

**BEFORE
THE OHIO POWER SITING BOARD**

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| 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 |) | |

**INTERVENING BRATENAHL RESIDENTS' APPLICATION FOR REHEARING OF
OCTOBER 8, 2020 ORDER ON REHEARING**

Pursuant to R.C. 4906.12, R.C. 4903.10, and O.A.C. 4906-2-32(A), Intervenors Susan Dempsey and Robert M. Maloney ("Bratenahl Residents") hereby apply for rehearing of the Board's October 8, 2020 Order On Rehearing ("Order on Rehearing") in this matter. The specific grounds for this Application for Rehearing are as follows:

(1) The Order on Rehearing is unreasonable and unlawful because it denied the Bratenahl Residents' June 19, 2020 Application for Rehearing of the Board's May 21, 2020 Order ("May 21 Order"), which unreasonably and unlawfully granted 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. Icebreaker 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 Order on Rehearing is unreasonable and unlawful because it denied the Bratenahl Residents' June 19, 2020 Application for Rehearing of the Board's May 21 Order, as

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.¹

(3) The Order on Rehearing is unreasonable and unlawful because it granted Icebreaker's Application for Rehearing in part by removing the condition (the “Feathering Condition”) set forth in ¶160 of the Board's May 21 Order, which the Board terms as its “default bird and bat mitigation protocol,” see Order on Rehearing at 17, ¶32, and which required Icebreaker's turbines to “remain completely feathered during nighttime hours, from dusk to dawn, from March 1, through November 1 of each year of operation until or unless the Board directs otherwise.” May 21 Order at 78, ¶160. The Board's Feathering Condition was absolutely necessary to protect birds and bats migrating through the Project's rotor-swept zone, and the Feathering Condition's removal in the Order on Rehearing was, therefore, unreasonable and unlawful.

¹The first and second grounds for this Application for Rehearing were raised in the Bratenahl Residents' June 19, 2020 Application for Rehearing. In its Order on Rehearing, the Board rejected these arguments and denied the Bratenahl Residents' Application for Rehearing. They are raised again herein to preserve those arguments for any subsequent appeal to the Ohio Supreme Court.

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

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

A. Procedural History

The Board granted a Certificate to Applicant Icebreaker to construct and operate its Project on May 21, 2020 (“May 21 Order). On June 19, 2020, the Intervenor Bratenahl Residents filed an application for rehearing asserting that the Board should not have issued the Certificate even with the additional conditions imposed by the Board that were not set forth in Icebreaker’s and other signatory parties’ Revised Stipulation. Icebreaker simply had not met its burden to show the probable environmental impact of its Project (R.C. 4906.10(A)(2)) or that the Project represents the minimum adverse environmental impact (R.C. 4906.10(A)(3)).

On July 29, 2020, Icebreaker and some of those Signatory Parties—the Ohio Environmental Council, the Sierra Club, the Indiana/Kentucky/Ohio Regional Council of Carpenters, and the Business Network for Offshore Wind, Inc. (collectively, with Icebreaker, the “Signatory Parties”)—also applied for rehearing. The Signatory Parties asserted that the Board

lacked authority to, or simply should not have, imposed the Feathering Condition in the Certificate that Project turbines be completely feathered from dusk to dawn from March 1 through November 1. The Signatory Parties also asserted that the Board was without authority to include in the Certificate a condition (the “Board Review Condition”) requiring Icebreaker to obtain Board approval, on the public record, before the Feathering Condition may be altered or removed from the Certificate.

Prior to September 17, 2020, the Board circulated among its members a Draft Order denying all motions for rehearing. At its public meeting on September 17, 2020, to consider that decision, however, the Board, following discussion on a motion made by Board Member Mary Mertz, Director of the Ohio Department of Natural Resources, voted to remove the Feathering Condition from the Certificate. On October 8, 2020, the Board formally issued its Order on Rehearing denying the Bratenahl Residents’ Application for rehearing, but granting, in part, Icebreaker’s Application. Consistent with the action taken at the Board’s September 17, 2020 meeting, the Board’s Order on Rehearing removed the Feathering Condition, but reaffirmed the Board Review Condition.

The Bratenahl Residents now apply for rehearing of the Order on Rehearing.

