including, the collection line system, the location and size of three construction staging areas, the location of four access roads, the addition of a new access road, and the location of the project substation. He explained that the proposed amendment will result in significantly less impact on the environment and the local

community, primarily as a result of eliminating overhead collection lines in favor of underground lines. He also noted that another benefit of the proposed design is that the majority of the collection line system, all staging areas, and the substation will now share the same locations as the collection line system, staging areas and substation approved in *Buckeye II*. Mr. Speerschneider indicated that the new access road will be an improvement to the overall design because it will allow for a direct route from another nearby construction staging area for four other turbines. He also claimed that the new access road will not create any environmental concerns. With respect to the substation location, he explained that, if the amendment is approved, the current location for the *Buckeye I* substation will be abandoned and the substation will be placed in the same location as the *Buckeye II* substation and avoid the impacts of two substations. (Buckeye Ex. 1 at 2-5.)

Staff witness Stuart Siegfried explained that his testimony is limited to only the shifting the project substation by 1,000 feet and the addition of a new access road, because the Applicant had withdrawn the portion of the application that proposed the movement of one staging area 1.3 miles west. Mr. Siegfried indicated that no other Staff analysis was needed with respect to the movement of the substation because the substation approved by the Board in *Buckeye I* will be eliminated and the remaining substation will be constructed on the location already analyzed by Staff and approved by the Board in *Buckeye II*. (Staff Ex. 2 at 4.) Mr. Siegfried stated that the new access road will be approximately 2,600 feet in length with a permanent disturbance of 20 feet. Mr. Siegfried also referenced the application noting that the new access road will reduce construction related traffic on a public road. (Staff Ex. 2 at 6.)

IV. Staff Investigation of Proposed Amendment

With its amendment, the Applicant is proposing to modify certain components of the wind farm previously certified in *Buckeye I*, including changes to the construction staging areas, project substation, access roads, and the electric collection line system. The Applicant is not proposing to relocate or add wind turbines under this proposed amendment. (Buckeye Ex. 2 at 2; Staff Ex. 1 at 1-2.)

In its report of investigation, Staff found that, with this amendment, the Applicant is proposing to adjust the sizes and locations of three construction staging areas, which are identical to those approved by the Board in *Buckeye II*. The Applicant initially proposed to move the western staging area 1.3 miles west of its initial location to a parcel that the Applicant indicates it controls. The portion of the amendment application related to the shift of the western staging area was later withdrawn by the Applicant. (Buckeye 1 at 5, 11; Staff Ex. 1 at 2-3.) Staff also noted that the eastern and southern staging areas are proposed to be relocated at the request of the landowners within the same parcels as

initially planned and would allow it to use the same staging areas for both the *Buckeye I* and *Buckeye II* projects. Staff did not conduct an additional analysis of the proposed staging areas in this amendment proceeding. (Buckeye Ex. 2 at 7; Staff Ex. 1 at 2.)

Staff reported that the Applicant has proposed to move the project substation within the same parcel as initially approved. The amendment related to the proposed move of the substation would entail the temporary disturbance of approximately five acres, with permanent disturbance estimated at 1.75 acres. The Applicant indicated that the proposed change to the substation location would allow it to use the same substation for both *Buckeye I* and *Buckeye II* projects. The size and location of the amended substation area are identical to those approved by the Board in *Buckeye II*. Because the size and location of this project component has been previously approved by the Board and, therefore, found to have been reasonable, Staff did not conduct an additional analysis of the proposed substation location in this amendment proceeding. (Buckeye Ex. 2 at 6; Staff Ex. 1 at 3.)

The Applicant is also proposing a new access road, as well as relocations of four previously approved access roads. These amendments would entail a permanent disturbance 20 feet in width, while temporary disturbance would typically include vegetation clearing to a width of 55 feet. Staff found that these disturbance parameters are consistent with those from the initial application. (Staff Ex. 1 at 3.)

In addition, the Applicant is proposing to relocate four access roads from their previously approved locations. The Applicant indicated that the proposed relocated access roads are all located in farm fields, with no tree clearing required. First, the Applicant proposes to shift the access road to Turbine 40, which is approximately 1,000 feet in length, approximately 750 feet to the west. Staff found that this new route, which would parallel the original route, would be further from a wetland and follow a relocated collection line route. Second, the Applicant is proposing to relocate the north-to-south access road to Turbine 36 at the landowner's request. Staff found that the shift is approximately 500 feet east of its approved location and would follow a relocated collection line. A third proposed change would extend one of the relocated access roads east-west approximately 2,100 feet between Ault Road and Turbine 44. Staff noted that this modification would avoid a stream crossing consistent with a suggestion made by Staff during a field investigation for *Buckeye I*. The fourth proposed modification would shift approximately 625 feet of the access road that extends from United States (U.S.) Highway 36 to Turbine 21 approximately 470 feet to the east, so that it is within the same parcel as the eastern construction staging area. According to Staff, this proposed shift would move the access road's connection to U.S. Highway 36, so that it is no longer directly in front of a residence. (Buckeye Ex. 2 at 6; Staff Ex. 1 at 3-4.)

Under the amendment application, the Applicant has also proposed the construction of a new access road running north and south between Turbines 16 and 18. Staff found that this new access road reduces the need to use Perry Road and instead follows an approved collection line route. Staff determined that, although located largely in an active agricultural field, the Applicant estimates that the new access road would have temporary impacts to forested areas of 0.14 acres and would require a stream crossing near Turbine 18; however, a crossing structure is already in place at that location. (Buckeye Ex. 2 at 6-8; Staff Ex. 1 at 3-4.)

Staff explained that, as initially proposed, the electric collection system would have been approximately 65.4 miles of which approximately 40 miles would have been overhead lines. As proposed with this amendment, Staff notes that the electric collection system would total 41.1 miles all of which would be installed underground on parcels of participating landowners. Of the 41.1 miles, Staff determined that there are 7.32 miles that were not reviewed and approved in *Buckeye I* or *Buckeye II*. As a result, Staff focused its review in this proceeding on the 7.32 miles of new collection line routing. According to Staff, the Applicant is proposing to use direct burial methods, such as with the use of a cable plow or trencher, to install the electric collection line in most areas and open trenches for installation in areas where the direct burial methods may not be as appropriate. Other installation techniques may be used in certain locations to facilitate the avoidance of specific resources. The 7.32 miles of relocated electric collection system would involve the crossing of three streams, two wetlands, and three roads. Staff also noted that the Applicant intends to install the collection line at these three road crossings using directional drilling and that, as such, any direct impacts to the road at the crossing locations would be avoided. (Buckeye Ex. 2 at 5; Staff Ex. 1 at 4-5.)

Staff recommended the Board find the proposed amendment to the Certificate poses minimal social and environmental impacts, provided that the amendment includes the following recommended conditions:

- (1) The Applicant shall adhere to all conditions of the original certificate for *Buckeye I*.
- (2) The Applicant shall construct the facility as approved in *Buckeye I*, and as further modified by the proposed amendment and replies to Staff data requests in this proceeding.
- (3) Within six months of completing construction, the Applicant shall either communicate the location of the buried electric

collection lines to the Ohio Utilities Protection Service (OUPS) or become a member of the OUPS.

(Staff Ex. 1 at 7.)¹

V. Conclusion

As noted previously, R.C. 4906.07(B) requires that, when considering an application for amendment of a certificate, the Board shall hold a hearing if the proposed change in the facility would result in:

1. any material increase in any environmental impact of the facility, or
2. a substantial change in the location of all or a portion of such facility.

In conformance with this statutory provision, Ohio Adm.Code 4906-5-10(B)(1)(a) provides that a hearing shall be scheduled in an amendment case, if the proposed change would result in any significant adverse environmental impact of the certified facility or a substantial change in the location of all or a portion of such certified facility. Under the amendment application, the Applicant proposed changes to four project components, including the construction staging areas, project substation, access roads, and the electric collection line system. No changes are proposed to relocate or add wind turbines.

With regard to the first of the two criteria requiring a hearing in an amendment application, upon review of the amendment application and the evidence of record, we find that none of the proposed changes in the application would result in a material increase in any environmental impact of the facility. Therefore, the Board finds that a hearing to consider the first criteria was not required pursuant to R.C. 4906.07(B).

Turning to the second of the two criteria, the Board finds that the portions of the amendment application regarding adjustments to the construction staging areas, modifications to four previously approved access roads, and the movement of the electric collection line system underground did not require a hearing under R.C. 4906.07(B), because they did not result in a substantial change in the location of all or a portion of the facility. However, because the portions of the amendment application related to shifting the project substation by 1,000 feet and the addition of a new access road of approximately

¹ In the Staff Report, Staff initially recommended a condition addressing the shift of the western staging area proposed in the amendment application. This condition was no longer applicable following Buckeye's withdrawal of that portion of its amendment application.

2,600 feet in length may result in a substantial change in the location of all of a portion of the facility, we find that a hearing was required under R.C. 4906.07(B). As such, a hearing was appropriately held on these portions of the amendment application.

In considering the portion of the amendment application that was the subject of the hearing because it would result in a substantial change, as noted previously, the record reflects that the adjustments to the sizes and locations of the eastern and southern staging areas were proposed at the request of the landowners within the same parcels as initially planned (Buckeye Ex. 2 at 7; Staff Ex. 1 at 2). Also, the proposed changes to the construction staging areas would allow Buckeye to use the same staging areas for both the *Buckeye I* and *Buckeye II* projects which we have previously determined reasonable and approved (Buckeye Ex. 2 at 7; Staff Ex. 1 at 2). In addition, the Applicant will no longer use the project substation initially planned for *Buckeye I* and, instead, will use the substation approved by the Board in *Buckeye II*. As a result, the Applicant will use the same substation for both the *Buckeye I* and *Buckeye II* projects, effectively eliminating a substation (Buckeye Ex. 1 at 2-5). Further, the modifications to four previously approved access roads will all be located in farm fields and will require no tree clearing. The modifications to two access roads will now follow relocated collection lines, one access road will avoid a stream crossing, and another access road will avoid being placed directly in front of a residence. The additional new access road proposed in the application reduces the need to use Perry Road and, instead, follows an approved collection line route. (Buckeye Ex. 2 at 6; Staff Ex. 1 at 3-4.) No issues were raised at the hearing regarding these portions of the amendment application.

As for the remainder of the amendment application that was not within the scope of the January 6, 2014 hearing, a portion of this relates to the electric collection line system. The record reflects that approximately 40 miles of the total 65.4 miles of the electric collection line system originally approved to be overhead is now proposed to be placed underground. In addition, all of the 41.1 miles will be installed on parcels of participating landowners. Of the 41.1 miles, Staff determined that there were 7.32 miles that had not previously been reviewed and approved in *Buckeye I* or *Buckeye II*. In order to avoid specific resources, the Applicant proposes to use direct burial methods to install the electric collection line in most areas or open trenches where the direct burial methods may not be as appropriate, as well as other installation techniques. In addition, the Applicant intends to install the collection lines for the 7.32 miles using directional drilling at three road crossings which will avoid any direct impacts to the road at the crossing locations (Buckeye Ex. 2 at 5; Staff Ex. 1 at 4-5.)

