

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Ohio Power Siting Board's	)	
Review of the Icebreaker Windpower, Inc.	)	Case No. 16-1871-EL-BGN
Application for a Certificate to Construct a Wind-	)	
Power Electric Generation Facility	)	

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**INITIAL POST-HEARING BRIEF OF THE  
OHIO ENVIRONMENTAL COUNCIL AND SIERRA CLUB**

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Miranda Leppla (0086351)  
Trent Dougherty (0079817)  
Chris Tavenor (0096642)  
Ohio Environmental Council  
1145 Chesapeake Avenue, Suite I  
Columbus, OH 43212  
(614) 487-7506  
[mleppla@theoec.org](mailto:mleppla@theoec.org)  
[tdougherty@theoec.org](mailto:tdougherty@theoec.org)  
[ctavenor@theoec.org](mailto:ctavenor@theoec.org)

*Counsel for the Ohio Environmental  
Council and Sierra Club*

## **I. Introduction**

Since Ohio's birth, the state has been home to great innovation—home to those willing to push the boundaries to create new and better technologies as well as opportunities to improve the lives of fellow Ohioans and others around the world. The Icebreaker Windpower project, the subject of this proceeding, is yet another example of the Buckeye State pioneering a new technology with the potential to change the lives of Ohioans and those beyond our borders for the better. Climate change is an ever-increasing threat, and the expansion of options for development of renewable energy will play an integral part in the fight to prevent the worst impacts of climate change from threatening our planet. Continued burning of fossil fuels will only exacerbate negative environmental consequences and resulting public health impacts. Additionally, development of a new technology to be sited here in Ohio has the potential to lead to job development as well as economic benefits for the region.

Because it is the first offshore wind farm proposed in Ohio, as well as the first sited in a body of freshwater in North America, the siting options and technologies proposed for use in the six turbine demonstration project have been comprehensively studied and analyzed at length. Best practices, safeguards, and additional conditions and requirements contained in the Revised Stipulation and Recommendations, have been used and included in order to ensure the project proposal represents the minimum adverse environmental impact possible to the area in which it is proposed to be sited. Because of that fact, the Ohio Environmental Council and the Sierra Club support the Icebreaker Windpower project. We ask the Board to approve the proposed application for a certificate to build the six-turbine demonstration project in Lake Erie.

## **II. Facts**

Icebreaker Windpower, Inc. (“Icebreaker” or “Applicant”) opened this docket in late 2016 and filed its Application for a Certificate to Construct a Wind-Powered Electric Generating Facility, the subject of this proceeding, on February 1, 2017. In sum, the Applicant proposes to build an offshore wind facility in Lake Erie consisting of six turbines that would produce 20.7 megawatts of power for the Cleveland area. Supplements to the Application were filed in March, July, and August of 2017, as well as March of 2018. These supplements include: additional information about potential turbine models; two memorandums of understanding between Icebreaker and the Ohio Department of Natural Resources related to the fisheries and aquatic resources and avian and bat impact monitoring protocols and analyses agreed upon for the project; an aerial waterfowl and waterbird study plan; and lengthy information related to avian and bat wildlife in the project area.

On July 3, 2018, the Ohio Power Siting Board (OPSB) Staff filed its Staff Report, recommending that the Application be approved subject to thirty-four conditions contained in the Staff Report and that the Project proposal met all of the applicable statutory criteria set forth in R.C. 4906.10 (A) (1)-(8). Staff Ex. 1, at 13-52. The Staff Report is the culmination of an extensive process undertaken by the OPSB Staff to review the proposed application to ensure compliance with statutory requirements, and includes coordination with each of the agencies that are members of the OPSB, as well as the U.S. Fish and Wildlife Service, the U.S. Army Corps of Engineers, and the U.S. Coast Guard, among others. Additionally, the public was invited to speak at two public hearings held on November 8, 2017 and July 19, 2018.

After extensive negotiations, on September 4, 2018, the Environmental Advocates signed the Joint Stipulation and Recommendations (Joint Ex. 1) which contained thirty-five conditions, along with Icebreaker Windpower, Inc., the Indiana/Kentucky/Ohio Regional Council of Carpenters, and the Business Network for Offshore Wind. OPSB Staff and two additional intervenors, Susan Dempsey and Robert Maloney (collectively, “Bratenahl Residents”) did not sign the stipulation. At the hearing in September 2018, Staff objected to just four of the thirty-five conditions contained in the Joint Stipulation, which mainly focused on avian and bat data collection issues, while the Bratenahl Residents objected to the Joint Stipulation in its entirety.