B. Introduction to Argument

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. As noted in the Bratenahl Residents’ Application for Rehearing of the Board’s May 21 Order, 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. All parties acknowledged 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. Indeed, this Board has itself “expressed concern regarding the lack of data at the project site and the novel nature of the Project. Order on Rehearing at 16, ¶32.

Nonetheless, in its May 21 Order, the Board concluded that Icebreaker had submitted sufficient evidence so that “the nature of the probably environmental impact can be determined.” May 21 Order at 39, ¶104. See also May 21 Order at 42, ¶108 (“Consistent with our determinations above, the Board finds that the nature of the probable environmental impact can be evaluated and determined.”). 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 rotor-swept zone, May 21 Order at 37, ¶100 (“The radar studies are also unable to ascertain the altitude of the birds and bats.”) (citing Bratenahl Resident’s Ex. 23); May 21 Order at 39-40, ¶105 (“We acknowledge, as pointed out by the Bratenhal Residents, that NEXRAD has restrictions in that the radar cannot identify individual birds and has limitations in measuring 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. May 21 Order 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).”) (emphasis added).

The Bratenahl Residents maintain that 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 rotor-swept zone. The Board itself has implicitly acknowledged this by imposing the Board Review Condition so that “prior to any construction or operation of the Project, the Board shall address the bird and bat risk mitigation measures that shall apply to this project.” Order on Rehearing at 15, ¶30. Quite simply, if the evidence now existed to enable the Board to make the statutorily mandated determinations as to the nature of the Project’s probable environmental impact and that the Project represents the minimum adverse environmental impact, then there would be no need for the retain the Board Review Condition in its Order on Rehearing—i.e., there would be no reason to require Icebreaker to return to the Board after it has compiled the necessary Project site bird and bat radar data to enable the Board to determine the true, scientifically-valid probable environmental impact of the Project on birds and bats and determine whether the Project, sited in a major North American migratory bird pathway, represents the minimum environmental impact to birds and bats. No party can dispute that that scientifically-critical data does not now exist. Icebreaker has refused to gather it.

The evidence—not only that submitted by the Bratenahl Residents, but also that submitted by Icebreaker—establishes that birds and bats regularly fly through the Project site. But again, unless and until evidence establishes the number and density of birds and bats that fly through the Project’s rotor-swept 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 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 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” May 21 Order at 41, ¶107 (emphasis added). The 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. May 21 Order 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.” May 21 Order at 70, ¶148 (emphasis added). Despite the acknowledged lack of relevant 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.

In their memoranda submitted in connection with the Board's proceedings on rehearing, the Bratenahl Residents applauded the Board's imposition of conditions not contained in the parties' Revised Stipulation, including the Feathering Condition requiring that the turbines be feathered from dusk to dawn from March 1 through November 1 and the Board Review Condition requiring that Icebreaker file pre-construction radar compliance information and the bird and bat mitigation plan in the record for Board review and determination.² An award of the Certificate without such vital conditions is likely to be catastrophic to migrating birds and bats. Now, however, in granting Icebreaker's Application for Rehearing, in part, the Board has removed the Feathering Condition that was so crucial to the protection of migrating birds and bats. The Board's removal of that condition only compounds its error. The Board, therefore, erred by issuing the Certificate.

Finally, as previously 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." May 21 Order at 97, ¶200. The Board reaffirmed its incorrect conclusion on rehearing. Order on Rehearing at 20, ¶39. Again, the Board is simply wrong. The Board cannot find and determine that the Project serves the public interest, as required under R.C. 4906.10(A)(6), if the Project violates the Public Trust Doctrine.

²R.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.

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.” May 21 Order at 97, ¶200 (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.*” May 21 Order at 6, ¶35 (citation omitted). Clearly, the State is relinquishing 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 May 21 Order 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.” May 21 Order 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, 582.³ And, 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.

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 protocol, 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

³Icebreaker 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 suggested by ODNR and FWS. 9/26/18 Gordon Test. at 552.

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 May 21 Order, 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. . . .” May 21 Order 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 15.⁴ While Staff argues that this deficiency in the evidence is not fatal, it goes on to concede 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 rotor-swept 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,

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

Icebreaker still has not identified a technology by which it will attempt to collect the 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.” May 21 Order at 77, ¶159. Thus, the Board concluded that “the ability to calculate and assess the actual environmental impact *relies on technology and data that is, to an extent, unknown.*” May 21 Order at 77, ¶160 (emphasis added).

