

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Application of Icebreaker	)	
Windpower, Inc., for a Certification to	)	
Construct a Wind-Powered Electric	)	Case No. 16-1871-EL-BGN
Generation Facility in Cuyahoga County,	)	
Ohio	)	

**APPLICATION FOR REHEARING OF INTERVENING  
BRATENAHL RESIDENTS**

Pursuant to R.C. 4906.12, R.C. 4903.10, and O.A.C. 4906-2-32(A), Intervenors W. Susan Dempsey and Robert M. Maloney ("Bratenahl Residents") hereby apply for rehearing of the Board's Opinion, Order, and Certificate of May 21, 2020 ("Decision") in this matter. The specific grounds for this Application for Rehearing are as follows:

(1) The Decision is unreasonable and unlawful because it grants a certificate of environmental compatibility and public need ("Certificate") to Applicant Icebreaker Windpower, Inc. ("Icebreaker") to construct, operate, and maintain a 6-turbine wind-powered electric generation facility ("Project") located on approximately 4.2 acres of submerged, leased state of Ohio land in Lake Eric, 8-10 miles off the shore of Cleveland, in Cuyahoga County, despite applicant having failed to introduce sufficient evidence for the Board to make valid findings and determinations as to the nature of the probable environmental impact of the Project (R.C. 4906.10(A)(2)) or to determine that the Project represents the minimum adverse environmental impact (R.C. 4906.10(A)(3)).

(2) The Decision is unreasonable and unlawful because the Project does not serve the public interest, convenience, and necessity. (R.C. 4906.10(A)(6)). The grant of a Certificate to a private party, Icebreaker, to use the State's interest in Lake Erie for its own, for-profit, benefit, violates the Public Trust Doctrine. The State of Ohio owns its interest in Lake Erie in trust for

the benefit of the citizens of Ohio--the“public benefit”—to enjoy, *inter alia*, navigation, commerce, and fishing in and on the lake’s waters free from the obstruction or interference of interests ceded to private parties; and free from the award of a private, for-profit, interest in the Lake to Icebreaker that is not granted equally to the citizens of the State.

The bases for this Application for Rehearing are set forth in detail in the Memorandum in Support below.

Respectfully submitted,

/s/ John F. Stock

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## **MEMORANDUM IN SUPPORT**

### **I. INTRODUCTION**

The authority of the Board to grant a certificate is controlled by R.C. 4906.10. R.C. 4906.10(A)(2) & (3) specifically require that before the Board may grant a Certificate to Icebreaker, it must make findings and determinations (1) as to the nature of the probable environmental impact of the Project; and (2) that the Project represents the minimum adverse environmental impact. The record in this case irrefutably establishes that Icebreaker has failed to submit to the Board sufficient data and information at this juncture for the Board to make any valid findings or determinations with regard to either of these statutory requirements. Indeed, all parties acknowledge that Icebreaker has yet to even identify the technologies it intends to use to attempt to gather the data necessary for any determinations to be made as to the environmental

impact of its Project—despite the fact that since 2008, the Ohio Department of Natural Resources (“ODNR”) and the U.S. Fish and Wildlife Service (“FWS”) have been requesting that Icebreaker collect such data from the Project site. However, Icebreaker steadfastly has refused to do so, depriving the Board of the very data necessary for it to determine whether a Certificate should be granted to Icebreaker.

Nonetheless, in its Decision, the Board concluded that Icebreaker had submitted sufficient evidence so that “the nature of the probable environmental impact can be determined.” Decision at 39, ¶104. See also Decision at 42, ¶108 (“Consistent with our determinations above, the Board finds that the nature of the probable environmental impact can be evaluated and determined.”). The Board then determined that:

Icebreaker’s main impact *is expected to be* on nocturnal migrating birds. By evaluating migration patterns at the project site [<sup>1</sup>] and by reviewing terrestrial wind farms in the Great Lakes region, the probable impact can be determined. *It is expected* that most birds, when migrating south in the fall and north in the spring, will fly above the rotorswept zone of the turbines. Those birds flying through the rotorswept zone will experience collision, attraction, and avoidance associated with the turbines.

