

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Application of :  
Republic Wind, LLC, for a Certificate to : Case No. 17-2295-EL-BGN  
Site Wind Powered Electric Generating :  
Facilities in Seneca and Sandusky :  
Counties, Ohio. :

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

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**On behalf of the Staff of  
The Ohio Power Siting Board**

January 13, 2020

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and Staff agree that turbine 42 cannot be constructed as planned because it does not meet the minimum setback requirement to a gas pipeline. Appellant's Brief at 16, Staff Brief at 23. However, Republic claims in its brief that all other turbines meet the minimum setback requirements. Applicant's Brief at 15. But Turbines 10, 38, and 43 should not be constructed as proposed because they are too close to highways. Republic and Staff agree that the setback, defined in Ohio Adm.Code 4906-4-08(C)(2)(b) is 1,125 feet plus the horizontal distance from the tip of the turbine's nearest blade at ninety degrees to the property line of the nearest adjacent property, including a state or federal highway. Turbines 10, 38, and 43 are too close and cannot pass this standard. The old standard was 1.1 x total hub height setback from the state or federal highways. Turbines 10, 38, and 43 comply with the old standard, but not with the new – 1,125 feet plus – setback. Turbine 10 is less than that distance to State Route 19 and Turbines 38 and 43 are less than that distance to State Route 18. Staff Ex. 5 at 9, Appellant's Brief at 15.

Republic argues that it filed its application before the new setback language became effective for Ohio Adm.Code 4906-4-08(C)(2)(b). Applicant's Brief at 15. These sections of the Code became effective April 26, 2018 and Republic filed the amended application for locations for turbines 10, 38, and 43 on December 26, 2018, eight months after the effective date of the setback rule. The original application was filed on February 2, 2018 before the new setback rule was in place; however, Republic filed a Motion to Suspend the procedural schedule and stay discovery on August 29, 2018. On December 26, 2019, Republic filed its amended application, which consisted of over five thousand

pages. It was a new “amended application” and Turbines 10, 38, and 43 were new locations. The effective date for the rules was April 26, 2018 and this amended filing was made eight months later in December 2018.

In addition, the safety manual for these turbines state that a safety area of 1,640 feet around the turbine must be maintained if something malfunctions. A safety area this size would require State Routes 18 and 19 to be closed because the state routes are less than 1,640 feet away from these turbines. Staff Ex. 5 at 10. This is further rational why turbines 10, 38, and 43 should not be constructed as proposed.

## **II. AVIATION**

Another inaccuracy in Republic’s brief is that Republic ignores Ohio power siting law as it relates to aviation. In particular, Republic states throughout its brief that the FAA found that none of the turbines would constitute a hazard to air navigation and that all of the turbines can be constructed up to 606 feet above ground level with no threat to safety. Applicant’s Brief at 26. However, Republic conveniently ignores the language in the FAA’s determination of no hazard that states “this determination ...does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body” as well as Ohio’s law governing power siting in Ohio.<sup>1</sup> Specifically, R.C. 4906.10(A)(5) requires that the Board not grant a certificate for the construction, operation, and maintenance of a major utility facility

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<sup>1</sup> Republic recognizes that consulting with ODOT is required before the Board issues a certificate in its Standard of Review section of its Initial Brief; however, makes no arguments nor points out any facts that support the mandatory ODOT consultation. *See* Republic Brief at 4.

unless it finds and determines that the facility will, among other things, comply with R.C. 4561.32 (Ohio Department of Transportation's ("ODOT") authority to adopt rules regarding regulation of the airspace around airports). "In determining whether the facility will comply with all rules and standards adopted under 4561.32 \*\*\* the board *shall* consult with the office of aviation of the division of multi-modal planning and programs of the department of transportation[.]" R.C. 4906.10(A)(5) (emphasis added). When the Staff consulted with ODOT, ODOT unequivocally determined that several airports near the project would be negatively impacted if the project was constructed as proposed. Republic's brief makes no mention of the FAA deference to State laws and no mention of this section of R.C. 4906.10 regarding consultation with ODOT. This statute cannot be waived by the Board. Revised Code 4906.10 requires that the Board make a determination regarding eight areas codified in Ohio's law. As seen in one of these requirements, the Board shall consult with ODOT. This consultation with ODOT is not optional.