We note that the ALJ denied the motion of the Citizen Intervenors at the commencement of the hearing to expand the scope of the hearing. Specifically, while

expressing agreement with Staff's finding that the applicant use directional drilling on the 7.32 miles of the electrical system, the Citizen Intervenors also sought to expand the hearing because they wanted to make sure that the decision of this Board required directional drilling be done for the entire length of the electrical lines. "Now, we are not as much concerned about the locations of the lines as we are about whether the installation of those lines is going to cut through the roads in the community. We have a commitment from the applicant in response to the Staff's data requests that the 6.3 miles of line in brand-new locations will use horizontal directional drilling to go under the roads instead of cutting through them. "We want to make sure that the decision of this Board requires directional drilling to be done of that extra 24 miles of electrical lines as well the 6.35 miles that the Applicant's already committed to use directional drilling for." (Tr. at 9). The Citizen Intervenors made no argument that the location of the electrical collection system required a hearing in accordance with R.C. 4906.07(B). It is clear that the Citizen Intervenors merely wanted to ensure that directional drilling was used for burying the electrical lines. It is noteworthy that the Citizen Intervenors never filed an interlocutory appeal of the November 21, 2013 ALJ Entry; rather, they made an untimely motion for the same relief at the commencement of the hearing. Notwithstanding the merits of this procedural blemish, we agree with the ruling of the ALJ that R.C. 4906.07(B) does not require that the scope of the hearing include consideration of the Citizen Intervenors' issue regarding the utilization of directional drilling. Moreover, while not raised as an issue by the Citizen Intervenors, we find that the movement of the electrical system at the same location, from above ground to underground, does not result in a substantial change in the location of all or a portion of the facility previously approved by the Board. Therefore, there was no statutory requirement under R.C. 4906.07(B) to hold a hearing on this portion of the amendment application.

Based upon the record in this proceeding, the Board concludes that, pursuant to R.C. Chapter 4906, Buckeye's amendment application should be approved, subject to the conditions set forth in *Buckeye I* and the Staff Report. Accordingly, Buckeye's certificate, issued in *Buckeye I*, should be amended to provide for adjusting the construction staging areas, shifting the project substation by 1,000 feet, adding a new access road, modifying four previously approved access roads, and moving the electric collection line system underground.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) Buckeye is a corporation and a person under R.C. 4906.01(A).
- (2) Buckeye's electric generation facility is a major utility facility under R.C. 4906.01(B)(1).

- (3) On March 19, 2013, Buckeye filed an application in this proceeding to amend the certificate issued in *Buckeye I*.
- (4) The proposed amendment would involve adjusting the construction staging areas, shifting the project substation by 1,000 feet, adding a new access road, modifying four previously approved access roads, and moving the electric collection line system underground.
- (5) In accordance with R.C. 4906.06 and Ohio Adm.Code 4906-5-10(B), Buckeye served copies of the amendment application upon local government officials and a public library and filed its proof of service on March 22, 2013. Public notice of the proposed amendment was also published in Champaign County, Ohio and filed with the Board on May 16, 2013.
- (6) On November 1, 2013, Staff filed a report evaluating the amendment application.
- (7) By Entry issued November 21, 2013, the ALJ found that none of the six proposed changes in the amendment application would result in a material increase in any environmental impact of the facility. The ALJ also found that the following three proposed changes in the amendment application did not require a hearing under R.C. 4906.07(B), because they did not result in a substantial change in the location of all or a portion of the facility: adjustments to the construction staging areas; modifications to four previously approved access roads; and the movement of the electric collection line system underground. However, the ALJ found that the changes in the amendment application relating to the movement of one staging area 1.3 miles west, shifting the project substation by 1,000 feet, and the addition of a new access road, required a hearing under R.C. 4906.07(B), because they may result in a substantial change in the location of all or a portion of the facility.
- (8) Champaign, Townships, Farm Federation, Urbana, and the Citizen Intervenors were granted intervention in this proceeding.

- (9) By Entry issued November 21, 2013, the ALJ granted Buckeye's motion for waivers of Ohio Adm.Code 4906-17-02, 03, 04, 05, 06, 07, 08(A), 08(B), 08(C), 08(D), 08(E), 08(F).
- (10) On December 13, 2013, Buckeye filed a notice of withdrawal of its request to shift the western construction staging area.
- (11) On December 23, 2013, Urbana filed a response to Buckeye's withdrawal of its request to shift the western construction staging area and noted that it had no other issues to address at the hearing.
- (12) An evidentiary hearing was held on January 6, 2014, to consider the portion of the amendment application related to shifting the project substation by 1,000 feet, and the addition of a new access road.
- (13) The basis of need criteria in R.C. 4906.10(A)(1) is not applicable to this case. The application satisfies the criteria in R.C. 4606.10(A)(2) through (8).
- (14) Based on the record, in accordance with R.C. Chapter 4906, the certificate of environmental compatibility and public need for Buckeye's electric generation facility, issued in *Buckeye I*, should be amended to permit: adjusting the construction staging areas; adding a new access road; modifying four previously approved access roads; and moving the electric collection line system underground, subject to the conditions set forth in *Buckeye I* and this Order.

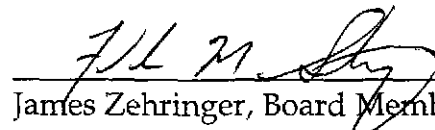


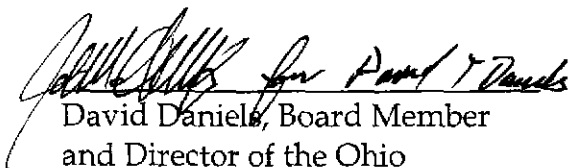
ORDER:

It is, therefore,

ORDERED, That Buckeye's amendment application be approved, subject to the conditions set forth in *Buckeye I* and this Order. It is, further,

ORDERED, That a copy of this Order on Certificate Amendment be served upon all interested persons of record.


THE OHIO POWER SITING BOARD


Todd A. Snitchler, Chairman
Public Utilities Commission of Ohio
David Goodman, Board Member
and Director of the Ohio
Development Services Agency
James Zehringer, Board Member
and Director of the Ohio
Department of Natural Resources
Theodore Wymyslo, Board
Member and Director of the
Ohio Department of Health
Craig Butler, Board Member
and Interim Director of the Ohio
Environmental Protection Agency
David Daniels, Board Member
and Director of the Ohio
Department of Agriculture
Jeffrey A. Lechak, Board Member
And Public Member

SEF/sc

Entered in the Journal

FEB 18 2014



Barcy F. McNeal
Secretary

**BEFORE
THE OHIO POWER SITING BOARD**

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Champaign County to be Collected at)	Case No. 13-360-EL-BGA
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MEMORANDUM OF INTERVENORS UNION NEIGHBORS UNITED, ROBERT
AND DIANE McCONNELL, AND JULIA JOHNSON IN OPPOSITION TO THE
MOTION OF BUCKEYE WIND LLC FOR AN EXTENSION OF ITS CERTIFICATE**

EXHIBIT G
UNU NOTICE OF APPEAL OF INCIDENTAL TAKE PERMIT

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNION NEIGHBORS UNITED, INC.,
4880 East U.S. Hwy 36,
Urbana, Ohio 43078,

Plaintiff,

v.

SALLY JEWELL, in her official capacity as
SECRETARY OF THE UNITED STATES
DEPARTMENT OF THE INTERIOR,
United States Department of the Interior,
1849 C. Street, N.W.
Washington, DC 20240,

DANIEL M. ASHE, in his official capacity as
DIRECTOR, UNITED STATES FISH AND
WILDLIFE SERVICE,
United States Fish and Wildlife Service,
1849 C. Street, N.W. Room 3331,
Washington, DC 20240-0001,

TOM MELIUS, in his official capacity as
REGIONAL DIRECTOR FOR THE
MIDWEST REGION, UNITED STATES FISH
AND WILDLIFE SERVICE,
United States Fish and Wildlife Service,
Midwest Region,
5600 American Blvd. West, Suite 990,
Bloomington, MN 55437-1458,

Defendants.

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

Civil Case No. _____

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
AND PETITION FOR JUDICIAL REVIEW**

INTRODUCTION

1. This is an action for declaratory and injunctive relief brought under the Administrative Procedure Act, 5 U.S.C. §§ 701–706, to remedy violations of the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* and the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, concerning the final approval and issuance of a Record of Decision and Incidental Take Permit for the killing of endangered Indiana bats at the Buckeye Wind Power Project in Ohio.
2. Plaintiff is a nonprofit citizen organization incorporated in the State of Ohio that advocates for protecting the quality of the environment for humans and wildlife from the impacts of wind power facilities in Ohio.
3. Applicant Buckeye Wind LLC (“Buckeye Wind”) sought an Endangered Species Act (“ESA”) Section 10(a)(1)(B) Incidental Take Permit (“ITP”) from Defendant U.S. Fish and Wildlife Service (“USFWS” or “Service”) for the direct killing (taking) of federally endangered Indiana bats (*Myotis sodalis*) at the Buckeye Wind Power Project (“Project” or “Buckeye Wind Project”) in Champaign County, Ohio.
4. On or about July 17, 2013, USFWS issued a final Environmental Impact Statement (“EIS”) and Record of Decision (“ROD”) for the proposed issuance of an ITP to applicant Buckeye Wind.
5. The USFWS also issued a Biological Opinion, approved Buckeye Wind’s Habitat Conservation Plan (“HCP” dated March 2013), and issued an ITP on or about July 17–18, 2013. The ITP has a term of 30 years.
6. The ROD and EIS submitted by USFWS for the proposed issuance of the ITP to Buckeye Wind do not comply with the requirements of and violate the National Environmental Policy Act of 1969, as amended (“NEPA”).

7. Also, the decision of USFWS to issue an ITP to Buckeye Wind as well as USFWS's findings associated with the decision to issue the ITP in question do not comply with the requirements of and violate the Endangered Species Act of 1973, as amended ("ESA").

8. The ROD and EIS are arbitrary and capricious, an abuse of discretion, and violate NEPA because USFWS refused to consider in the EIS a reasonable and discrete alternative, submitted to the Service in formal comments, that is likely to be significantly more effective at reducing mortality of endangered Indiana bats compared to the alternative chosen and approved by USFWS.

9. Furthermore, USFWS's finding that the taking of endangered Indiana bats has been "minimized" to the "maximum extent practicable" by the ITP and associated HCP is arbitrary and capricious, an abuse of discretion, and violates the ESA. Section 1539(a)(2)(B)(ii) of the ESA requires that "the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking" in order to obtain an ITP. The USFWS's finding is arbitrary and capricious because (1) there exists a reasonable and discrete alternative, recommended by commenters, that is likely to kill significantly fewer endangered Indiana bats than will likely be killed under the alternative chosen and approved by USFWS; and (2) this recommended alternative has not been found to be impracticable.

APPLICABLE STATUTES, JURISDICTION AND VENUE

10. Plaintiff brings this action pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"); the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* ("ESA"); and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA").

11. The APA provides that final agency action is subject to judicial review, and also provides the standards for judicial review and judicial remedies for this action. 5 U.S.C. §§ 701-706.

Defendants' issuance of the ROD and ITP are final "agency actions" subject to judicial review under the APA.

12. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under United States law.

13. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*

14. This Court has the authority to grant injunctive relief pursuant to the Administrative Procedure Act, 5 U.S.C. § 706.

15. Venue is proper in this judicial district because one or more Defendants reside in the District of Columbia. *See* 28 U.S.C. § 1391(e)(1).