What is clear is that, contrary to the Board’s May 21 Order granting 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 May 21 Order and its Order on Rehearing, 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 complete dearth of necessary evidence violates the Board’s statutory mandate to make these required R.C. 4906.10(A)(2) and (A)(3) determinations before issuing a Certificate. The Board failed to correct this material error in its Order on Rehearing. This Application for Rehearing of the Order on Rehearing should, therefore, be granted.

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

The May 21 Order 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 Board failed to correct this error in its Order on Rehearing, and accordingly, that order is unreasonable and unlawful.

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.” May 21

Order 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.*" May 21 Order 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 May 21 Order 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." May 21 Order 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).

In its Order on Rehearing, the Board merely again stated "the determination of whether the project violates the Public Trust Doctrine is one of a judicial nature and, consequently, outside the Board's jurisdiction. Order on Rehearing at 20, ¶39. The Bratenahl Residents maintain that 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. This determination is, therefore, within the Board's jurisdiction. The Board erred in holding otherwise, and the Board should, therefore, grant this Application for Rehearing.

C. The Board Appropriately Imposed the Feathering Condition in its May 21 Order, and Acted Unreasonably and Unlawfully Removing That Condition in its Order on Rehearing.

As noted above, much more bird and bat radar data and information must be submitted by Icebreaker before the Board can validly and finally determine that the Project represents the minimum adverse environmental impact to birds and bats. Indeed, as the Board properly recognized in its May 21 Order, the Staff Report and Ms. Hazelton's testimony established that the Board cannot determine that the Project represents the minimum environmental impact without the Feathering Condition.

Staff Report Condition 19 would have required that turbines in the Project be feathered at night during the full bird and bat migration seasons (March 1 through January 1) until Icebreaker has demonstrated that its yet-unidentified post-construction avian and bat collision monitoring technologies actually identify bird and bat collisions with its turbines:

- (19) Turbines shall be feathered completely from dusk to dawn from March 1 through January 1 until the Applicant has demonstrated that the post-construction avian and bat collision monitoring plan is sufficient, as determined by the ODNR in consultation with Staff. The ODNR may approve modifications to turbine operation for testing purposes.

Staff Ex. 1 (Staff Report) at 47-48.

Staff concluded that its feathering condition was necessary to ensure that the Project represents the minimum adverse environmental impact to birds and bats:

Post-construction monitoring protocols would be approved by the ODNR prior to construction. *Staff recognizes that having an approved post-construction monitoring protocol in place prior to construction is a critical component of assuring the project does not result in significant impacts to avian and bat species.* Once the project is constructed, *Staff recommends that turbines be feathered completely from dusk to dawn from March 1 through January 1, when bats and migratory species would be most vulnerable to collision,* with limited allowances for testing purposes assigned by the ODNR. *These feathering requirements would be in place until the post-construction monitoring plan is proven effective as determined by the ODNR and Staff.*

Staff Ex. 1 (Staff Report) at 24-25 (emphasis added).

In her September 18, 2018 Pre-Filed Testimony (Staff Ex. 7), ONDR Wind Energy Administrator Hazelton testified that Staff's feathering condition was necessary to ensure that the Project represents the minimum adverse environmental impact unless and until Icebreaker demonstrates that its avian and bat collision monitory plan will produce scientifically-valid data. Icebreaker had not yet identified its proposed monitoring technology, much less demonstrated that the technology would work, requiring the feathering condition to protect birds and bats:

Q. Briefly describe the Staff Report's findings and recommendations with regards to R.C. 4906.10(A)(3).

A. Regarding R.C. 4906.10(A)(3), the recommended Conditions 15-26 in the Staff Report ensure the facility represents minimum adverse environmental impacts regarding wildlife. * * *

* * *

Q. *How will Staff Report Condition 19 help ensure that the project will represent the minimum adverse environmental impact?*

A. *Condition 19 mandates turbines be fully feathered from dusk to dawn March 1-January 1, which represents the time waterfowl, passerines and bats are present due to migration and summer residency.* Radio telemetry tracking and radar surveys suggest hundreds of thousands to millions of birds migrate over Lake Erie[,] making it an important global migration pathway. Based on mortality results from the terrestrial wind energy projects in Ohio and various wildlife surveys conducted by ODNR, the Division of Wildlife anticipate the most significant risk to birds and bats is at nighttime during spring and fall migrations, as well as during their summer residency. The Applicant has documented birds and bats at the project site 8-10 miles offshore during bat acoustic surveys and aerial waterfowl surveys. Robust pre-construction and post-construction protocols are warranted to quantify bird and bat activity at the project to inform the mitigation plan. *Condition 19 ensures collision risk will be minimal until the Applicant has demonstrated the protocols included in the avian and bat collision monitoring plan are sufficient and acceptable to ODNR and OPSB Staff.*

