

**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 |) | |

**CUYAHOGA COUNTY AND BRATENAHL RESIDENTS' MEMORANDUM IN
OPPOSITION TO ICEBREAKER WINDPOWER INC.'S MOTION TO REESTABLISH
THE PROCEDURAL SCHEDULE AND FOR WAIVER OF O.A.C. 4906-3-09(A)(2)**

I. INTRODUCTION

Applicant Icebreaker Windpower, Inc. filed its application for a certificate of environmental compatibility and public need for its project (the “Proposed Project”) off the Lake Erie shore near Cleveland and Bratenahl, Ohio, on February 1, 2017. The Board’s Staff thereafter began its investigation and review of the Application.

On October 23, 2017, however, Staff moved to suspend the procedural schedule after concluding that Applicant had submitted insufficient information with regard to “the viability and design of the pre-and post-construction radar monitoring protocol that Applicant intends to utilize at the project site for determining project impacts.” Staff Memorandum in Support at 1-2. Staff noted that “[t]his information is necessary to measure the effect of off-shore turbines on birds and bats” Staff Memorandum in Support at 2. Staff further explained:

Due to the fact that this project is precedent-setting, since it is the first proposed off-shore wind facility in Lake Erie, Staff requires more information on the radar technology monitoring protocol it selected for this small demonstration project and whether it can reliably measure the effect of off-shore turbines on birds and bats and inform of the risk levels for future development projects in Lake Erie. *The pre-construction radar monitoring protocol is important to Staff’s investigation because it establishes baseline conditions using methodologies that will be duplicated during the project’s operational phase to provide robust pre- vs. post-construction comparisons for impact assessment.*

Staff Memorandum in Support at 2-3 (emphasis added).

Finally, staff observed that Applicant had indicated that it intended to provide the information requested “in the fall of 2017,” Staff Memorandum in Support at 2, and that it anticipated that the “radar report” would be “made available to the Staff within a month” *Id.*

The ALJ, on behalf of the Board, issued an Entry granting the Staff’s motion on the same day. In that Entry “the ALJ directs Icebreaker to supplement the record with additional information on the radar technology monitoring protocol *it selected* for this project and whether it can reliably measure the effect of offshore turbines on birds and bats and inform of the risk levels for future development projects in Lake Erie.” *In re Application of Icebreaker Windpower, Inc.*, No. 16-1871-EL-BGN, slip op at 2, ¶5 (Oct. 23, 2017) (emphasis added).

On January 24, 2018—two months after the anticipated date the supplemental information would be filed—Applicant filed its “Response to October 23, 2017 Entry and Request from Staff,” which consists of nothing more than a document dated “December, 2017,” entitled “Evaluation of Icebreaker Wind project vendor proposals for radar-based monitor of flying animals” authored by Robert H. Diehl (“the Diehl Report”).

Also on January 24, 2018, Applicant filed its “Motion to Reestablish the Procedural Schedule and for Waiver of O.A.C. Rule 4906-3-09(A)(2), and Request for Expedited Ruling.” In that Motion, Applicant asserts that the filing of the Diehl Report complies with the Board’s October 23, 2017 Entry, and that the procedural schedule should therefore be reestablished with the date of the Diehl Report’s filing as the new effective date of the Application’s filing. Applicant is wrong.

Although prior to the Staff’s motion to stay the procedural schedule in this case Applicant had submitted the results of radar studies purporting to assess the potential harm that the

Proposed Project would have on bats and migratory birds, as the U.S. Fish and Wildlife (“FWS”) admonished the Department of Energy, those studies did not produce scientifically-valid results as to the probable environmental impact of the Project on bats and birds. October 4, 2017 FWS Letter to DOE (filed with the Board on November 7, 2017). Without this scientifically-valid data from proper radar studies – establishing the “*baseline conditions*” that Staff has appropriately acknowledged Applicant must submit for the Board to evaluate its Application – the Board cannot make its required “findings” and “determinations” of the “nature of the probable environmental impact” of the Project and that the Project “represents the minimum adverse environmental impact.” R.C. 4906.10(A)(2) and (3). And the Board must make these findings and determinations before it approves or denies a certificate for Applicant. However, despite the fact FWS has been telling LEEDCo/Icebreaker for years that it must conduct valid radar studies at the Proposed Project site (not from on-shore), to date, Applicant still has not conducted those studies and provided the data to the Board. With its Motion to reestablish the procedural schedule and the Diehl Report, Applicant still has not provided the Board with the requested, and necessary, valid bird and bat radar study data for the Board to determine the probable environmental impact of the Project on birds and bats. Applicant’s Application remains incomplete. Applicant’s Motion must be denied or its Application rejected.