16. This Court has the authority to award costs and attorneys' fees under 28 U.S.C. § 2412(d).

PARTIES

17. Plaintiff Union Neighbors United, Inc. ("UNU") is a nonprofit corporation based in Urbana, Ohio. UNU was formed to promote the safety and well-being of the Champaign County community by addressing issues relating to the siting of industrial wind turbines, including adverse impacts on wildlife such as Indiana bats. UNU has ten trustees and officers, all of whom reside in the area that will be affected by the Buckeye Wind Project, and all of whom enjoy and want to protect the community's wildlife, including its bats. UNU brings this action on behalf of its member officers and trustees.

18. UNU pursues its purpose and mission by communicating its concerns to public officials and educating the public about the effects of siting industrial wind turbines in the community.

19. UNU produces and makes available educational materials about the effects of wind development on humans, bats (including the Indiana bat), and other wildlife in Champaign County and other locations through a website, phone line, e-mail address, booth at the Champaign County Fair, and placement in the Champaign County Library.
20. UNU members have testified before committees of the Ohio General Assembly and have attended meetings of the Ohio Wind Working Group (“OWWG”), a taskforce operated by the State of Ohio to establish policies and best management practices for the siting and operation of industrial wind developments. The State of Ohio appointed UNU member Julia Johnson to serve as a voting member representing the public in the OWWG, and two UNU members also served on the Environmental Action Team subcommittee for the OWWG. UNU has been an intervenor in the Buckeye I and II applications before the Ohio Power Siting Board.
21. UNU submitted both informal and official comments to USFWS with regard to planning for the Buckeye Wind Project, the drafting of the HCP and EIS, and USFWS’s permitting of the facility under the ESA.
22. UNU submitted official comments to USFWS on March 1, 2010 in response to the Service’s January 29, 2010 federal register notice regarding the then proposed Buckeye Wind Project. These comments were submitted for USFWS’s consideration in making a decision under NEPA about the proposed HCP and ITP to address the Project’s anticipated impacts on the endangered Indiana bats found in the vicinity of the Project. UNU expressed concern that the Project would kill and/or harm wildlife, including endangered Indiana bats, and asked USFWS to protect Indiana bats.
23. UNU again submitted comments to USFWS on June 25, 2010, in response to the Service’s May 26, 2010 Federal Register notice concerning the draft EIS for the Buckeye Wind

Project's proposed HCP and ITP,

24. UNU again submitted comments to USFWS on September 27, 2012 in response to USFWS's request for comments on the draft EIS.

25. UNU again submitted comments on May 20, 2013 in response to USFWS's request for comments on the final EIS for the Buckeye Wind Project's proposed HCP and ITP. In those comments UNU incorporated by reference the submitted comments of the Conservation Law Center filed on September 26, 2012 and May 17, 2013.

26. UNU's comments described above were submitted on behalf of UNU and member-trustees Robert McConnell, Diane McConnell, and Julia Johnson.

27. Plaintiff UNU brings this action on behalf of its member officers and trustees who are directly and imminently injured by the USFWS's approval of an ITP, HCP, and ROD for the Buckeye Wind Project. The USFWS's approvals are a direct cause of these injuries.

28. One or more UNU members live within a mile of the Project's turbines and will be able to see Project wind turbines from their homes.

29. One or more UNU members frequently observe bats, including Indiana bats, on their properties and near the Project site. One or more UNU members also garden or own land currently used for agricultural purposes in the affected area. These members derive educational, scientific, ecological, spiritual, social, aesthetic, and recreational benefits from the presence of bats, including Indiana bats, on their properties and in the affected area.

30. Any adverse impact to Indiana bats necessarily impairs the ability of UNU's members to reap the benefits provided by Indiana bats in the area surrounding the Project, therefore injuring these members in economic and other ways. As such, these individuals will be injured by any

direct “takes” of Indiana bats caused by Defendants’ actions or any indirect “takes” through Indiana bat habitat degradation caused by Defendants’ actions.

31. UNU member and trustee Julia Johnson resides at 4891 E. U.S. Route 36, Urbana, Ohio. Ms. Johnson is an active member of UNU and has been a trustee of the organization since its incorporation in September 2008. She makes periodic donations to UNU in support of its mission.

32. Ms. Johnson’s home sits on 30 acres of land bordered by woods to the south and west and by the trees and fairways of the Urbana Country Club golf course to the north and east. Ms. Johnson also owns an additional 182 acres of undeveloped property adjacent to her home to the south and east, portions of which are wooded and portions enrolled in the USDA FSA Habitat Conservation Program. She is also the part owner of a farm of approximately 800 acres, portions of which are wooded and portions enrolled in the USDA FSA Habitat Conservation Program. At least four generations of her family have lived in Urbana, Ohio.

33. At the time of the Ohio Power Siting Board’s (“OPSB”) evidentiary hearing on the first phase of the Project, four turbines were proposed to be between 500 feet and three-quarters of a mile from Ms. Johnson’s property line. Three of those turbines have been approved by the OPSB. Ms. Johnson’s property line is approximately 600 feet in a direct line from the closest approved turbine. Buckeye Wind’s Visual Impact Analysis also indicates 55 to 70 Buckeye wind turbines will be visible from her property.

34. Ms. Johnson often walks on her property, which is bordered by woods and situated between two ponds that attract wildlife, including bats. Ms. Johnson erected a bat house next to her northern pond to encourage more bat activity on her property. She enjoys watching bats in the evening from the deck of her house as the bats swoop over her pond to feed on insects. Ms.

Johnson attributes the lack of mosquitos around her deck and the resulting ability to dine comfortably outdoors to the presence of bats near her home.

35. Ms. Johnson is active in various environmental causes. For example, she is a founding board member of the Philander Chase Corporation, established in 2000 to preserve and maintain the farmland, open spaces, scenic views, and characteristic landscapes surrounding Kenyon College and Gambier, Ohio, and currently serves on the board and chairs the Conservation Committee. She is a member and current president of the Little Garden Club of Columbus, an affiliate of the Garden Club of America, has advocated for sustainable federal environmental policies on behalf of the Garden Club, and has worked to establish funding for research on conservation of pollinators, including bats.

36. Ms. Johnson is very active in the issues surrounding the recognized impacts of the Buckeye Wind Project and wind power projects in general. In 2007, she lobbied the county prosecutor to convene a local education initiative to inform the community about the implications of an industrial wind facility for Champaign County, and she was one of two citizens appointed to the subsequently convened Wind Turbine Study Group. Impact to wildlife was one of the identified issues considered by this group. Ms. Johnson participated for four years on a subcommittee of the Ohio Wind Working Group called the Environmental Action Team, chaired by Megan Seymour of USFWS. She also has testified in the Ohio General Assembly regarding the impacts of wind power development.

37. Ms. Johnson has enjoyed watching bats on a number of occasions on her property and on surrounding properties, all within a short distance from the Buckeye wind turbines. Given the occurrence of Indiana bats in the area, some of the bats she has observed over the years likely have been Indiana bats. She derives educational, aesthetic, and recreational enjoyment from

observing these bats in this area. She also receives natural benefits from the presence of bats on and near her property, including Indiana bats. She intends to continue enjoying watching bats on her property and dining on the deck of her home into the future.

38. Because of her long-standing interest in dedicating her property to wildlife conservation, observing Indiana bats and other bats on her property, and because of the benefits of mosquito and insect control enjoyed by Ms. Johnson on her property, Ms. Johnson is injured by the Buckeye Wind Project, which will result in the unlawful taking of Indiana bats and the loss and degradation of Indiana bat habitat. The reduction in Indiana bats and other bats from this area would make it more difficult for her to observe and enjoy these bats and enjoy their benefits.

39. UNU member and trustee Anita Bartlett resides at 6044 E. U.S. Highway 36, Cable, Ohio. Ms. Bartlett is an active member of UNU and is a trustee and officer of UNU. She has served as UNU's secretary for seven years.

40. She and her husband James L. Bartlett own 2.5 acres and have lived on the property for 35 years.

41. According to the 2009 Buckeye Wind Project map for Phase 1, the Bartletts' property line is approximately one-half mile from turbine 47 and three-quarters of a mile from turbines 28 and 33. A map in the Buckeye Wind Phase II application to the OPSB indicates nine additional turbines to be sited within one mile of her property. Six to seven of the proposed turbines will be visible from the Bartlett property, and some turbines may be within approximately 2,700 feet of their home's foundation.

42. Ms. Bartlett is a lifelong appreciator of bats. Her first recollection of an interest in bats occurred at the age of ten when she observed bats at an outdoor concert in Ohio. She has been a member of Bat Conservation International ("BCI") since 1998, and has made donations to

special projects like the study of white nose syndrome. She reads the BCI e-mail newsletter and magazines. Ms. Bartlett advised St. Michael Catholic Church in Mechanicsburg, Ohio on preventing bats from entering the church belltower to prevent the church from resorting to lethal methods. Ms. Bartlett has visited Ohio Caverns and other caves partly for the purpose of bat watching, and has taken friends and family with her to watch bats on different occasions. Ms. Bartlett also bat-watches with a friend on her friend's property in an adjoining township.

43. Bat watching is a favorite activity for Ms. Bartlett. She has observed bats on a number of occasions at her home and on the surrounding property. Given the occurrence of Indiana bats in the area, some of the bats she has observed over the years most likely have been Indiana bats. She watches bats in the sky and near the trees on their 2.5 acres and in the woods to the north of her home. She finds joy and inspiration from the bats she watches flying above her property.

44. Ms. Bartlett and her husband planted shade, screen and windbreak trees and shrubs that serve as a wildlife habitat. They have installed a bat house on their property to encourage bats to roost on their property.

45. Bats control the mosquito population in her area and on her property and enable Ms. Bartlett to sit comfortably outdoors to enjoy her flowers. Ms. Bartlett has a weakened immune system resulting from chemotherapy and a stem cell transplant. She fears the effects of mosquito-borne illnesses such as the West Nile virus, and therefore distinctly appreciates the insect control provided by bats, including the endangered Indiana bat.

46. Ms. Bartlett has been active in opposing the Buckeye Wind Project. She has painted opposition signs for her property and for others, and has testified to Ohio senators regarding impacts of industrial wind turbines.

47. Ms. Bartlett derives educational, spiritual, aesthetic, social, and recreational enjoyment from observing bats in the area where she lives near the Project. She also receives natural benefits from the presence of bats on and near her property, including Indiana bats. She intends to continue enjoying bat watching, gardening, and utilizing the outdoor space on her property into the future.

48. Because of her long-standing interest in observing Indiana bats and other bats on her property and in the vicinity of the project, her social bonding with other people over an appreciation of bats, and because of the benefits of mosquito and insect control enjoyed by Ms. Bartlett on her property, Ms. Bartlett is injured by the Buckeye Wind Project, which will result in the unlawful taking of Indiana bats and the loss and degradation of Indiana bat habitat. The reduction in Indiana bats and other bats from this area would make it more difficult for her to observe and enjoy these bats and enjoy their benefits.

49. UNU member and trustee James Bartlett resides with his wife Anita Bartlett at 6044 E. U.S. Highway 36, Cable, Ohio. Mr. Bartlett is an active member of UNU and has been a trustee of the organization since its incorporation in September 2008.

50. Dozens of turbines will be visible during the six-mile trip west from the Bartlett home into the town of Urbana on U.S. Highway 36, and as many as 31 turbines will be visible on the return trip from Urbana.