After the hearing closed, the parties continued holding discussions to determine whether a revised settlement agreement could be reached. On May 14, 2019, Icebreaker filed another supplement to the Application, a commitment with Ohio Department of Natural Resources (ODNR) regarding language to be included in its Impact Mitigation Plan and Collision Monitoring Plan pursuant to the previously filed Avian and Bat Memorandum of Understanding and Monitoring Plan. The following day, a Revised Joint Stipulation (Joint Ex. 2) was filed, which included all previously signing parties as well as OPSB Staff. A hearing on the Revised Joint Stipulation was held August 20, 2019, at which time the only party to challenge the Revised Joint Stipulation were the Bratenahl Residents.

### **III. Standard of Review**

When considering whether to approve an application for a certificate to construct a wind farm, the Ohio Power Siting Board makes its determination pursuant to Revised Code Section 4906.10(A). The Board cannot grant a certificate for the construction, operation, and

maintenance of a major utility facility, either as proposed or as modified, unless the Board determines the eight statutory criteria listed under the statute are met. There is ample evidence in this proceeding that the Application, as modified by the Staff Report and Revised Joint Stipulation and Recommendations meet all eight of the statutory criteria, and that the project represents the minimum adverse environmental impact.

Additionally, because this application is being presented to the Board as part of a Revised Stipulation agreement, the Board must also consider the reasonableness of the stipulation, which it does by using a three-part test: (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties? (2) Does the settlement, as a package, benefit customers and the public interest? (3) Does the settlement package violate any important regulatory principle or practice? *See e.g., Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (Order on Remand) (Apr. 14, 1994); *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 561, 629 N.E.2d 423 (1994), citing *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992). When reviewing a contested stipulation, the Board must still require evidentiary support for the terms of the stipulation. The Board is permitted to “place substantial weight on the terms of a stipulation,” but it still “must determine, from the evidence, what is just and reasonable.” *Consumers' Counsel, supra*.

#### **IV. Argument**

The Ohio Environmental Council and the Sierra Club (“Environmental Advocates”) intervened in this proceeding in order to ensure Ohio’s need to move toward a clean energy future is appropriately balanced with protections for wildlife, Lake Erie, and the entire

environment along Ohio's north shore. Icebreaker Windpower, Inc.'s ("Icebreaker" or "Applicant") effort to build a six turbine demonstration project ("Project Icebreaker") in Lake Erie has been approached with an eye toward environmental protection since its inception, and the wildlife and environmental studies and protections meet the high standard necessary to ensure the continued health of Lake Erie and the wildlife that call it home.

The extensive studies undertaken related to bird and bat impacts as well as fisheries and water resources impacts, along with the additional studies and data collection that will continue throughout the pre-construction, construction and operational phases if the project is approved, have satisfied the concerns of the Environmental Advocates as well as the statutory requirements in Ohio law. Based upon the Application, supplements, and evidence presented at the hearing, as well as the additional agreements resulting from the Revised Joint Stipulation and Recommendations (Joint Ex. 2), Project Icebreaker meets all requirements set forth by R.C. 4906.10(A) and the Revised Joint Stipulation and Recommendation is the product of serious bargaining among capable, knowledgeable parties, will benefit ratepayers and the public interest, and does not violate any important regulatory principle or practice, meeting all of the criteria set forth by this Board for approving a stipulation.

For the reasons that follow, the Board should approve the Application of Icebreaker Windpower, Inc. for a Certificate to Construct a Wind-Powered Electric Generation Facility in Cuyahoga County, Ohio—the first freshwater offshore wind farm in North America.