*Id.* (emphasis added). Although the Board acknowledged that sufficient radar studies had not been performed to determine the number, density, or altitude of birds and bats that fly through the Project’s rotorswept zone, Decision at 37, ¶100 (“The radar studies are also unable to ascertain the altitude of the birds and bats.”) (citing Bratenahl Resident’s Ex. 23); Decision at 39-40, ¶105 (“We acknowledge, as pointed out by the Bratenahl Residents, that NEXRAD has restrictions in that the radar cannot identify individual birds and has limitations in measuring

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<sup>1</sup>This is the very information that Icebreaker has refused to collect since 2008. Precisely because Icebreaker has refused to collect this required data from the Project site, the Board is left to guess that most birds are expected to fly above the rotorswept zone of the turbines in the Project area—without radar data from the rotorswept zone (which Icebreaker could have collected) to support that likely-erroneous guess.

altitude.”) (citation omitted), it agreed with Staff’s argument that such data was unnecessary to determine the nature of the Project’s probable environmental impact. Decision at 38, ¶101 (“Staff submits that while that data is incredibly important, its purpose is to determine the actual—not probable—environmental impact and is not applicable to R.C. 4906.10(A)(2).”).

However, the nature of the probable environmental impact cannot be determined unless and until the Applicant submits sufficient evidence to show the number and density of birds and bats that fly through the Project’s rotorswept zone.<sup>2</sup> The evidence submitted by the Bratenahl establishes that birds and bats regularly fly through the Project site. Unless and until evidence establishes the number and density of birds and bats that fly through the Project’s rotorswept zone—evidence which Icebreaker acknowledges does not exist, see 9/25/18 Gordon Test. at 317 (Icebreaker does not know how many birds fly through the Project’s rotor-swept zone during migrations periods); 9/25/18 Gordon Test. at 331 (Icebreaker’s experts have not performed any radar study that covers the entirety of the Project’s rotor-swept zone)—the Board cannot determine the nature of the probable environmental impact of the Project. Rather, bereft of the necessary data, the Board is left to mere conjecture as to the Project’s probable impact. Accordingly, the Board erred when it determined that it could determine the nature of the Project’s probable environmental impact.

The Board also erred when it determined—without sufficient evidence—that the project represents the minimum adverse environmental impact. Significantly, the Board agreed that “pre-construction radar . . . *is a necessary condition* in order to ensure that the project represents the minimum adverse environmental impact. . . .” Decision at 41, ¶107.I (emphasis added). The

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<sup>2</sup>Indeed, Icebreaker (speciously) argues that its Project will not have any environmental impact on birds and bats, undermining the Board’s determination that the nature of the probable environmental impact is a risk to birds and bats.

Board also acknowledged “that Staff was unable to definitely determine the project represents the minimum adverse environmental impact without adopting its recommended conditions proposed in the Staff Report, given the fact that no pre-construction avian radar data from the project site or designated radar or collision monitoring technologies were included with the application,” adding that information has yet to be provided in this proceeding. Decision at 54, ¶127 (citing Staff Ex. 3 at 6-16). Indeed, the Board concluded that “there is a *considerable unknown risk* associated with the number and density of birds and bats potentially migrating through the rotor-swept zone.” Decision at 70, ¶148 (emphasis added). Despite the acknowledged lack of necessary evidence and data regarding the risk of the Project to kill birds and bats—which it is the burden of Icebreaker to submit to the Board before it may issue a Certificate to Icebreaker—the Board nevertheless granted the Certificate subject to pre-construction radar and collision monitoring conditions that the Board contends will allow it to later assess whether the Project represents the minimum adverse environmental impact.

The Bratenahl Residents applaud the Board’s imposition of conditions not contained in the parties’ Revised Stipulation, including the requirement that the turbines be feathered from dusk to dawn from March 1 through November 1 and that Icebreaker file pre-construction radar compliance information and the bird and bat mitigation plan in the record for Board review and determination. Any award of a Certificate for the Project without such vital conditions would be catastrophic to migrating birds and bats. Nevertheless, R.C. 4906.10(A)(3) makes clear that the Board must make the finding and determination that the Project represents the minimum adverse environmental impact prior to the issuance of the Certificate, not during a post-certificate-issuance period as part of a statutorily-unrecognized “dynamic process” that allows the Board to

reserve these determinations until a later date. The Board, therefore, erred by issuing the Certificate.

Finally, as noted, the award of a Certificate for the Project violates the proscriptions of the Public Trust Doctrine. That doctrine prohibits the state from using its title in public property for the benefit of a private party such as Icebreaker. See *State ex rel. Squire v. City of Cleveland*, 150 Ohio St. 303, 345-46 (1948). The Board acknowledged the restrictions imposed under the Public Trust Doctrine, but suggested that “whether the project violates Public Trust Doctrine is a judicial determination and outside of the Board’s jurisdiction.” Decision at 97, ¶200. The Board is wrong. The Board cannot find and determine that the Project serves the public interest under R.C. 4906.10(A)(6) if the Project violates the Public Trust Doctrine.