51. Mr. Bartlett and his wife have planted over 30 species of hardwood and conifer trees and various shrubs and flowers on their property, which attract insects and several species of bats that feed on the insects. Mr. Bartlett assisted Julia Johnson in constructing a walking trail around her property so that she can enjoy watching wildlife, including bats and the endangered Indiana bat, on her property. He has assisted in erecting bat houses on two properties owned by a UNU

trustee and officer, and in the promotion and siting of bat houses on two Clark County properties. Mr. Bartlett has protected and nurtured wildlife – including Indiana bat – habitat on his property for 35 years and will continue to do so for as long as he owns the property.

52. Mr. Bartlett joined Bat Conservation International (“BCI”) 15 years ago with his wife Anita. He educates local people about bats and promotes the erection of bat houses in the area. He and his wife make bats a central focus of their vacation plans both nationwide and in the Ohio area. Mr. Bartlett often watches bats on his property in the open areas in the front yard and along the north side of his property, and believes that some of the bats he observed may have been Indiana bats. Given the occurrence of Indiana bats in the area, some of the bats he has observed over the years most likely have been Indiana bats. He looks forward to the return of bats each spring and considers bat watching one of the benefits of living in a rural area.

53. Mr. Bartlett worked for the State of Ohio Department of Natural Resources Division of Forestry for 35 years as a service forester on private land in seven counties in west-central Ohio, and has operated his own forestry consulting business since retiring in 2005. Mr. Bartlett has included information on the Indiana bat in the several hundred management plans he has written for the last 20 years. Mr. Bartlett appreciates the importance of bats to agriculture in the rural area where he resides as a natural control of harmful insects.

54. Mr. Bartlett has enjoyed watching bats on a number of occasions on his property, within a short distance of the Project wind turbines. He derives educational, aesthetic, social, and recreational enjoyment from observing these bats in this area. He also receives natural benefits from the presence of bats on and near his property, including Indiana bats. Mr. Bartlett intends to continue enjoying bat watching on his property onto the future.

55. Because of his longstanding interest in observing Indiana bats and other bats in the vicinity of the Project, his social bonding with other people over an appreciation of bats, and because of the benefits of mosquito and insect control enjoyed by Mr. Bartlett on his property, Mr. Bartlett is injured by the Buckeye Wind Project, which will result in the unlawful taking of Indiana bats and the loss and degradation of Indiana bat habitat. The reduction in Indiana bats and other bats from this area would make it more difficult for him to observe and enjoy these bats and enjoy their benefits.

56. Because the USFWS's ITP allows more Indiana bats to be killed than is legal under the ESA, the injury to UNU members is exacerbated. These individuals are injured by Defendants' violations of the ESA, because USFWS's approval of the ITP impairs and will continue to impair the survival of Indiana bats in the immediate vicinity of areas where UNU members engage in bat watching and receive natural benefits from the Indiana bat's presence. Hence, Defendants' actions will make it more difficult for these individuals to enjoy the benefits of Indiana bats and other bat species.

57. DOI is an Executive Department and is an agency of the United States as defined by 5 U.S.C. § 551(1). Defendant Jewell is named in her current official capacity as the Secretary of the Interior. This Defendant has supervisory responsibility over defendant Ashe, has the statutory duty to implement the ESA, and is ultimately responsible for the arbitrary and capricious and unlawful acts described in this Complaint.

58. USFWS is a sub-agency within DOI and is an agency of the United States as defined by 5 U.S.C. § 551(1). Defendant Ashe is named in his current official capacity as the Director of USFWS. This Defendant is responsible for administration of the ESA and the arbitrary and capricious and unlawful acts described in this Complaint.

59. Defendant Tom Melius is named in his current official capacity as the Regional Director of USFWS Midwest Region 3. This Defendant is also responsible for the arbitrary and capricious and unlawful acts described in this Complaint.

LEGAL FRAMEWORK

National Environmental Policy Act

60. Congress enacted the National Environmental Policy Act (“NEPA”) to “promote efforts which will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321. To achieve this goal, NEPA requires federal agencies, including the USFWS, to fully consider and disclose the environmental consequences of an agency action before proceeding with that action. *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.2.

61. An agency’s evaluation of environmental consequences must be based on scientific information that is both “[a]ccurate” and of “high quality.” 40 C.F.R. § 1500.1(b).

62. The NEPA process “is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” 40 C.F.R. § 1500.1(c).

63. The agency’s evaluation of all “reasonable alternatives” for completing the action “is the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. The EIS must “inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

64. The comparison of alternatives in the EIS should “sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14. Agencies shall “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the

reasons for their having been eliminated,” and shall “[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.” 40 C.F.R. §§ 1502.14(a) & (b).

65. According to DOI regulations, the “range of alternatives” that must be considered in the EIS includes “all reasonable alternatives, or when there are potentially a very large number of alternatives then a reasonable number of examples covering the full spectrum of reasonable alternatives, each of which must be rigorously explored and objectively evaluated.” 43 C.F.R. § 46.420(c). The range of “reasonable alternatives” must include “technically and economically practical or feasible” alternatives. 43 C.F.R. § 46.420(b).

Endangered Species Act

66. Section 9 of the ESA makes it unlawful to “take” any endangered species. 16 U.S.C. § 1538(a)(1)(B). A species is “endangered” if it “is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). The statute defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The USFWS’s regulations further define “harm” to include “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3.

67. Section 10 of the ESA creates an exception to the general ban on taking. Under that section, the Service may issue a permit allowing “any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B). Such a permit is called an Incidental Take Permit (“ITP”).

68. Prior to the grant of an ITP, the applicant must submit a conservation plan, known as a Habitat Conservation Plan (“HCP”). 16 U.S.C. § 1539(a)(2)(A).

69. Before issuing an ITP the USFWS must make specified findings. These include findings that the taking will be incidental, that the taking “will not appreciably reduce the likelihood of the survival and recovery of the species in the wild,” and, most relevant here, that “the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking.” 16 U.S.C. § 1539(a)(2)(B). The implementing regulations at 50 C.F.R. § 17.22(b) reiterate these statutory criteria for ITP issuance. Neither the statute nor the regulations define the terms “minimize” or “maximum extent practicable.”

Administrative Procedure Act

70. The Administrative Procedure Act (“APA”) provides that final agency action is subject to judicial review, and also provides the standards for judicial review and judicial remedies for this action. 5 U.S.C. §§ 701–706.

71. The APA requires courts to hold unlawful and set aside agency action, findings, and conclusions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2).

FACTUAL ALLEGATIONS

Purpose and Need for the Action

72. The federal action in this matter, which prompted the preparation of an EIS, is USFWS’s issuance of a Section 10(a)(1)(B) ITP for the covered activities in the published and approved HCP. The duration for the ITP is 30 years.

73. According to USFWS, the purpose for the action includes: “Respond to Buckeye Wind’s application for an ITP for the federally endangered Indiana bat related to Project activities that

have the potential to result in take, pursuant to the provisions of Section 10(a)(1)(B) of the ESA, as amended, and its implementing regulations (50 C.F.R. Part 17.22(b)(1)) and policies.”

74. According to USFWS, the issuance of the ITP and preparation of the EIS is needed because:

Commercial wind facilities have been shown to cause high numbers of bat fatalities in many locations. There is a need to ensure that take of Indiana bats is avoided and minimized to the maximum extent practicable and to ensure that the impact of any remaining take is fully mitigated. There is also a need to protect the habitat of Indiana bats including their maternity trees, swarming areas near hibernacula, and nearby foraging and roosting habitat.

Background Information on the Federally Endangered Indiana Bat

75. The Indiana bat (*Myotis sodalis*) was first listed as being in danger of extinction in 1967 under the Endangered Species Preservation Act of 1966 (32 Fed. Reg. 4001, March 11, 1967) because of large decreases in population size and an apparent lack of critical habitat in winter. It was listed as an endangered species under the ESA following the statute’s enactment in 1973.

76. In the four USFWS-designated Recovery Units (“RU”s) identified in the 2007 Indiana bat Recovery Plan – Ozark-Central, Midwest, Appalachian Mountains, and Northeast – the 2011 Indiana bat populations are as follows: Appalachian Mountains RU, 32,529 bats; Midwest RU, 305,297 bats; Ozark-Central RU, 70,822 bats; and Northeast RU, 16,060 bats.

77. During the winter (generally early November through mid-April), Indiana bats hibernate in underground habitat such as caves and mines.

78. In the spring (April through May), Indiana bats leave the hibernacula and migrate to their summer habitat. Migration distances vary greatly across the species’ range, with documented migration distances greatest in the Midwest RU. Individuals have been documented to travel as far as 357 miles between hibernacula and summer habitat. In the spring when fat reserves and food supplies are low, migration provides an additional stress. Spring radio telemetry studies

have documented migrating Indiana bats traveling in relatively direct flight patterns towards their summer ranges shortly after they emerge from hibernacula.

79. At their summer roosts, pregnant Indiana bats form maternity colonies (also referred to as maternity roosts) of between 25 and 100 bats (although sometimes more), and each female typically gives birth to one pup. In contrast to reproductive females, some males and non-reproductive females may summer near hibernacula, or migrate to summer habitat some distance from their hibernaculum. Summer roosts are typically under the exfoliating bark of dead or live trees or in tree cavities. Roost trees may be in open areas, forests, riparian habitat, or even residential developments. Maternity colonies typically use 10 to 20 trees each year, but only one to three of these are primary roosts used by the majority of bats for some or all of the summer. Roost trees may be occupied by a colony for a number of years until they are no longer suitable. Pups are normally born in late June and early July and grow quickly, becoming capable of flight between early July and early August. Maternity colonies begin disbanding during the first two weeks in August, although some large colonies may maintain a steadily declining number of bats into mid-September.

80. Indiana bats generally begin their autumn migration to their hibernation sites beginning in late August. It is generally accepted that Indiana bats, especially females, are philopatric; that is, an individual bat will return annually to the same hibernacula. However, members of a maternity colony do not necessarily hibernate in the same hibernacula, and may migrate to hibernacula that are over 190 miles apart.

81. Upon arrival at hibernacula, Indiana bats mate and build up fat reserves by foraging, usually in close proximity to the cave. This period of activity prior to hibernation is called swarming.

82. The distribution of Indiana bats expands during the spring and summer. Based on current records, the core Indiana bat summer range includes southern Iowa, northern Missouri, northern Illinois, northern Indiana, southern Michigan, and western Ohio. As of 2011, evidence of Indiana bat maternity colonies has been documented in 25 Ohio counties.

83. Impacts to bats of multiple species, including federally endangered Indiana bats, from collisions with wind turbines or barotrauma are well documented. Barotrauma is defined as internal hemorrhaging due to an over-expansion of hollow respiratory structures, and is caused by a sudden drop in air pressure near turbine blades.

84. Prior to 2009, no Indiana bats were known to have been killed at wind facilities. To date, 5 Indiana bat fatalities have been documented in post-construction monitoring studies at wind energy facilities. Two of the fatalities occurred at the Fowler Ridge wind facility in Benton County, IN, during the fall migration period; the first occurred in September 2009 and the second occurred in September 2010. The third Indiana bat fatality occurred at the North Allegheny Wind facility in Cambria and Blair counties in Pennsylvania. This fatality also occurred during the fall migration period in September 2011. The fourth Indiana bat fatality occurred on July 26, 2012 at the Laurel Mountain Wind Power facility near Elkins, WV. The fifth Indiana bat fatality occurred on the night of October 2-3, 2012 at the Blue Creek Wind Farm in Paulding County, OH.