The Cuyahoga County Residents and the Bratenahl Residents oppose the Motion.¹

II. ARGUMENT

A. **Applicant Has Not Supplied the Required Bird and Bat Radar Data Necessary to Make Its Application Complete And For the Board to Reestablish the Procedural Schedule.**

¹ Cuyahoga County Residents Vicci Weeks, Caryn Good Seward, and Steven Seward moved to intervene in this proceeding on October 16, 2017. Bratenahl Residents W. Susan Dempsey, Robert M. Maloney, Gregory Binford, and Leon Blazey, Jr. moved to intervene on January 22, 2018. Both motions remain pending.

In the Staff’s Motion to Suspend and Memorandum in Support, Staff notes that the Proposed Project is “precedent-setting.” Staff Memorandum in Support at 2. Staff acknowledged that Applicant had not provided to the Board valid pre- and post-construction radar monitoring studies necessary for the Board to determine the probable environmental impact of the Project on birds and bats:

Staff believes it is necessary that Applicant provide it with additional supplemental information *on the viability and design of the pre- and post-construction radar monitoring protocol* that Applicant intends to utilize at the project site for determining project impacts. * * * This information is necessary to measure the effect of off-shore turbines on birds and bats as discussed further below.

Staff Memorandum in Support at 1-2 (emphasis added). Indeed, as the Board noted in its October 23, 2017 Entry, Staff’s motion was granted precisely because Staff had a “need to consider, supplemental information relating to the radar technology monitoring protocol selected for this project and whether it can reliably measure the effect of offshore turbines on birds and bats and inform of the risk levels for future development projects in Lake Erie” *In re Application of Icebreaker Windpower, Inc.*, No. 16-1871-EL-BGN, slip op at 2, ¶7 (Oct. 23, 2017).

Significantly, in its Application—filed on February 1, 2017—Applicant 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 at 90 (emphasis added). In this regard, FWS concluded that Applicant’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:

The conclusions reached in the [D]raft EA regarding potential impacts to birds and bats are based on available data collected primarily outside of the project area. . . . Additional data on bird use of the airspace were generated using NEXRAD weather radar data from the Cleveland area which provides limited data about bird and bat use within the airspace that will be occupied by the turbines (the "rotor-swept zone."). . . . *Studies of bird and bat use of the specific project area have been recommended by the Service for several years . . . but are just starting to be implemented. . . . Data from these site-specific studies are not available for inclusion in the Draft EA.*

Thus, the conclusions in the Draft EA are based on assumptions that observations from other parts of Lake Erie are relevant to the project area, and that impacts at onshore wind facilities in the U.S. and Canada are relevant predictors of impacts to birds and bats at offshore wind developments in Lake Erie. *These assumptions may or may not be accurate.* Because of the potential risk of bird and bat mortality, and because this project is designed to be a demonstration project to evaluate offshore wind installation in the Great Lakes, *pre-construction monitoring* to inform risk and post-construction monitoring to assess actual impacts are necessary components of the project that *must be implemented.*

. . . If per-turbine impacts are not accurately measured for this precedent-setting project, risk levels of larger future projects may be substantially underestimated.

October 4, 2017 FWS Letter to DOE at 2-3 (emphasis added). In short, Applicant was to carry-out – "implement" – valid pre-construction monitoring. As noted, Applicant has not implemented that monitoring.

Moreover, FWS not only concluded that Applicant's study data are insufficient, FWS also concluded that certain assertions made by Applicant concerning Lake Erie bird and bat data (parroted in DOE's Draft EA) are affirmatively misleading:

Section 3.4.1.3 of the Draft DA describes the Affected Environment relative to birds and bats. Pages 3-29 and 3-32 describe a NEXRAD weather radar analysis of bird and bat use of the project area Page 3-32 states, "Several recent studies employing marine radar in shoreline environments have demonstrated relatively high densities of nocturnal migrant birds along the shorelines of Lake Erie and Lake Ontario, reinforcing the understanding that such migrants tend to

concentrate along coastlines and avoid flying over large water bodies, such as Lake Erie, if possible Page 3-51 includes a similar statement. *These statements are misleading These [cited] publications instead state that migrants concentrate on the shoreline during dawn and daytime when they land to rest and refuel. During the actual nocturnal migration, however, migrants commonly cross Lake Erie and all of the other Great Lakes. . . .*

Id. at 3 (emphasis added). Even though Applicant acknowledged in its February 2017 Application that additional studies were required, Applicant has failed to conduct those scientifically-valid studies and submit the results to the Board, necessitating Staff's request for additional information and the Board's Entry directing that such information be filed.