**A. The Board Should Approve Icebreaker Windpower, Inc.’s Application Because it Meets the Statutory Requirements of Ohio Revised Code 4906.10(A) and the Revised Joint Stipulation and Recommendations Meets the Three-Part Test for Settlements Required by the Board.**

**1. The Revised Joint Stipulation and Recommendation is the product of serious bargaining among capable, knowledgeable parties.**

The Ohio Environmental Council and the Sierra Club (“Environmental Advocates”) agreed to sign the Revised Joint Stipulation and Recommendation (“Revised Joint Stipulation”) (Joint Ex. 2) along with Icebreaker Windpower, OPSB Staff, the Indiana/Kentucky/Ohio Regional Council of Carpenters, and the Business Network for Offshore Wind because it contains the necessary protections to move the project forward in an environmentally safe and responsible manner. The Revised Joint Stipulation contains thirty-four conditions that modified Icebreaker’s Application, added in order to strengthen the protections and considerations already contained in the Application itself. The conditions also ensure the demonstration project is able to move forward to bring clean energy to the shores of Lake Erie in an environmentally sound manner. All parties to the Revised Joint Stipulation were represented by competent legal counsel and were included in lengthy discussions about the Application that span multiple years.

**2. The Revised Joint Stipulation and Recommendation, as a package, benefits customers and the public interest, and satisfies the criteria set forth by R.C. 4906.10(A)(2), (3) and (6).**

As environmental advocacy organizations, the Environmental Advocates are uniquely qualified to address the parts of Icebreaker’s Application that relate to wildlife and water impacts, and our organizations analyzed these parts of the Application in detail to ensure

stringent standards were included in Icebreaker’s proposal.<sup>1</sup> Additionally, the Ohio Power Siting Board process is rigorous—requiring the Applicant to work with OPSB Staff, Ohio Department of Natural Resources, and U.S. Fish and Wildlife Service on protective measures to ensure wildlife and the environment are properly considered and protected in any approved certificate. The Application and Revised Joint Stipulation and Recommendation meet that high bar, as detailed below.

**a) The Environmental Impact Studies and Protections Satisfy R.C. 4906.10(A)(2)-(3).**

As part of the Application, Icebreaker submitted documentation of extensive baseline studies and information, as well as pre-construction, post-construction, and monitoring requirements included to ensure this project has the minimum adverse environmental impact. Additionally, there are checks and processes included in the Application and Revised Joint Stipulation that detail what Icebreaker is required to do if, at any point during operation of the facility, it adversely impacts bird or bat populations. These studies detail the nature of the probable environmental impact and prove that the measures to be implemented as part of the project represent the minimum adverse environmental impact.

**(1) Avian and Bat Risk Assessment Shows Icebreaker is a Low Risk Project.**

The Avian and Bat Risk Assessment (Applicant Ex. 6), based upon extensive and robust surveys, determined there was low risk of adverse impact to birds and bats across the project location. The surveys analyzed by the Risk Assessment cover time periods from

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<sup>1</sup> While the Application satisfies all requirements of R.C. 4906.10(A), this brief explicitly focuses on the environmental aspects of the project due to the nature of the Environmental Advocates’ interest and expertise and to address the aspects of the Application that were most debated.



2003 through 2016, and included radar surveys and analyses, bird and bat acoustic surveys, aerial and boat-based bird surveys, and nearly 100 bird and bat fatality surveys in the Great Lakes region. App. Ex. 6. Icebreaker witness Wally Erickson, a Senior Biometrician whose firm completed the Aerial Waterfowl Survey, the Assessment of Nocturnal Bird Migration Activity from Weather Radar, and a bat acoustic survey for bats, and who was a co-author of the 2016 Risk Assessment for birds and bats stated that his support was because of the low risk of the project. Tr. IV at 940:7-9; 994:21-995:23. In fact, Witness Erickson had “a hard time finding [a project] that’s lower risk” than Icebreaker due to the “number of wind turbines” and because “you’re not going to have mortality of resident songbirds [or] resident raptors, the waterfowl densities were low in that area”, and waterfowl “tend not to be very at risk when it comes to collisions, even on land”. Tr. IV at 1002:14 - 1003:8.

Thus, the area which Icebreaker has proposed for the project location, at the outset and without any added restrictions, means it is an extremely low risk project to bird and bat populations.

**(2) The Monitoring, Impact Mitigation and Adaptive Management Strategies included in the Application and Revised Joint Stipulation Ensure Continued Monitoring and Processes to Address Potential Risks to Bird and Bat Populations.**

Icebreaker has also agreed to additional monitoring and adaptive management strategies to ensure continued monitoring and assessment of Project Icebreaker’s impacts as the project moves forward into the development phase.