85. Four of these mortalities confirm that Indiana bats are at risk of collision with wind facilities during the fall migratory period. The July mortality indicates that male Indiana bats are also at risk during the summer. The degree of risk in spring and summer to female Indiana bats from operation of wind facilities within the home range of maternity colonies remains unknown. It is likely that additional Indiana bat mortality has occurred at wind farms across the species'

range but has not been documented due to lack of or insufficient post-construction monitoring, inaccurate identifications, surveyor biases, decomposition, and removal by scavengers.

The Activities at the Buckeye Wind Power Project

86. Development of the Buckeye Wind Project will include installation of up to 100 turbines, each with a generating capacity of up to 2.5 MW. In addition to turbines, the Project will include construction of access roads, underground and overhead electricity collection lines, a substation, up to four temporary construction staging areas, temporary crane paths, two temporary concrete batch plants, four permanent meteorological towers and an Operation and Maintenance (“O&M”) facility. The Project will operate for 25 years. If the operational life of the turbines were to extend beyond 25 years, the ITP may be renewed.

87. In 50 C.F.R. § 402.02, “Action Area” is defined as “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” The action area is not limited to the footprint of the action and should consider the effects to the environment resulting from the action. The Service has described the Action Area in this case to include an area of 80,051 acres, which includes portions of Union, Wayne, Urbana, Salem, Rush, and Goshen Townships in Champaign County in west central Ohio. The Action Area is primarily used for agriculture, but also contains scattered woodlands, low-density residential development, and small municipalities.

88. At the time of completion of the published HCP, the planned locations of 52 turbines were known. An additional 48 turbines will be sited within the Action Area. The Action Area should include the area where direct and indirect effects of all 100 turbines will occur.

Observed Presence of Indiana Bats in the Action Area in Summer

89. The winter and summer population distributions and migratory pathways for Indiana bats include the Action Area and the area around the Project.

90. Suitable Indiana bat summer foraging and maternity habitat is distributed throughout the Action Area.

91. During mist-netting conducted for an unrelated proposed wind development project in 2009, a total of five Indiana bats were captured within the Action Area. One adult lactating female Indiana bat was captured in June 2009 in the central portion of the Action Area and flew 10.1 km (6.3 mi) southeast following her capture. Her roost tree was located approximately 2.4 km (1.5 mi) east of the Action Area, where her transmitter signal was lost. Five emergence counts were conducted at her roost tree with an average emergence count size of 32.6 ± 12.8 bats and a maximum count of 46 bats, all assumed to be adult females since surveys were conducted in late June, prior to juveniles becoming able to fly. These bats constitute one maternity colony and are included in calculations for the Action Area population because at least one member of the colony was documented using the Action Area, and potential foraging and commuting habitat for the colony has been identified within the Action Area.

92. Three additional adult lactating female Indiana bats were captured and radio-tagged in late June 2009 at a single mist net location in a riparian woodlot in the northernmost portion of the Action Area. An additional Indiana bat was captured during this same netting event, but escaped as it was being removed from the net. The radio telemetry data was also used to track the three females to roost trees in order to locate maternity colonies and conduct emergence counts. Three roost trees were identified in the Action Area. All three bats used the same roost tree on six nights, which had an average emergence count size of 21.0 ± 12.9 bats and a

maximum of 38 bats at this one tree on one night. Average emergence count sizes at the other two roosts were 7.3 ± 3.6 (maximum of 12) and 2.3 ± 0.6 (maximum of 3). This grouping constitutes the second confirmed maternity colony within the Action Area. Simultaneous counts at all three identified roost trees only occurred on 2 nights, and totaled a maximum of 29 bats.

93. According to the published HCP, the estimated mean summer Indiana bat population within the Action Area was 415 Indiana bats.

Migration of Indiana Bats Through or Near the Action Area

94. In addition to summer use, Indiana bats may travel or roost throughout the Action Area during fall migration (approximately August 1 through October 31) and spring migration (approximately April 1 through May 31). Indiana bat migration records from 1971 to 2010 show Indiana bats migrating through or near the Project Action Area.

95. According to the published HCP, the number of Indiana bats likely to pass through the Action Area during spring and fall migration (*i.e.*, the migratory population within the Action Area) ranges from approximately 2,900 to 5,800 Indiana bats.

The ESA's Minimization to the Maximum Extent Practicable Criterion

96. As stated above, to issue an ITP, USFWS must find that the Project's applicant will, to the maximum extent practicable, minimize and mitigate the impacts of taking. *See* 16 U.S.C. § 1539(a)(2)(B)(ii). The implementing regulations at 50 C.F.R. § 17.22(b)(2)(i)(B) reiterate this statutory criterion for ITP issuance. Neither the statute nor the regulations define the terms "minimize" or "maximum extent practicable."

97. Where the taking of the listed species is primarily through direct fatalities, minimizing the "impacts of such taking" requires minimizing the number and risk of fatalities. According to USFWS, the primary form of take of Indiana bats anticipated under the HCP for the Project is

harm in the form of direct fatalities resulting from operation of the wind turbines due to collision with turbines or to barotrauma.

98. According to USFWS practice and guidance, minimization and mitigation are separate actions, and minimization must come before mitigation. USFWS's 2011 Wind Energy Projects Guidance¹ addresses the question, "What does 'minimize and mitigate to the maximum extent practicable' mean?" The agency responds as follows:

We interpret this section to mean that the impacts of the proposed project, including the HCP, which were not eliminated through informal negotiation *must be minimized to the maximum extent practicable and those remaining impacts that cannot be further minimized must be mitigated to the maximum extent practicable. These standards are based in a biological determination of the impacts of the project as proposed, what would further minimize those impacts, and then what would biologically mitigate or compensate for those remaining biological impacts.*

Emphasis added. USFWS addresses a further question in the guidance: "Is it allowable for an applicant to mitigate in lieu of minimization measures, or must the applicant first minimize if possible?" The USFWS's response is, "An applicant must first minimize to the maximum extent practicable."²

99. According to USFWS's July 17, 2013 Statement of Findings for the Buckeye Wind ITP issuance, "Impacts to the species (or listed entity) of the proposed taking that are not avoided or eliminated as a result of project and HCP planning must be *minimized* to the maximum extent practicable. Any *remaining* impacts [*i.e.*, those impacts that cannot be minimized or are

¹ USFWS, *Indiana Bat Section 7 and Section 10 Guidance for Wind Energy Projects*, Revised (Oct. 26, 2011).

² *Id.* at pp. 47–48.

impracticable to minimize] must *then* be *mitigated* (e.g., ‘offset’ or ‘rectified’) to the maximum extent practicable.”³ Emphasis added.

100. The jeopardy⁴ criterion in 16 U.S.C. § 1539(a)(2)(B)(iv) and 50 C.F.R. § 17.22(b)(2)(i)(D) – *i.e.*, “the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild” – is separate and distinct from the minimization criterion in 16 U.S.C. § 1539(a)(2)(B)(ii) (“the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking”). The jeopardy analysis entails assessing whether the proposed action is unlikely to reduce appreciably the likelihood of both survival and recovery of the Indiana bat by reducing its reproduction, population, and distribution in the wild. According to the Biological Opinion for the Buckeye Wind Project, the principal components of the jeopardy analysis are: identifying the probability of individual Indiana bat exposure to action related stressors and its response to that exposure, integrating those individual risks (exposure risk and subsequent response) to discern the consequences to the populations those individuals belong to, and determining the consequences of any population-level risks to the species range-wide.⁵

**The Applicant-Proposed and USFWS-Approved Operational Strategy of
Turbine Cut-in Speed and Feathering**

101. The primary method used by Buckeye Wind to minimize impacts to Indiana bats is the use of cut-in speeds higher than manufacturer-specified and “feathering” of turbine blades when

³ USFWS, Statement of Findings and Recommendations regarding the Proposed Issuance Of An Endangered Species Act Section 10(A)(1)(B) Incidental Take Permit For The Buckeye Wind Power Habitat Conservation Plan, Champaign County, Ohio, (July 17, 2013), p. 14.

⁴ NMFS and USFWS joint ESA regulations define “jeopardize the continued existence of” as “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

⁵ USFWS, Biological Opinion for the Buckeye Wind Power Project, p. 3.

wind speed is below the cut-in speed to stop the blades from spinning. Cut-in speed is the wind speed at which the turbine blades are operational such that wind-generated electricity enters the power grid. The “normal,” “non-curtailed,” or “manufacturer-specified” cut-in speed is usually 3.5–4.0 meters/second (“m/s”) (7.8–8.9 mph) on modern turbines. Turbine blades may be allowed to spin freely below the cut-in speed or in the alternative may be “feathered” (*i.e.*, rotated in pitch to reduce the blades’ angle to the wind) below the cut-in speed to prevent most of the free spinning of the blades.

102. Buckeye Wind has developed a Collision Risk Model to estimate Indiana bat mortality as a result of Project operation. According to the model, season-specific estimates of collision/barotrauma were influenced by five primary factors: seasonal population size, flight height, weather conditions that influence the number of bats that are active on a nightly basis, movement bouts within the turbine array, and mortality probability. Mortality probability was estimated based on the average number of turbine encounters and a survival probability selected from a probability distribution.

103. The Collision Risk Model was used to estimate mortality of Indiana bats during three periods: spring emergence and migration, or “spring” (1 April to 31 May), summer habitat use, or “summer” (1 June to 31 July), and fall migration, or “fall” (1 August to 31 October). According to USFWS, although discrete activity periods were delineated for modeling purposes, a great deal of overlap is expected to occur, especially between the spring migration and summer habitat use, and also between summer and the fall migratory period.

104. For the Collision Risk Model, the average summer Indiana bat population size was estimated to be 415 Indiana bats, including adult female, adult male, and juvenile bats. The smallest estimated population size for the model was the 2009 estimate of 99 Indiana bats. In contrast, the size of *migratory populations* of Indiana bats moving through the Action Area

during the *spring and fall migration* periods was estimated to range from approximately 2,900 to 5,800 migrating Indiana bats.

105. The Collision Risk Model predicts that baseline annual Indiana bat mortality for the low, moderate, and high flight height scenarios (without feathering or cut-in speeds) ranged from 6.9 Indiana bats per year to 25.4 Indiana bats per year, which includes adult female, adult male, and unborn and non-flying juveniles in the spring and summer.⁶

106. Collision Risk Model results indicate that predicted mortality of Indiana bats, under operating conditions that do not include feathering of turbines or higher than “normal” cut-in speeds, is highest during the migratory periods.⁷

107. To estimate take of Indiana bats due to the Project, Buckeye Wind has applied the median reduction in fatality across three studies of curtailment (68.3%) to the median predicted mortality from the Collision Risk Model. The cut-in speeds proposed by Buckeye Wind and approved by USFWS fall between 5.0 m/s (11.2 mph) and 6.0 m/s (13.4 mph). In the Arnett et al. (2010), Good et al. (2011), Young et al. 2013, Baerwald et al. (2009), and Good et al. (2012) studies, cut-in speeds of 5.0 m/s (11.2 mph) and 5.5 m/s (12.3 mph) resulted in reduction in mortality of 67%, on average.⁸ The Applicant and USFWS believe it is reasonable to assume that similar reductions in mortality will be observed at the Buckeye Wind Project for those cut-in speeds.