On land, wind facilities monitor bird and bat mortality by conducting standardized carcass searches in established plots under the turbines. *It is unlikely many carcasses can be recovered from Lake Erie and even less likely, given the state of technology at this time, recovered carcasses could be definitively attributed to operation of turbines. At this time, Icebreaker has not submitted an acceptable collision monitoring plan demonstrating the technology and methodology that will be used to document collisions between birds and bats and wind turbines will meet the objectives in the MOU.*

Staff Ex. 7 (9/19/18 Hazelton Pre-Filed Testimony) at 6, 8-10 (emphasis added).

In addition, Staff specifically rejected Condition 19 of Icebreaker's September 4, 2018 Stipulation, which would not have permitted Staff to require Icebreaker to feather its turbines at night unless and until Staff determined that Icebreaker's post-construction bird and bat collision monitoring plan was not sufficient—something Staff may never know (as the above-quoted Hazelton Pre-Filed testimony attests, Staff has no idea as to how it would know that a bird or bat/turbine collision occurred, at night and over water, if the collision simply were not detected by Icebreaker's technology):

- Q. Would Condition 19 as presented in [Icebreaker's 9/4/18] Stipulation in conjunction with the testimony presented by the Signatory Parties, benefit the public interest and represent the minimum adverse environmental impact?
- A. Stipulation Condition 19 is not in the public interest regarding protection of wildlife and does not satisfy R.C. 4906.10(A)(3), which requires the project to represent the minimum adverse environmental impact. *At this time, the Applicant has not identified a suitable technology* but has agreed to further explore the options that can meet the objectives set out in the MOU. The Stipulation envisions approval of the collision monitoring plan under R.C. 4906.10(A)(3) being predicated on the "state of available technology" at the time of submission, not on whether this technology can accomplish the objectives set out in the MOU. Additionally, although the Applicant volunteers a different curtailment regime if the proposed plan is not sufficient, this modified regime is limited to non-specific "peak spring and fall migrations periods when cloud ceilings are low." *Thus, the Stipulation's proposed curtailment regime is not protective of wild birds* during 1) full migratory seasons, 2) summer residency periods, or 3) the vast majority of the nocturnal hours when birds and bats typically migrate

and is not in the public interest[,] ***nor does it ensure the project represents the minimum adverse environmental impact.***

Staff Ex. 7 (9/19/18 Hazelton Pre-Filed Testimony) at 10 (emphasis added).

Furthermore, Ms. Hazelton reiterated under cross-examination by Icebreaker's counsel at the original hearing in this case (September 24 - October 2, 2018), that a primary reason that the Staff Report required turbine feathering at night during migration seasons is that Icebreaker had neither identified the post-construction collision technology it would use or provided pre-construction radar data sufficient for Staff to assess the risks to birds and bats (despite ODNR and FWS having requested such data from Icebreaker since 2008⁵):

Q. [Icebreaker Counsel] Ms. Hazelton, do you have [Icebreaker's 9/4/18] Joint Stipulation, which is Joint Exhibit 1, in front of you? It looks like this.

A. Yes.

Q. Do you also have the Staff Report?

A. I do.

Q. Will you please start by referring to page 47, I believe it is in the Staff Report. Thank you.

A. Okay.

Q. I am looking specifically at Condition 18 [in the Staff Report].

A. Yes.

Q. It states "At least 60 days prior to commencement of construction, the Applicant shall submit an avian and bat impact mitigation plan which incorporates the most current survey results and post-construction avian and bat monitoring plan to the ODNR and Staff for review and acceptance that implementation of the plans would be effective in avoiding significant impacts to avian an bat species." Do you see that as requiring submission

⁵"FWS and ODNR have been requesting this information [avian radar data from the Project site] since 2008." Bratenahl Residents' Ex. 7 at 2. See also Tr. at 324-25, 582.

of a post-construction monitoring plan prior to commencement of construction?