ODOT reviewed the FAA's determination and also performed a separate and independent analysis based on the same obstruction criteria described in 14 C.F.R. Part 77, which is the same criteria the FAA used. Staff Ex. 3 at 4. ODOT and the FAA both determined that all 50 turbines would exceed obstruction standards. However, the FAA issued a determination of no hazard for these turbines because it determined that existing flight procedures could be modified and that with the implementation of these modified procedures, the obstructions would not constitute a hazard. In order to make that

determination, new flight procedures for the Seneca County Airport, Sandusky County Regional Airport and Fostoria Metropolitan Airport and measures for the Ohio National Guard 179<sup>th</sup> Airlift Wing would need to be implemented. App. Ex. 29 at Att. 11, Staff Ex. 1 at 51 – 53. ODOT may include in its determination a statement that compliance with obstruction standards may be waived, however, ODOT will only consider this option if the local airport is willing to give up the utility of its navigable airspace. None of the airports affected by the Republic project agree to forfeit their current navigable airspace. Staff Ex. 3 at 17.

Staff properly translated ODOT Office of Aviation's determination/consultation into appropriate conditions for Board consideration. Staff's recommendations regarding aviation seek to minimize the adverse impacts from the Republic Wind farm. These negative aviation impacts will go beyond the project's footprints and affect multiple airports. Staff recommends that Conditions 52, 53, 54, 55, 56, 57, and 59 of the Staff Report and Supplemental Staff Report be adopted and made part of the certificate in this case.

### **III. NOISE**

Republic agrees with the Staff's findings that 46 dBA adequately addresses potential concerns for noise impacts on sensitive receptors. Republic Brief at 21. In Staff's Initial Brief, and in its Supplemental Staff Report, Staff noted that new evidence was raised at the hearing revealing the fact that Republic, in a separate case pending before the Board, had performed a sound study that was done in an area well within the

Republic Wind Farm Project area. The noise study was admitted into the record in this case.<sup>2</sup> Staff witness Bellamy recommended using the new sound data as an “eighth monitoring point” for evaluating the ambient nighttime noise in this case. Staff Ex. 16 at 2. The new noise data presented study results from the western area of the Project. Witness Bellamy justified its inclusion as the data provides a “more complete picture of the wind generation project area,” and there were no data samples from the western part of the Project. Staff Ex. 16 at 2. The results of this additional study were admitted into this case. With the inclusion of this new data point, the project area ambient nighttime noise changes to approximately 40.5 dBA, placing the noise limit at 45.5 dBA instead of 46.<sup>3</sup> Staff Ex. 16 at 3. Staff encourages the Board to adopt Conditions 44, 58, and 60. Condition 44 is identical to Ohio Adm.Code 4906-4-09(F)(2) and was used by Applicant in designing and analyzing the project. Its application in this case is not contested by Staff nor the Applicant, thus the Board should approve the condition.

An additional error in the noise study was discovered at the public hearing. At that hearing, Staff learned that the study failed to include at least one residence on the noise study map. Further investigation by Staff revealed that there were an additional nine residences not modeled in the noise study. Staff Ex. 15 at 4. Although the new data did not alter the overall noise impact limit, Staff recommends that the Board prohibit construction of any turbine that is modeled to impact a previously non-modeled receptor

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<sup>2</sup> These sound monitoring values were obtained as part of the related case, Case No. 19-1066-EL-BTX, the Republic Wind transmission line case, Tr. II at 325, and allowed in to cross-examine Applicant’s expert. Tr. II at 333.

<sup>3</sup> The actual calculated ambient nighttime  $L_{eq}$  with the eight data point is 40.42, but Staff recommends rounding up to 40.5. Staff Ex. 16, at 3.

(residence) above the ambient level of the project area. Staff Ex. 15 at 4. Condition 58 prohibits the use of certain turbine models at location 37 due to Applicant's failure to fully disclose the sound data for the location in a timely manner. Applicant failed to provide the data until after it was pointed out to Staff by concerned citizens. Staff believes that the non-participants should have been provided the information sooner, and, as a result of the surprise, Staff believes it is fair to use turbines that will not raise the sound levels above the current ambient level at the site. Applicant's witness agrees that such a result would be possible and does not pose a problem for the Applicant's plan. App. Ex. 18 at 4. Thus, in the interest of fairness and to protect the interests of the public, Condition 58 should be adopted.

Condition 60 requires the Applicant to submit a noise study 30 days prior to the construction of the facility. This condition should also be approved. According to the Board's rules, the Applicant must "submit a preconstruction background noise study of the project area that includes measurements taken under both day and nighttime conditions." Ohio Adm.Code 4906-4-08(A)(3)(e). Given that the modeling is likely different based on the inclusion of the eighth data point, a second submission of the ambient sound levels within the project area is essential to determine whether the project still meets the requirements of  $L_{eq}$  plus 5 dBA before the project is begun. Condition 60 satisfies the Board's rule both in letter and spirit.

Thus, the Board should accept Staff's three conditions regarding noise as found in the Staff Report, Supplement to the Staff Report, and the Supplemental Prefiled Testimony of Mark Bellamy.