108. The study of the effects of raising wind turbine cut-in speed on bat fatalities, conducted at Fowler Ridge Wind Farm in Benton County, Indiana, shows (1) that a cut-in speed of at least 6.5 m/s (14.5 mph) is potentially the most effective cut-in speed for reducing take of Indiana bats,

⁶ See Table 7 from USFWS, Biological Opinion for the Buckeye Wind Power Project, p. 43.

⁷ *Id.*

⁸ See Table 9 from USFWS, Biological Opinion for the Buckeye Wind Power Project, p. 44.

and (2) that a 6.5 m/s (14.5 mph) cut-in speed is significantly more effective at reducing bat fatalities than a 5.0 m/s (11.2 mph) cut-in speed.

109. USFWS's draft EIS for the Fowler Ridge Wind Farm ITP/HCP application recognizes that a 6.5 m/s cut-in speed is significantly more effective than a 5.0 m/s cut-in speed.⁹ The Fowler Ridge DEIS, which presumably reflects the best available science, predicts that a cut-in speed of 6.5 m/s will reduce Indiana bat mortality to less than half of the mortality associated with a cut-in speed of 5.0 m/s (applicant's preferred alternative). This reduction is highly statistically significant.

110. For the Buckeye Wind Project, USFWS did not consider in the EIS the potential benefits of applying a cut-in speed of 6.5 m/s at all turbines, or even at a subset of turbines or in selected seasons, as a minimization measure. Also, neither Buckeye Wind nor the USFWS considered the practicability of such an alternative.

111. In USFWS's responses to the comments on the Project EIS and HCP, USFWS did not dispute that a 6.5 m/s cut-in speed alternative could reduce take significantly more than Buckeye Wind's proposed plan, now the approved plan. That is, USFWS did not claim that the effectiveness of the proposed and approved Project curtailment strategy for reducing take is statistically equivalent to an alternative that applies 6.5 m/s cut-in speed.

The Agency's Classification of Indiana Bat Habitat and Use of the Classification to Estimate Risk

112. The USFWS and Buckeye Wind modeled Indiana bat habitat suitability in the Action Area. From the model results, four categories of habitat suitability were described: Category 1, Category 2, Category 3, and Category 4, representing most to least suitable habitat, respectively.

⁹ Tables 5.4 and 5.5 from Fowler Ridge Draft EIS (March 2013), FWS-R3-ES-2013-0032, pp. 127–28.

113. Habitat suitability is expressed with regard to three Indiana bat behaviors: foraging, roosting, and migration.

114. Indiana bat *foraging* habitat was strongly associated with the configuration and spatial relationships of forested patches; the three most important variables were the degree of forest fragmentation, the connectedness of forest patches, and the total core area of forested habitat.

115. In contrast, *roosting* habitat suitability was driven largely by distance to streams, distance to forested streams, and distance to the nearest forest edge.

116. Twelve percent of the Action Area (9,923.9 acres) was categorized as having the highest suitability (*i.e.*, Category 1) for Indiana bat roosting and foraging activities. Categories 1, 2, and 3 habitats collectively comprised 24,331 acres, which is equal to approximately 30% of the total Action Area.

117. According to USFWS and Buckeye Wind, habitat in Categories 1, 2 and 3 is considered suitable for roosting, foraging, commuting, and migrating. According to USFWS and Buckeye Wind, Category 4 habitat is considered unsuitable for roosting and foraging, “but suitable for migratory Indiana bat use.”¹⁰

118. Therefore, all four habitat categories – Categories 1, 2, 3, and 4 – are considered by USFWS to be suitable habitat for *migrating* Indiana bats.

119. Indiana bats are at risk of turbine-related fatality while migrating across non-forested habitat, as has been shown by the recorded Indiana bat fatalities at the Fowler Ridge Wind Farm in Benton County, Indiana.

¹⁰ USFWS, Biological Opinion for the Buckeye Wind Power Project, p. 30.

The Applicant-Proposed and USFWS-Approved “Minimization” Strategy Makes Protection Less Stringent When Risk Is Perceived To Be Lower

120. Under the Applicant-proposed and USFWS-approved baseline operational plan, between April 1 and October 31 of each year, operational restrictions will dictate that turbines are feathered (*i.e.*, not spinning) from ½ hour before sunset to ½ hour after sunrise until a designated cut-in speed is reached.

121. The cut-in speeds to be implemented under the plan are dictated by season and habitat category, which are perceived by USFWS to present different degrees of risk of turbine-related take of Indiana bats and to result in different predicted number of fatalities. That is, the proposed “minimization” plan sets the level of protection for Indiana bats – *i.e.*, the cut-in speed with feathering – higher when the perceived level of risk and predicted number of fatalities is higher, and lower when the perceived level of risk and predicted number of fatalities is lower.

122. According to the approved operational plan, cut-in speeds will range from the manufacturer-specified cut-in speed (*i.e.*, 3.5 m/s to 4 m/s, depending on manufacturer and turbine size) for Category 4 habitat during the spring season to 6.0 m/s for Category 1 habitat during the fall season.¹¹

123. USFWS contends that the risk of turbine-related take is lowest for habitat Category 4 and highest for habitat Category 1. USFWS approved a range of cut-in speeds that varied with habitat category, even though USFWS considers all four habitat categories to be suitable habitat for *migrating* Indiana bats and even though the estimated number of Indiana bats migrating through the Action Area far exceeds the estimated number of Indiana bats summering in the Action Area.

¹¹ See Table 8 from USFWS, Biological Opinion for the Buckeye Wind Power Project, p. 43.

124. The “expected” take of Indiana bats due to the Project was calculated by multiplying (a) the median results from the Collision Risk Model (*i.e.*, median expected fatalities without any operational measures) by (b) the expected level of protection to be achieved with the proposed mixed cut-in speed plan (*i.e.*, an estimated 68.3% reduction in fatality by using a mixture of cut-in speeds ranging from 3.5–4 m/s to 6.0 m/s).¹² Thus, USFWS set the “expected” level of take for Indiana bats (*i.e.*, 5.2 Indiana bats per year) based on the predicted effectiveness of the proposed mixed cut-in speed plan.

125. The “allowable” take of Indiana bats for any one year is higher than the “expected” take: “No more than 14.2 Indiana bats may be taken in any 1 year,” and “no more than 26 Indiana bats total may be taken over any consecutive 5-year period.”¹³

126. The HCP’s “adaptive management plan for minimization” is to allow the turbines to be cut-in at lower wind speeds when the average observed take in the preceding year is equal to or less than “expected” take (*i.e.*, cut-in speed will be lowered in increments of 0.5 m/s, accounting for season, habitat, and weather), and to allow the turbines to be cut-in at higher wind speeds when the average observed take for the preceding year is greater than “expected” take (*i.e.*, cut-in speed will be raised in increments of 0.5 m/s, accounting for season, habitat, and weather). Lower cut-in speeds generally allow a greater percentage mortality of bats than higher cut-in speeds.

127. If the proposed and approved mixed cut-in speed plan does not minimize take of Indiana bats to the maximum extent practicable, then the “expected” take, which becomes the reference point for triggering adaptive management measures, is larger than the ESA allows, and the ITP and HCP would violate the ESA.

¹² See Table 10 from USFWS, Biological Opinion for the Buckeye Wind Power Project, p. 45.

¹³ USFWS, Biological Opinion for the Buckeye Wind Power Project, p. 70.

The Alternative Recommended in Comments But Not Considered by USFWS

128. As alleged above, according to studies of the likely reduction in bat fatalities due to increasing cut-in speeds of wind turbines as well as documentation by USFWS in the context of other wind power projects, implementing a 6.5 m/s cut-in speed alternative over all turbines at the Buckeye Wind Project would likely reduce take of Indiana bats significantly more than the Applicant-proposed and USFWS-approved mixed cut-in speed plan.

129. In particular, studies at two operating wind power facilities – Casselman and Fowler Ridge¹⁴ – show that curtailing cut-in speed to 6.5 m/s is the strategy that reduces turbine-related bat mortality to the maximum extent compared to other cut-in speeds, thus minimizing take of Indiana bats.¹⁵ In USFWS’s responses to the comments on the Project EIS and HCP, USFWS did not dispute that a 6.5 m/s cut-in speed alternative could reduce take significantly more than Buckeye Wind’s proposed plan, now the approved plan. Yet the highest cut-in speed considered and now approved for the Project HCP is 6.0 m/s, which is required only in Category 1 habitat during the summer and fall seasons. Most cut-in speeds in the approved operational plan are lower.

130. The draft EIS for the Fowler Ridge Wind Farm ITP/HCP application¹⁶ recognizes that a 6.5 m/s cut-in speed is significantly more effective than a 5.0 m/s cut-in speed.

¹⁴ Arnett, et al., *Effectiveness of changing wind turbine cut-in speed to reduce bat fatalities at wind facilities. A final report submitted to the Bats and Wind Energy Cooperative* (May 2010); Good et al., *Bat Monitoring Studies at the Fowler Ridge Wind Energy Facility, Benton County, Indiana, April 13 – October 15, 2010, A report prepared for Fowler Ridge Wind Farm* (Jan. 28, 2011); see also Good et al., *Bat Monitoring Studies at the Fowler Ridge Wind Farm, Benton County, Indiana, April 1 – October 31, 2011, A report prepared for Fowler Ridge Wind Farm* (Jan. 31, 2012).

¹⁵ See Table 9 from USFWS, Biological Opinion for the Buckeye Wind Power Project, p. 44.

¹⁶ Fowler Ridge Draft EIS (March 2013), FWS-R3-ES-2013-0032.

131. The 2010 and 2011 studies of cut-in speeds at Fowler Ridge¹⁷ together show that increasing cut-in speed without feathering reduces turbine-related fatalities of bats, and that the addition of feathering below the cut-in speed reduces turbine-related fatalities of bats even further.¹⁸ The following table summarizes the combined results of the 2010 and 2011 Fowler Ridge studies. The table indicates that a 6.5 m/s cut-in speed with feathering could reduce Indiana bat fatalities by more than 79 percent.

132. Table. Results of Fowler Ridge studies of cut-in speed: mean reduction in bat fatalities with change in cut-in speed only (2010) and with change in cut-in speed plus feathering of blades (2011), relative to “normal” operation (3.5 m/s cut-in speed with no feathering).

Cut-In Speed	2010 Fowler Ridge Study (without feathering)	2011 Fowler Ridge Study (with feathering)
3.5 m/s	Normal Operation	36%
4.5 m/s	No treatment	57%
5.0 m/s	50%	No treatment
5.5 m/s	No treatment	73%
6.5 m/s	79%	No treatment

133. These data and results were pointed out to USFWS in comments on the Buckeye Wind Project EIS and HCP. USFWS did not dispute or deny the accuracy or reasonableness of the above data and results.

¹⁷ Good et al. (2011); Good et al. (2012).

¹⁸ The 2010 study did not use feathering. The 2011 follow-up study did use feathering, but unfortunately the 2011 study did not use the same treatments as the 2010 study.

134. In comments on the Project EIS and HCP, Plaintiff recommended that USFWS consider and analyze an alternative to the proposed and now approved mixed cut-in speed plan. The recommended alternative would use a cut-in speed of 6.5 m/s for all turbines. The comments pointed out that the best available science supports and compels serious consideration of an alternative implementing a 6.5 m/s cut-in speed, and that implementing such an alternative at the Project could reduce take of Indiana bats significantly more than the mixed cut-in speed plan proposed by Buckeye Wind.