Moreover, the Board erroneously determined that “because the state *is not relinquishing any interest in Lake Erie*, and consistent with our prior determinations, we find that the project does not violate the Public Trust Doctrine.” *Id.* (emphasis added). That determination is contrary to the Board’s prior acknowledgement that the state is relinquishing an interest in Lake Erie to Icebreaker: “[t]he project will be constructed on the bed of Lake Erie, *on leased submerged state land* off the coast of Cleveland, Ohio, *the rights of which were obtained through a submerged land lease with the state of Ohio*.” Decision at 6, ¶35 (citation omitted). Clearly, the state is relinquishing to Icebreaker a significant interest in its title to Lake Erie. It is leasing possession of a portion of its interest—held in trust for the People of Ohio—to a private, for-profit Norwegian-controlled entity. And while the Board attempts to minimize the significance of the interest being relinquished “due to the small scope of the project,” see Decision at 97, ¶200, it concedes that the Project is a “demonstration project,” the “ultimate goal” of which “is to assess whether large-scale wind facilities are viable in Lake Erie and other Great Lakes.” Decision at 1,

¶2. The Board's determination that the Project does not violate the Public Trust Doctrine is unreasonable and unlawful.

## II. ARGUMENT

### A. Icebreaker Failed to Demonstrate the Nature of the Project's Probable Environmental Impact or That the Facility Represents the Minimum Adverse Environmental Impact.

Icebreaker filed its Application on February 1, 2017. At that time, it stated that “[w]hile state and federal agencies have agreed that the information regarding the impact to fish and wildlife supports a finding that the permitting processes at the state and federal levels can move forward, *they have requested that the Applicant conduct additional field surveys prior to construction in order to provide a direct comparison with postconstruction survey information, as a means to assess the level of wildlife impact during the operational phase of the project.*” Application (Applicant’s Ex. 1) at 90 (emphasis added). Significantly, FWS and ODNR, in comments on Icebreaker Pre-Construction and Post-construction Monitoring Survey Protocol, Bratenahl Residents’ Ex. 7, noted that “*FWS and ODNR have been requesting this information [avian radar data from the Project site] since 2008.*” Bratenahl Residents’ Ex. 7 at 2 (emphasis added). See also Tr. at 324-25, 582.<sup>3</sup> And the FWS explicitly concluded that Icebreaker’s pre- and post-construction bird and bat studies, cited in the U.S. Department of Energy’s (“DOE”) draft Environmental Assessment (the “Draft EA”), were insufficient, October 4, 2017 FWS Letter to DOE (Bratenahl Residents’ Ex. 12) at 2-3, and that assertions made by Icebreaker that birds migrate around Lake Erie, instead of crossing it, are affirmatively misleading. *Id.* at 3.

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<sup>3</sup>Icebreaker admits that it already would have collected the requested, and necessary, radar data if it had placed a radar unit at the Project site at any time since 2008, as requested by ODNR and FWS. 9/26/18 Gordon Test. at 552.

Board Staff agreed that the information Icebreaker submitted with the Application was insufficient, particularly the information regarding the viability and design of pre- and post-construction radar monitoring protocols, calling such information “*necessary to measure the effect of off-shore turbines on birds and bats. . .*” (emphasis added). Significantly, Staff concluded that this information was necessary to determine the Project’s probable environmental impact and whether the Project represented the minimum adverse environmental impact. Motion to Suspend the Procedural Schedule at 1-2 (emphasis added). The Board agreed with Staff’s assessment. *In re Application of Icebreaker Windpower, Inc.*, No. 16-1871-EL-BGN, slip op at 2, ¶7 (Oct. 23, 2017). Although Icebreaker submitted the “Diehl Report,” Applicant’s Exhibit 37, in response to Staff’s request for more information, that report was nothing more than an evaluation of several vendor proposals, all of which admittedly contained numerous deficiencies. See Applicant’s Ex. 37 at 1. Even the “best” proposal—which called for radar mounted on a floating barge—was “not without concern, particularly over the ability to track targets in an offshore setting where sea clutter will likely pose a persistent problem that is magnified by a rolling and pitching barge.” *Id.* Indeed, in its Decision, the Board noted that “no decision has been made as to whether the chosen avian radar technology will be deployed on a floating platform or a stationary platform. . . .” Decision at 74, ¶154.