Staff's report indicated that the Republic project's nature of the probable environmental impact had satisfied R.C. 4906.10(A)(2), provided that the Board include Staff's recommended conditions.

#### **IV. AESTHETICS**

Aesthetics comes into consideration when the Board determines the nature of the probable environmental impact that the proposed facility may have. R.C. 4906(A)(2). Both Seneca County and the Park District claim that the Bowen Nature Preserve was ignored by Staff. Seneca County Brief at 8, Seneca Park District Brief at 1. They complain that Staff did not visit Bowen Park. Seneca County at 9, Seneca Park District Brief at 2. However, Staff did visit the Project area five or six times and spent 40 hours in the Project area. Seneca County Brief at 9, Seneca Park District at 2. The fact that Staff did not physically visit every parcel of land does not demonstrate that visual impacts of the proposed facility were not taken into consideration by the Staff. In fact, the opposite is true. It would be unreasonable to require that every single parcel of land (comprised of 19,000 acres involving approximately 440 properties) be inspected.

As noted in the Staff Report "[d]ue to the height of turbines in a wind farm, it is impractical to directly screen them from view." Staff Ex. 1 at 23. The turbines will be painted a neutral light color and existing woodlots offer additional natural screening or

portions of the facility. Staff Ex. 1 at 23. There will be impacts and the Staff's responsibilities in performing its investigations are to achieve a result "that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of various alternatives, and other pertinent considerations." R.C. 4906.10(A)(3). The law does not establish an absolute value of no effects. The law charges the Board with minimizing the impacts of the proposed project. The wind farm may be seen at Bowen Park; however, the addition of the wind farm does not preclude or alter the continuation of existing recreational, institutional, commercial, industrial, residential or agricultural land uses. The use of the park will continue as it is today. Staff considered the visual impact that the project would have and recommends the conditions in the Staff Report and its Supplement be adopted as part of any certificate issued in this case.

## **V. KARST**

Local Intervenors discuss concerns regarding the existence of Karst topography in the Project area. See Local Residents' Brief 32 – 40. Staff recognizes the possibility of the existence of Karst in the area. Staff witness Collins confirmed that currently 27 of the proposed 50 wind turbines are situated in areas exhibiting karst features (Tr. Vol. VII at 1413). Staff witness Collins also found that it would be more prudent if the Applicant avoid "the karst features, in the most severe cases." (Tr. Vol. VII at 1416). Staff expects the Applicant to further continue site-specific geotechnical exploration work to wholly

define the nature/extent of the karst features at all of the proposed 50 wind turbines and most specifically those 27 proposed wind turbines noted by Staff. (Tr. Vol. VII at 1414).

Staff witness Conway noted that because there is Karst topography in the project area it requires avoidance and special consideration during foundation design and installation. Staff Ex. 5 at 8 -9. Staff agrees with Applicant witness McGee, a registered professional engineer, that the Applicant should implement proper mitigation measures (such as grouting) where appropriate and feasible. (Applicant Ex. 27 at page 6). Staff expects that the Applicant's final detailed engineering plans will properly use best engineering practices, identify and account for any karst formations at each proposed wind turbine location, and implement proper mitigation measures, or avoid non-feasible wind turbine locations. Staff recommends that the Board include in any approval for this Project the requirement that Applicant provide detailed engineering drawings of the final project design and foundation design which properly take into consideration karst features. These detailed engineering drawings must also identify the registered professional engineers and structural engineers that are licensed to practice engineering in the state of Ohio. Staff Ex. 4 at 9.

## **VI. ECOLOGICAL CONDITIONS**

Conditions 22, 25, 26, and 29 should be approved without modification. The ecological conditions were thoughtfully designed by Staff in coordination with the Ohio Environmental Protection Agency, Ohio Department of Health, Ohio Department of Natural Resources (ODNR), Ohio Department of Agriculture, and the U.S. Fish and

Wildlife Service (USFW) for the protection of the ecology impacted by the project. Staff Ex. 1 at ii.

Condition 22 should continue to protect against impacts to all sensitive plant species. The purpose of the condition was not, as proposed in the Applicant Brief, to just protect against impacts to threatened species. Tr. VI at 1357-1358. Instead, the purpose was to protect against impacts for all listed species that are identified during the project. *Id.* Listed species include not only threatened species, but other categories such as endangered and potentially threatened species. *Id.* at 1358.