135. USFWS has acknowledged that “Increasing the cut-in speeds by 1 m/s [over those speeds set forth in the proposed mixed cut-in speed plan] is expected to reduce take of all bats to very low levels.” *See* USFWS response to Itemized Comment Number 0030-33. Therefore, USFWS acknowledges that the approved mixed cut-in speed plan is less effective at reducing take of Indiana bats than an alternative plan with higher cut-in speeds.

136. In *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002), the Court considered the implications of an alternative minimization plan for an ESA-listed species that could reduce take more than the proposed and approved minimization plan. The approved plan was less effective at reducing take than the alternative plan. The Court ruled that USFWS could not issue an ITP consistent with the ESA without making a finding that the more effective alternative is impracticable.

137. USFWS refused to consider or analyze *any* alternative minimization plan that set cut-in speeds to 6.5 m/s, even at a subset of wind turbines or in a subset of seasons. Thus, USFWS did not consider or analyze whether the recommended higher cut-in speed alternative could significantly reduce turbine-related take of Indiana bats compared to the proposed mixed cut-in speed plan, which uses lower cut-in speeds. In addition, USFWS did not consider or analyze

whether the recommended alternative, or any other alternative that set cut-in speeds at 6.5 m/s, would be practicable for Buckeye Wind to implement.

138. The only alternative considered by USFWS that might be more effective than the proposed mixed cut-in speed plan is an alternative that shuts down all wind turbines all night for the active seasons. This alternative does not employ the results of cut-in speed studies. Also, USFWS and Buckeye Wind represented that this alternative is not economically viable for any wind power company to implement, without providing evidence of the economic impact of this alternative. Therefore, USFWS did not compare the proposed (and now approved) mixed cut-in speed plan to *any* alternative cut-in speed plan that might be more effective for reducing turbine-related take of Indiana bats and which would likely have less economic effect than the nightly shut down alternative.

The Alternatives to the Proposed Operational Plan Actually Considered in the EIS

139. The Final EIS identifies seven alternatives as follows: (1) No Action; (2) Applicant's Proposed Action Alternative (varied cut-in speeds based on turbine risk category); (3) Maximally Restricted Operations Alternative A; (4) Minimally Restricted Operations Alternative B; (5) Fewer Turbines; (6) Other Locations in Western Ohio; (7) ITP of Shorter Duration (< 30 years). The latter three of these alternatives were eliminated from further analysis.

140. According to USFWS, Alternative A (Maximally Restricted Operations Alternative) would require all turbines to be non-operational from sunset to sunrise during the entire period over which Indiana bats are active (April 1 through October 31).

141. According to USFWS, "Alternative A would likely result in the project not being built."¹⁹ USFWS provides no evidence to support this conclusion. Buckeye Wind stated in the

¹⁹ USFWS, Record of Decision for the Buckeye Wind Power Project (July 17, 2013), p. 8.

HCP that “this alternative did not meet the purpose and need of the Project to generate ample clean and renewable energy and allow for an economically viable Project.”²⁰ Buckeye Wind provides no evidence that Alternative A would be economically non-viable.

142. According to USFWS, Alternative B (Minimally Restricted Operations Alternative) would require feathering of all turbines until a cut-in speed of 5.0 m/s is reached, for the first one to six hours after sunset, during the fall migration period only (August 1 through October 31). From April 1 to July 31, turbines would be feathered until the manufacturer’s cut-in speed (3.5–4.0 m/s) is reached from one-half hour before sunset to one-half hour after sunrise. Alternative B would result in a take of approximately 12 Indiana bats per year, over twice the expected take using the proposed plan.

143. USFWS has not considered or analyzed *any* alternative to the proposed and now approved operational plan – *i.e.*, the mixed cut-in speed plan – that employs raised cut-in speeds and feathering and that might be more effective at reducing turbine-related mortality of Indiana bats than the proposed and approved plan.

**The USFWS Finding Regarding Minimization of the Impact of Take
to the Maximum Extent Practicable**

144. Before issuing the ITP the USFWS must find that “the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking.” 16 U.S.C. § 1539(a)(2)(B).

145. USFWS found that for the Buckeye Wind Project HCP, “The taking has been minimized and mitigated to the maximum extent practicable” and “[t]he Service finds that Buckeye Wind will minimize and mitigate the impacts of take on the Indiana bat to the maximum extent practicable.” USFWS states in its findings:

²⁰ See Habitat Conservation Plan for Buckeye Wind Power Project, Section 2.7.2.3, p. 34.

To make the finding that the conservation measures included in the HCP minimize and mitigate the impacts of take to the maximum extent practicable, the Service must first evaluate whether the conservation measures are rationally related to the level of take anticipated under the plan. In effect, the minimization and mitigation measures need to address the biological needs of the Covered Species in a manner that is commensurate with the impacts to the species anticipated under the HCP. The Service believes the amount of minimization and mitigation provided for in the HCP compensates for the impacts of take of Indiana bats that will or could potentially occur under the plan. . . . The Buckeye Wind HCP, including its minimization and mitigation measures, fully compensates for impacts of the take to the covered species.

CLAIMS FOR RELIEF

COUNT I: Violation of NEPA, 42 U.S.C. §§ 4321 *et seq.* – Failure to Consider a Reasonable, Discrete, and Likely More Effective Alternative Recommended By Plaintiff.

146. Plaintiff repeats the allegations in paragraphs 1 through 145 and incorporates them by reference.

147. Defendants' selection and consideration of alternatives in the EIS is arbitrary, capricious, and not in accordance with NEPA because Defendants refused to consider the recommended reasonable, discrete, and likely more effective alternative to the proposed operational curtailment plan.

148. In comments on the Buckeye Wind Project EIS and HCP, Plaintiff recommended that USFWS consider and analyze an alternative cut-in speed/feathering plan for minimizing take of Indiana bats that implements a cut-in speed of 6.5 m/s for all turbines, which has been shown by the best available science to be the cut-in speed that can significantly reduce turbine-related fatalities of bats more than other cut-in speeds studied to date.

149. Plaintiff's recommended alternative, or a comparable alternative, is objectively feasible, viable, and reasonable in light of the agency's objectives; would likely meet the purpose and need as stated in the EIS; is within the ambit of existing standards for selecting alternatives for

the Project EIS; is a discrete and obvious alternative that relies on raising cut-in speeds as does the proposed operational plan; and is distinguishable from the alternatives considered because, according to the best available science, it is likely to be significantly more effective at reducing turbine-related fatalities of Indiana bats (the primary source of concern) than the proposed plan.

150. USFWS refused to consider any such alternative using cut-in speeds higher than in the proposed mixed plan, and thus made no analysis or findings of the effectiveness of such an alternative at reducing take of Indiana bats or of the practicability of its implementation.

Plaintiff did not and does not request that USFWS consider a multitude of combinations of cut-in speeds for different seasons and habitat Categories. In fact, such an approach, which as used by USFWS attempts to match protection level to perceived risk, has failed to identify the practicable alternative most likely to minimize turbine-related fatalities of Indiana bats at the Project.

Rather, Plaintiff recommended that a 6.5 m/s cut-in speed alternative be considered because the available studies indicate that this or a comparable cut-in speed alternative is the most effective at minimizing the impacts of take.

151. The only considered alternative to the proposed and approved mixed cut-in speed plan that could further reduce take is a Maximally Restricted Operations Alternative where all turbines would be non-operational, regardless of wind speed, from sunset to sunrise during the entire period over which Indiana bats are active. This Maximally Restricted Alternative does not utilize increases in cut-in speed to reduce collision and barotrauma in bats and likely has greater economic consequences than the alternative recommended by Plaintiff. This Maximally Restricted Alternative had no realistic chance of being selected by USFWS because, as the HCP

states, “this alternative did not meet the purpose and need of the Project to generate ample clean and renewable energy and allow for an economically viable Project.”²¹

152. The Minimally Restricted Operations Alternative used cut in speeds of 5.0 m/s, which have been shown by several studies to be significantly less effective at reducing turbine-related fatalities than higher cut-in speeds. Thus, the Minimally Restricted Alternative was known from the beginning of the alternatives development to not minimize take of Indiana bats compared to an alternative that used higher cut-in speeds. USFWS thus, in effect, restricted consideration in the EIS to a single viable cut-in speed/feathering proposal – the proposed and approved mixed cut-in speed plan.

153. By refusing to consider a 6.5 m/s cut-in speed alternative and by making its decision based on an unreasonably limited set of alternatives, the comparison of alternatives in the EIS did not sharply define the issues and did not provide a clear basis for choice among options by the decision maker and the public. *See* 40 C.F.R. § 1502.14. USFWS’s restriction of consideration in the EIS to a single viable cut-in speed/feathering proposal does not foster informed decision making.

154. USFWS rejected the recommendation that it consider and analyze an all-turbines 6.5 m/s cut-in speed alternative or any equivalent alternative. The immediate harm in USFWS’s refusal to consider Plaintiff’s recommended alternative in the EIS is that if an alternative is not considered in the EIS it will not show up in the HCP or ITP. That statement is borne out by the final approved EIS and HCP. Thus, USFWS’s refusal to consider Plaintiff’s recommended alternative guaranteed that it would not be an available option when the ITP/HCP application was considered for approval.

²¹ *See* Habitat Conservation Plan for Buckeye Wind Power Project, Section 2.7.2.3, p. 34.

155. The 2013 USFWS Record of Decision for the Buckeye Wind Power Project is therefore arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA, 42 U.S.C. §§ 4321 *et seq.*, and must be set aside pursuant to the APA, 5 U.S.C. § 706.

COUNT II: Violation of NEPA, 42 U.S.C. §§ 4321 *et seq.* – Failure to Consider Reasonable and Feasible Alternatives Identified by USFWS for a Nearby Proposed Wind Power Project.

156. Plaintiff repeats the allegations in paragraphs 1 through 155 and incorporates them by reference.

157. On September 26, 2008, the Service wrote to wind developer Babcock & Brown offering opinions concerning the risk of take of Indiana bats associated with a proposed wind energy facility in Logan County, Ohio. The area proposed for the Babcock & Brown wind power project was fewer than ten miles from the present northern boundary of the Buckeye Wind Project. In its letter to Babcock & Brown, USFWS recommended that the developer consider a range of measures to minimize the project's impact on the Indiana bat, including a ban on clearing of forest cover for turbines and supporting infrastructure.

158. Plaintiff urged USFWS to consider in the Buckeye Wind Project EIS this and other measures identified by the Service's own staff for other wind power projects. The USFWS refused to consider any of these measures in the context of the Buckeye Wind Project.

159. USFWS has offered no rationale for rejecting consideration of a ban on forest clearing, other than to state that Buckeye Wind proposes to impact no more than 16.8 acres of trees. USFWS did not consider whether such a measure might further reduce the impacts of the Buckeye Wind Project on Indiana bats or whether it might be practicable.

160. The 2013 USFWS Record of Decision for the Buckeye Wind Power Project is therefore arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA, 42 U.S.C. §§ 4321 *et seq.*, and must be set aside pursuant to the APA, 5 U.S.C. § 706.