Moreover, despite these noted and acknowledged deficiencies, and despite the Board's request for specific supplemental information, the Diehl Report was the only document Applicant supplied in response to the Board's directive.² The Diehl Report, however, fails to provide the information requested by Staff and the Board. The report provides absolutely no data regarding the presence of birds and bats in the Proposed Project area from which potential impacts can be assessed. Instead, the report is nothing more than Mr. Diehl's evaluation of various vendor proposals submitted to Applicant in response to Applicant's request for information. See Diehl Report at 1. It contains no information necessary for the Staff's evaluation of the potential environmental impacts of the Proposed Project on birds and bats.

²Applicant incorrectly refers to the Diehl Report as "the only supplemental information requested" Applicant's Motion at 5. As noted above, however, Staff did not request a report prepared by a particular named individual, but rather "information *on the viability and design of the pre- and post-construction radar monitoring protocol* that *Applicant intends to utilize* at the project site for determining project impacts," Staff Memorandum in Support at 1-2 (emphasis added), and the Board directed Applicant to file "additional information on the radar technology monitoring protocol *it selected* for this project" *In re Application of Icebreaker Windpower, Inc.*, No. 16-1871-EL-BGN, slip op at 2, ¶5 (Oct. 23, 2017) (emphasis added). While the Diehl Report evaluates the proposals submitted to Applicant, it suggests that, at least as of December, 2017 when the Diehl report was prepared, Applicant has yet to make a decision on which protocol it intends to use at the site.

Furthermore, even within the improperly limited scope of the Diehl Report – merely evaluating proposed methodologies for bird and bat radar studies – the report provides no meaningful information that would make Applicant’s Application complete because it concludes that there are deficiencies in all of the proposed radar study methodologies proffered by the vendors: “*None of the vendor options satisfactorily addresses all the challenges such operations face in an offshore context and in other settings as well.*” Diehl Report at 27 (emphasis added). And again: “*The number of [radar study] options is necessarily constrained by the limited number of vendor responses, and one wonders what radar configurations might be available from other vendors and whether they might represent more suitable solutions.* *Id.* at 1 (emphasis added). And finally: “*Far too many unknowns are present to anticipate the outcome of radar work in relation to this project.*” *Id.* at 23 (emphasis added). Thus, the Diehl Report expressly refuses to opine that any radar study methodology under consideration by Applicant will produce any scientifically-valid data.

Applicant has not submitted to the Board any scientifically-valid results from pre-construction bird and bat radar studies to enable the Board to make its required finding as to the “probable environmental impact” of the Project and that the Proposed Project “represents the minimum adverse environmental impact.” R.C. 4906.10(A)(2) and (3). Indeed, the Diehl Report confirms that Applicant cannot yet identify for the Board what radar study methodology will produce scientifically-valid data if a pre-construction study is conducted at some time in the future.

Applicant’s Application is incomplete. It does not provide the Board with scientifically-valid data regarding bird and bat use of the Proposed Project area to enable the Board to perform its proper statutory review of the Application. Indeed, the proffered Diehl Report confirms that

Applicant has not even determined how it will provide that required data to the Board in the future. It is premature to reestablish a schedule governing the adjudication of Applicant's Application until Applicant provides the Board with scientifically-valid data concerning the presence of birds and bats in the Project area to enable the Board to determine the probable environmental impact of the Project on birds and bats, and that the Project represents the minimum adverse environmental impact. Because the supplemental information filed by Applicant does not constitute a complete and pertinent response to this Board's October 23, 2017 specific directive – it does not establish the “baseline conditions” for birds and bats now existing at the Proposed Project site – the Application is incomplete. The Board should not reestablish the procedural schedule unless and until Applicant submits such scientifically-valid baseline data establishing the volume, density, and frequency of birds and bats present at the Project site, and the threat that the Proposed Project poses to them.

Respectfully submitted,

/s/ John F. Stock

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CERTIFICATE OF SERVICE

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Case No(s). 16-1871-EL-BGN

Summary: Memorandum Cuyahoga County and Bratenahl Residents' Memorandum in Opposition to Icebreaker Windpower Inc.'s Motion to Reestablish the Procedural Schedule and for Waiver of O.A.C. 4906-3-09(A)(2) electronically filed by John F Stock on behalf of Weeks, Vicci and Seward, Caryn Good and Seward, Steven and Dempsey, W. Susan and Maloney, Robert M. and Binford, Gregory and Blazey, Jr., Leon