Staff also admitted that “there will be collision, avoidance, and attraction primarily affecting birds and bats,” Staff Brief at 12, and that “[s]ince Icebreaker has not completed the pre-construction or post-construction monitoring, the precise impacts cannot be quantified at this time.” *Id.* (citing 9/18/18 Hazelton Pre-Filed Test. at 6 (Staff Ex. 7)). See also Staff Brief at 15.<sup>4</sup>

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<sup>4</sup>The Bratenahl Residents’ expert witness, Henry M Streby, Ph.D. (“Streby”), Assistant Professor of Ecology within the Department of Environmental Sciences at the University of Toledo, agrees with Staff’s assessment that “*adequate pre-construction monitoring of bird*



While Staff argues that this deficiency in the evidence is not fatal, it concedes that even Icebreaker's own witness, Dr. Caleb Gordon "stated the attraction that birds and bats might have to a wind farm located on Lake Erie, in comparison to a land-based facility, *is unknown*," Staff Brief at 13 (emphasis added) (citing 9/25/18 Gordon Test. at 485), and that "*no proven effective technologies to perform bird/bat collision monitoring at offshore wind energy facilities are currently available*." Staff Brief at 13 (citing Icebreaker Ex. 38 at 12) (emphasis added). Thus, Icebreaker completely failed to collect and submit to the Board pre-construction radar studies for the rotorswept zone of the Project site, despite FWS and ODNR repeatedly requesting since 2008 that Icebreaker collect such data. Moreover, as noted, some twelve (12) years later, Icebreaker still has not identified a technology by which it will attempt to collect such required data.

The same is true with regard to post-construction collision-monitoring technology. Icebreaker still has not even identified a methodology by which it would attempt to collect data regarding birds and bats killed by its proposed wind turbines. As a result, the Board was forced to "recognize [that] there remains a certain degree of uncertainty around the post-construction avian and bat collision monitoring technology and whether the Revised Stipulation's conditions maintain sufficient protections for bird and bat species. Specifically, we are concerned that even the improvements garnered in the Revised Stipulation may not be sufficient to minimize impacts on these species after considering Dr. Streby's testimony and the issues raised during the cross-examination of Staff witness Hazelton, namely the fact that we do not have data from the project site indicating the number of birds and bats that may migrate through the rotor-swept zone." Decision at 77, ¶159. Thus, the Board concluded that "the ability to calculate and assess the

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*activity in the Project area has not been completed, rendering it impossible to make a reliable determination of the nature of the probable environmental impact of the Project on birds, or that the Project represents the minimal adverse environmental impact on birds. . . .*" 9/14/18 Streby Pre-Filed Test. (Bratenahl Residents' Ex. 23) at 2 (emphasis added).

actual environmental impact *relies on technology and data that is, to an extent, unknown.*” Decision at 77, ¶160 (emphasis added).

What is clear is that, contrary to the Board’s Decision to grant a Certificate, Icebreaker failed to submit evidence which would permit the Board to assess the Project’s probable environmental impact or to determine that it represents the minimum adverse environmental impact. Although hundreds of thousands to millions of birds and bats migrate over Lake Erie every year, see 9/18/18 Hazelton Pre-Filed Test. (Staff Ex. 7) at 8 (“Radio telemetry tracking and radar surveys suggest hundreds of thousands to millions of birds and bats migrate over Lake Erie, making it an important global migration pathway.”), Icebreaker has yet to conduct adequate radar testing at the Project site. Despite more than a decade of ODNR and USFWS urging Icebreaker to conduct site-specific radar testing, see Bratenahl Residents Exhibit 7 at 2 (ODNR and FWS February 28, 2017 Memorandum) (“Preferred is radar data from the Project area. Fish and Wildlife Service has been requesting this information since 2008.”), Icebreaker failed or refused to do so. 10/2/19 Hazelton Test. at 1768 (“There has not been a radar system deployed at the project site that I am aware of.”). Without such testing, the Board, contrary to its Decision, is unable to properly assess the environmental risk the Project poses. See 10/2/18 Hazelton Test. at 1694 (“The goal of [pre-construction radar] would be, again, to quantify the risk. We understand generally what the risk would be, but we are unable to quantify that at this time with the information that we have.”). See also 9/18//18 Hazelton Pre-Filed Test. at 6 (Staff Ex. 3) (“*Since Applicant has not completed the pre-construction or post-construction monitoring, the precise impacts cannot be quantified at this time.*”) (emphasis added). Consequently, the Board’s Decision to grant a Certificate given the current state of the evidence—even with the additional conditions it imposed—cannot be considered in compliance with the Board’s statutory mandate

to make these required determinations before issuing a Certificate. This Application for Rehearing should, therefore, be granted.