COUNT III: Violation of ESA, 16 U.S.C. §§ 1539 – Illegal Issuance of Incidental Take Permit; Arbitrary and Capricious Finding that Applicant Will Minimize the Effects of the Taking of Indiana Bats to the Maximum Extent Practicable.

161. Plaintiff repeats the allegations in paragraphs 1 through 160 and incorporates them by reference.

162. Defendants’ findings pursuant to 16 U.S.C. § 1539(a)(2)(B) that “[t]he taking has been minimized and mitigated to the maximum extent practicable” and “[t]he Service finds that Buckeye Wind will minimize and mitigate the impacts of take on the Indiana bat to the maximum extent practicable,” are arbitrary, capricious, an abuse of discretion, and not in accordance with the ESA because (1) the proposed and approved minimization plan, which uses a mixture of cut-in speeds varying from the manufacturer specified speed (3.5–4.0 m/s) to 6.0 m/s by season and perceived habitat quality, is likely to be significantly less effective at reducing turbine-related take of Indiana bats than the alternative recommended by Plaintiff but not considered by USFWS; (2) under *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002), in the face of an alternative minimization plan that may reduce take significantly more than the proposed plan, USFWS cannot issue an ITP consistent with the ESA without making a finding that the reduced impact alternative is impracticable; (3) USFWS has made no finding with regard to the effectiveness or practicability of Plaintiff’s recommended reduced-impact alternative; and (4) USFWS cannot rely on adaptive management to satisfy the “minimize to the maximum extent practicable” requirement with a wait-and-see approach after implementing what is at most a second-best strategy, especially where measures reasonably expected to significantly further

reduce take are immediately available. Defendants have issued an ITP based on a set of measures that are not likely to minimize the impact of take to the maximum extent practicable.

163. The results of the Fowler Ridge studies, when added to other studies of cut-in speed, lead to three conclusions. First, the best available science indicates that a cut-in speed of 6.5 m/s is the most effective cut-in speed of those studied for reducing take of Indiana bats. Second, feathering (*i.e.*, stopping the blades from turning) below a 6.5 m/s cut-in speed can reduce mortality even further than 79%. Third, implementing a 6.5 m/s cut-in speed alternative at the Buckeye Wind Project would likely reduce take of Indiana bats significantly more than the Applicant-proposed and USFWS-approved cut-in speed plan that uses a mixture of cut-in speeds.

164. For the Buckeye Wind Project, USFWS has done what is prohibited by *Gerber v. Norton*: namely, USFWS has ignored a requested alternative that the best available science indicates would reduce take significantly further than the proposed and approved plan; has approved an ITP/HCP based on a purported minimization strategy that the best available science indicates is significantly less effective at reducing take than the recommended alternative; and has not found that the more effective alternative is impracticable to achieve.

165. USFWS's findings that "[t]he taking has been minimized and mitigated to the maximum extent practicable" and that "[t]he Service finds that Buckeye Wind will minimize and mitigate the impacts of take on the Indiana bat to the maximum extent practicable" indicate that the Service has used an approach to selecting a minimization plan that is inconsistent with the requirements of the ESA.

166. USFWS has selected cut-in speeds with known lower effectiveness in an attempt to match protection level with what the Service perceives as variation in predicted risk levels over

season and habitat. USFWS refers to its approach to minimization as a “commensurate” or “rationally related” approach. For example, USFWS states in its findings:

To make the finding that the conservation measures included in the HCP minimize and mitigate the impacts of take to the maximum extent practicable, *the Service must first evaluate whether the conservation measures are rationally related to the level of take anticipated under the plan.* In effect, the minimization and mitigation measures need to address the biological needs of the Covered Species in a manner that is *commensurate with the impacts to the species* anticipated under the HCP. The Service believes the amount of minimization and mitigation provided for in the HCP *compensates for the impacts of take* of Indiana bats that will or could potentially occur under the plan. . . . The Buckeye Wind HCP, including its minimization and mitigation measures, *fully compensates for impacts of the take to the covered species.*²²

Emphasis added.

167. USFWS conflates the required finding that the applicant will *minimize* the impact of take to the maximum extent practicable with the required finding that the applicant will *mitigate* the impact of take to the maximum extent practicable.

168. According to USFWS’s July 17, 2013 Statement of Findings for the Buckeye Wind ITP issuance, “Impacts to the species (or listed entity) of the proposed taking that are not avoided or eliminated as a result of project and HCP planning must be *minimized* to the maximum extent practicable. Any *remaining* impacts [*i.e.*, those impacts that cannot be minimized or are impracticable to minimize] must *then* be *mitigated* (*e.g.*, ‘offset’ or ‘rectified’) to the maximum extent practicable.”²³

169. Mitigation measures are thus intended to offset or rectify the impacts that remain *after* impacts of take have been minimized to the maximum extent practicable. USFWS guidance similarly provides for this two-step process. But USFWS has not used this two-step process for the Buckeye Wind Project.

²² USFWS, Statement of Findings and Recommendations (July 17, 2013), p. 15.

²³ USFWS, Statement of Findings and Recommendations (July 17, 2013), p. 14.

170. Rather, for the Buckeye Wind Project, USFWS has combined minimization and mitigation and asked whether both *together* are “rationally related to the level of take anticipated under the plan”; are “commensurate with the impacts to the species anticipated under the HCP”; and “fully compensate for impacts of the take to the covered species.”²⁴ This “commensurate” procedure is contrary to the recognized and USFWS-adopted stepwise process of first *minimizing* to the maximum extent practicable and then mitigating any *remaining* impacts (*i.e.*, those impacts remaining that cannot be minimized or are impracticable to minimize).

171. The approach used by USFWS here is inconsistent with the ESA when applied to the minimization requirement. According to USFWS’s own statements, mitigation cannot be used to replace or substitute for minimization to the maximum extent practicable. No judicial decision applies a “rationally related” or “commensurate” approach to *minimization* efforts. A mitigation measure cannot serve the functions of a minimization measure. Full compliance with the minimization requirement cannot be withheld based on the justification that mitigation measures can offset the remaining impacts of take. USFWS has *not* found for the Buckeye Wind Project that the impacts of take will be minimized to the maximum extent practicable before the remaining take is mitigated to the maximum extent practicable. By not fully minimizing impacts of take first, the “remaining” impacts are larger than allowed by the ESA.

172. USFWS also takes the position that the proposed and approved operational plan “can significantly reduce all bat mortality compared to wind turbines that are not operating with

²⁴ See ¶166 above; *see also* USFWS, Statement of Findings and Recommendations (July 17, 2013), pp. 14–15 (“If the applicant provides these minimization and mitigation measures that are fully commensurate with the level of impacts, then it has met that issuance criterion . . .”), p.16 (“The Service finds that the HCP minimizes and mitigates the impacts of take of the Covered Species . . . because: (1) the HCP’s minimization and mitigation measures effectively compensate for the impacts of take under the plan . . .”).

feathering and cut-in speeds.”²⁵ The proper comparison for the proposed operational plan, however, is *not* with the manufacturer set cut-in speed without feathering. The proper comparison is with a raised cut-in speed alternative that reduces take to the greatest extent while still being practicable, such as the recommended but refused 6.5 m/s alternative.

173. The HCP’s adaptive management plan states that in general the cut-in speeds will be increased incrementally if the observed number of fatalities of Indiana bats is greater than the “expected” fatalities. The “expected” number of fatalities, in turn, is based on the proposed and approved mixed cut-in speed plan. Thus, because the mixed cut-in speed plan likely does not minimize take of Indiana bats to the maximum extent practicable, the “expected” take, which becomes the reference point for triggering adaptive management measures, is larger than allowed under the ESA. The result is that more Indiana bats will be taken than if the more effective 6.5 m/s alternative had been considered and selected.

174. Also, the adaptive management plan is arbitrary and capricious because it allows for a reduction in cut-in speeds after only a single year in which average take is estimated to be less than or equal to the “expected” number of fatalities. One year of data is insufficient for making conclusions about the actual level of take.

175. The basis of the adaptive management plan is that the cut-in speeds in the proposed mixed plan will be increased if observed take is greater than “expected.” This adaptive management plan therefore acknowledges that cut-in speeds higher than those used in the proposed mixed plan are likely to be, based on the best available science, more effective at

²⁵ USFWS, Statement of Findings and Recommendations (July 17, 2013), p. 15 (“The HCP estimates that use of feathering and cut-in speeds will reduce Indiana bat mortality by at least 68.3%, compared to Project operation without feathering and cut-in speeds.”); USFWS, Response to Itemized Public Comment 0030-21. *See also* Response to Itemized Public Comment Number 0030-15 (“All these [proposed] alternatives will result in reduction in bat mortalities compared to turbines operating per the manufacturer programmed settings.”).

reducing take of Indiana bats. The higher efficacy of a 6.5 m/s cut-in speed is well established. USFWS cannot rely on adaptive management to satisfy the “minimize to the maximum extent practicable” requirement with a wait-and-see approach after implementing what is known to be at most a second-best strategy, especially where measures reasonably expected to significantly further reduce take are immediately available.

176. Even if the approach used by USFWS to identify and select a minimization plan were legal, the use of lower and less-protective cut-in speeds in some habitat suitability categories, as was done here, is arbitrary and capricious. The data used by USFWS show that many more Indiana bats are potentially migrating through the Action Area in spring and fall than are potentially summering in the Action Area. USFWS also has recognized that migrating Indiana bats use all habitat categories as “suitable.” Thus, according to the data used by USFWS, the risk level and predicted mortality for *migrating* Indiana bats do not significantly vary due to habitat category, and the use of different cut-in speeds for different habitat categories is arbitrary and capricious.

177. The 2013 USFWS issuance of an Incidental Take Permit to Buckeye Wind and the USFWS’s findings presented to support that issuance for the Buckeye Wind Project are therefore arbitrary, capricious, an abuse of discretion, and not in accordance with the ESA, 16 U.S.C. §§ 1531 *et seq.*, and must be set aside pursuant to the APA, 5 U.S.C. § 706.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court:

- i. Declare that DOI's and USFWS's failure to consider and assess the impacts of the Plaintiff's recommended alternatives is arbitrary, capricious, an abuse of discretion, and not in accordance with the National Environmental Policy Act;
- ii. Declare that DOI's and USFWS's issuance of an Incidental Take Permit to Buckeye Wind for the Buckeye Wind Project, and DOI's and USFWS's findings presented in support of that permit issuance, are arbitrary, capricious, an abuse of discretion, and not in accordance with the Endangered Species Act;
- iii. Issue a permanent injunction vacating the final EIS, ROD, and ITP and directing DOI and USFWS to produce an amended or supplemental EIS that considers and assesses the impacts of Plaintiff's recommended alternatives or comparable alternatives and to incorporate the results in amendments to the relevant documents and permits, including the Biological Opinion, Habitat Conservation Plan, and Incidental Take Permit;
- iv. Maintain jurisdiction over this action until DOI and USFWS are in compliance with the APA, NEPA, the ESA, and every order of this Court;
- v. Award Plaintiff's attorneys' fees and costs pursuant to 28 U.S.C. § 2412; and
- vi. Grant such additional and further relief to which Plaintiff may be entitled.

Dated: September 19, 2013

Respectfully submitted,

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Summary: Memorandum in Opposition to Buckeye Wind's Motion for Extension of Certificate electronically filed by Mr. Jack A Van Kley on behalf of Union Neighbors United and Johnson, Julia Ms. and McConnell, Robert Mr. and McConnell, Diane Ms.