- A. The post-collision monitoring plan is part of this. However, I believe in my testimony, and later in Condition 19, it's clarified to indicate that *the collision monitoring technology we recognize is still under review and has not been established yet. It hasn't been decided upon by the Applicant which technology they would like to pursue. So, again, we would like to use Condition 19 as a placeholder for that until that's determined.*

And Condition 18 would include the collision monitoring plan as part of the post-construction survey, again as a placeholder, it would be part of it.

- Q. And the reference, in [Condition] 18, to "significant impacts to avian and bat species," is there a definition associated with "significant impacts"?

- A. No, not at this time. The reason we haven't defined it is twofold. The first reason is that significant impact could be different depending on which species you are referring to. * * *

And the other reason is that, again, *not understanding how collision monitoring or a lot of post-construction methods will be performed and what information will be provided, we don't really know how to make that determination because we don't know what data we will have in hand to review to make that determination*; so again, it hasn't been defined for those reason.

* * *

- Q. Okay. Why in Staff [Report] Condition 19, is the curtailment required for March 1 through January 1?

- A. We feel that there is a risk to wildlife that would be using the project site, and wildlife would be using the project site from those time periods for various reasons. Again, we can't -- we understand that the nature of the risk is to likely birds and bats. *However, we don't have the data yet to quantify that risk and that's what we are looking for with the pre-construction surveys, as well as the post-construction surveys, so we can verify if that prediction is correct.*⁶

⁶Significantly, 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

Tr. at 1639-4; 1648-49 (emphasis added).

In its Staff Report and testimony at the original hearing, Staff determined that Icebreaker's Project would not represent the minimum adverse environmental impact without turbine feathering because Icebreaker had failed to provide it with sufficient pre-construction avian radar data and a specific proposed post-construction collision technology so that Staff could assess the risk of the Project to birds and bats. To date, Icebreaker still has not supplied to ODNR, Staff, or the Board such necessary information to justify the issuance of a Certificate. Wind Energy Administrator Hazelton confirmed Icebreaker's continuing failure to provide such required scientific in response to cross-examination by the Bratenahl Residents' counsel at the August 20, 2019 resumed hearing on the Revised Stipulation:

Q. All right. What is not fulfilled?

A. The amount of data in the specific—the specific type of data that we are looking for. Again, the radar surveys, or I should say a method to document nighttime activity at the site, migration activities at the site by birds and bats.

Q. So is there—have there—has there been any avian radar study done at the project site?

A. The radar studies that have been done to date to the best of my knowledge encompass near the project site but not specifically in the rotor-swept zone.

Q. Has any radar device been placed on a floating platform at the project site?

“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 May 21 Order, 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. . . .” May 21 Order at 74, ¶154.

A. No.

Q. All right. Has any radar device mounted by any nature been put at the project site?

A. There has not been a radar system deployed at the project site that I am aware of.

Q. Okay. Has Icebreaker submitted to ODNR for review a proposed avian radar technology or system as of today's date to provide avian radar data for the rotor-swept zone of the project site?

A. No. I believe the Applicant is still reviewing that technology.

Q. Okay. Has Icebreaker submitted to ODNR for review a proposed collision monitoring technology or plan for use at the project site to date?

A. No.

Tr. at 1768-69.

Thus, the determinations made by Staff in its Staff Report and its sworn testimony at the original hearing, that Icebreaker's Project must be subject to a feathering condition to ensure it represents the minimum adverse environmental impact, are as valid today as they were when originally made. In its May 21 Order, the Board agreed and, therefore, imposed the Feathering Condition as the absolute minimum requirement to ensure that the Project represents the minimum adverse environmental impact.

The Board's Feathering Condition was amply supported by the record in this case. Indeed, as noted above, the record did not support the issuance of the Certificate in the first instance. Only the imposition of the Feathering Condition and the Board Review Condition could even arguably save the May 21 Order from being unreasonable and unlawful. As noted above, the Board's Draft Order would have denied Icebreaker's Application for Rehearing in its entirety. Presumably due to political pressure following the leaking of the Draft Order to the press, see Minutes of Board's September 17, 2020 Meeting at 3, however, the Board has now

removed the Feathering Condition. Without the Feathering Condition, the Board's issuance of a Certificate in this case cannot be sustained. Accordingly, 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 of the Board's Order on Rehearing.

Respectfully submitted,

/s/ John F. Stock

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