**B. The Issuance of a Certificate Violates the Public Trust Doctrine.**

The Decision granting a Certificate for the Project also violates the state's obligation to hold its ownership interest in Lake Erie for the benefit of all citizens of the State of Ohio—not for the pecuniary benefit of a private, for-profit Norwegian corporation, Fred. Olsen Renewables. The State of Ohio's ownership interest in Lake Erie is governed by the "Public Trust Doctrine." *Illinois Railroad Company v. Illinois*, 146 U.S. 387 (1892). The State of Ohio holds title to its portion of Lake Erie in trust for the benefit of the people of the State of Ohio, and is specifically prohibited from using its public trust interest for the benefit of a private-party such as Icebreaker. The State of Ohio's title in Lake Erie:

is a title different in character from that which the state holds in lands intended for sale. *It is a title held in trust for the people of the state*, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing on them, *freed from the obstruction or interference of private parties*. . . . The trust devolving upon the state *for the public*, and which can only be discharged by the management and control of the property *in which the public has an interest, cannot be relinquished by a transfer of the property*. . . .

146 U.S. at 452-453 (emphasis added). See also *State ex rel. Squire v. City of Cleveland*, 150 Ohio St. 303, 345-346 (1948). The State of Ohio—of which this Board is an agency—holds title in Lake Erie in trust for the benefit of its citizens. The state "cannot relinquish [its trust interest] by a transfer of the property." Here, the state directly has violated that proscription by transferring rights to Icebreaker in Lake Erie that it holds in trust for the citizens of the state.

The Board has determined that the barrier against permitting a private commercial enterprise permanently located in and on Lake Erie should be broken to allow wind turbines as a "demonstration project," a demonstration that Icebreaker asserts will provide valuable

information about the ecological effects of wind turbine projects in the Great Lakes and the financial viability of such projects, all for the purported purpose of assisting regulatory agencies in forming sound public policy for “future larger-scale offshore wind farms in Lake Erie and the other Great Lakes.” Application (submitted as Applicant’s Ex. 1) at 3. The Board concluded that “because *the state is not relinquishing any interest in Lake Erie*, and consistent with our prior determinations, we find that the project does not violate the Public Trust Doctrine.” Decision at 97, ¶200. (emphasis added). But if the state is not relinquishing to Icebreaker interests it holds in trust, then what is the purpose of its lease to Icebreaker?

Indeed, the determination that the rights of Ohio’s citizens in Lake Erie have not been ceded to Icebreaker is refuted by the Board’s own acknowledgement that “[t]he project will be constructed on the bed of Lake Erie, *on leased submerged state land* off the coast of Cleveland, Ohio, *the rights of which were obtained through a submerged land lease with the state of Ohio*.” Decision at 6, ¶35 (citation omitted) (emphasis added). Clearly, the state is relinquishing a significant interest in the title of Ohio citizens to Lake Erie. It is relinquishing possession of a portion of its submerged land—held in trust for the people of Ohio—to a private, for-profit Norwegian-controlled entity. And while the Board attempts to minimize the significance of the interest being relinquished “due to the small scope of the project,” see Decision at 97, ¶200, it concedes that the Project is a “demonstration project,” the “ultimate goal” of which “is to assess whether large-scale wind facilities are viable in Lake Erie and other Great Lakes.” Decision at 1, ¶2. The grant of a Certificate for the Project violates the Public Trust Doctrine, and therefore, is not in the public interest as required by R.C. 4906.10(A)(6). The Board should grant this Application for Rehearing.

### III. CONCLUSION

For the foregoing reasons, the Bratenahl Residents respectfully urge the Board to grant the foregoing Application for Rehearing.

Respectfully submitted,

/s/ John F. Stock

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## **CERTIFICATE OF SERVICE**

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to this case. In, addition, the undersigned certifies that a courtesy copy of the foregoing document was served upon the following persons via email on June 19, 2020:

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Summary: Application Application for Rehearing of Intervening Bratenahl Residents  
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