Condition 26 should be adopted without modification for the reasons stated in Staff's Initial Closing Brief and for the reasons stated in the Staff Report. The Staff Report explains why additional measures, above and beyond what is contained in the Applicant's current technical assistance letter, are needed at this project to protect the northern long-eared bat. The Staff Report, on page 29, states as follows:

The project site and adjacent parcels encompass habitat with confirmed use by listed species. The Applicant stated that it expects collision risk to bats in the project area to be consistent with other wind energy projects in agricultural landscapes in the Midwestern U.S. and estimates 980 to 2,200 bat deaths per year. However, the ODNR anticipates the mortality rate may be greater as this site has approximately five to eight times the amount of forested area as other operating projects in agricultural landscapes in Ohio. Additionally, active roost trees for the Indiana bat and northern long-eared bat have been documented in and adjacent to the project area during surveys.

In order to protect against higher than usual mortality rates for the northern long-eared bat, Condition 26 should be approved without modification.

Condition 25 and 29 are consistent with the rules found in Ohio Adm.Code 4906-4-09(D)(1), (2), and (6) and should, therefore, be adopted. The first two sentences of Condition 25<sup>4</sup> are essentially a replica of Adm.Code 4906-4-09(D)(2)<sup>5</sup>. And the last sentence of Condition 25 reasonably extends the Applicant's responsibility under Adm.Code 4906-4-09(D)(2) to mitigate when listed species are encountered during construction into a responsibility to also mitigate when listed species are encountered prior to construction. To the contrary, the adoption of the Applicant's proposed changes to Condition 25 would lower the standards required under the Adm.Code 4906-4-09(D)(2) by 1) limiting protection to endangered and threatened species, as opposed to all listed species, and 2) only preventing injuries, harm, and kills rather than preventing all adverse impacts. Tr. VI at 1361, 1362. And while Condition 29<sup>6</sup> is not a replica of Ohio Adm.Code 4906-4-09(D)(1) and (6)<sup>7</sup>, both the rule provisions and condition outline what

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<sup>4</sup> Condition 25 states, "The Applicant shall contact Staff, the ODNR, and the U.S. Fish and Wildlife Service (USFWS) within 24 hours if state or federal listed species are encountered during construction, operation, or monitoring activities. Activities that could adversely impact the identified plants or animals shall be immediately halted until an appropriate course of action has been agreed upon by the Applicant, Staff and the appropriate agencies. If the Applicant encounters any listed plant or animal species prior to construction, the Applicant notify Staff of the location and how impacts would be avoided during construction."

<sup>5</sup> Adm.Code 4906-4-09(D)(2) states, "The applicant shall contact board staff within twenty-four hours if federal or state listed species are encountered during construction activities. Construction activities that could adversely impact the identified plants or animals shall be halted until an appropriate course of action has been agreed upon by the applicant, board staff, and other applicable administrative agencies."

<sup>6</sup> Condition 29 states, "If Staff and the ODNR, in consultation with the USFWS, determine the project results in significant adverse impact to wild animals, the ODNR and Staff will notify the Applicant. As soon as possible and no longer than 30 days after receiving notification of the significant adverse impact, Applicant shall implement practices to rectify the significant adverse impact, which will include development and submission of a mitigation plan or adaptive management strategy to Staff and the ODNR for review to confirm compliance with this condition. Operation activities that could adversely impact the identified animals shall be modified to minimize risk until the mitigation plan or adaptive management strategy is agreed upon."

<sup>7</sup> Ohio Adm.Code 4906-4-09(D)(1) states, in part, "(1) \* \* \* If the United States fish and wildlife service, the Ohio department of natural resources division of wildlife, or board staff identify any recommendations for the avoidance of impacts to specific species, the applicant shall describe how it shall address all recommendations. \* \* \*

is required of the Applicant in the event that Staff, ODNR and USFW determine that the project results in adverse impacts to “federal or state listed and protected species or other species.” *See* Adm.Code 4906-4-09(D)(1), emphasis added. Condition 29 just outlines how the Applicant is supposed to interact with the various protection agencies with more needed specificity and replaces the phrase “other species” with the phrase “wild animals.” Conditions 25 and 29 should be adopted by the Commission.

## **CONCLUSION**

Staff respectfully requests that the Board condition any certificate issued in this case by adopting all the conditions set forth in that Staff Report, Supplement to the Staff Report, and Staff’s supporting testimony.

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(6) If construction activities result in significant adverse impact to federal or state listed and protected species, the applicant will develop a mitigation plan or adaptive management strategy.”

Respectfully submitted,

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*/s/ Jodi J. Bair*

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**On behalf of the Staff of**

**The Ohio Power Siting Board**

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Staff Reply Brief**, submitted on behalf of the Staff of the Ohio Power Siting Board, was served via electronic mail upon the following parties of record, this 13<sup>th</sup> day of January, 2020.

*/s/ Jodi J. Bair*

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