Condition 15 requires Icebreaker to comply with all terms included in the Avian and Bat Memorandum of Understanding (Applicant Ex. 3), which incorporates the pre- and post-construction protocols (consisting of aerial waterfowl surveys, bat acoustic monitoring

surveys, and radar monitoring surveys for pre- and post-construction, as well as post-construction collision monitoring requirements) that have been agreed upon by Icebreaker and the Ohio Department of Natural Resources to ensure proper monitoring at each stage of development of the project.

Condition 18 memorializes the requirement that Icebreaker comply with an avian and bird impact mitigation plan and collision monitoring plan as approved by ODNR and OPSB Staff, and in consultation with the U.S. Fish and Wildlife Service. Condition 20 ensures that at any point a state or federally listed endangered or threatened species is identified, Icebreaker must modify operations to minimize risk within 24 hours and then implement a plan in partnership with OPSB Staff and ODNR to remedy the problem and take adaptive management measures.

Conditions 21 and 22 ensure that radar data collection will occur pre-construction, and that a radar collision monitoring program, approved by OPSB Staff and ODNR prior to construction, will be in place to monitor actual impacts occurring post-construction as well. The requirement for approval of the radar technology prior to construction will ensure that the proper technology exists to ensure the safety of bird and bat populations and that data related to flight patterns can be collected to make the project even more rigorous and safer for wildlife in the area.

Condition 23 ensures a process to remedy any significant mortality events of non-state or federally listed endangered or threatened species were to occur. The rapid reporting time and coordination with ODNR will ensure risks minimized if the type of adverse impacts identified by the Condition were to occur.

**(3) Water Protections Satisfy R.C. 4906.10(A)(2)-(3).**

Similarly, the Application and conditions contained in the Revised Joint Stipulation and Recommendations ensure Lake Erie and aquatic life are protected and that the project represents the minimum adverse risk to those resources. Condition 15 requires Icebreaker to comply with all terms included in the Fisheries and Aquatic Resources Memorandum of Understanding (Applicant Ex. 3), the monitoring plan attached to that MOU, and any other protocols or requirements that result from that MOU. Condition 17 requires Icebreaker to submit their construction monitoring plan to ODNR and OPSB Staff for approval prior to construction. Condition 19 requires that Icebreaker submit a fisheries and aquatic resources impact mitigation plan to ODNR and Staff for approval prior to commencing construction.

The extensive body of data and analyses done by Icebreaker in partnership with the various agencies, consultants and boards that are part of this application process, as well as the requirements set forth by the Conditions included in the Revised Joint Stipulation, satisfy the criteria set forth in R.C. 4906.10(A)(2), requiring the Applicant to set forth the nature of the probable environmental impact, and (A)(3), requiring that the facility represents the minimum adverse environmental impact, as required by this Board. Additionally, the public interest is served and protected by the thorough requirements implemented by the Revised Joint Stipulation because it will ensure the continued protection of the wildlife that call Lake Erie home and for the Ohioans who recreate on Lake Erie's waters.

**3. Project Icebreaker represents an essential step toward Ohio's clean energy future, mitigating climate change in the process and Satisfies R.C. 4906.10(A)(6).**

Project Icebreaker will bring much needed clean energy development to Ohio. As a state that still generates nearly 50% of its electricity from coal-fired power plants and only

3% of its electricity from renewable resources, Icebreaker represents a small step in the right direction in the fight against climate change.<sup>2</sup> Ohio ranks 6th<sup>3</sup> in the nation for carbon pollution, resulting in associated negative health impacts such as asthma, cardio-pulmonary obstruction disease, heart attacks, and premature deaths. Wind energy provides a zero emissions source of electricity; it also helps reduce the amount of water consumption attributable to the electric sector (i.e. water used in coal and nuclear resources) since no water is used to create electricity from wind turbines. Project Icebreaker is an important step toward developing a new, safe method in which to increase clean energy in the Midwest, and the project's extensive scrutiny will ensure the project's location and development has the minimum adverse environmental impact possible.

Additionally, pioneering this new technology here in Ohio has the potential to lead to job development and economic benefits for the region, one of the reasons this project has support from a variety of groups, including labor. *See e.g.* Testimony of David McCall, Tr. Public Hearing, Nov. 7, 2018 at 12018. Project Icebreaker meets R.C. 4906.10(6) because it is in the public interest for Ohio to move toward a clean energy future.

**3. The Revised Joint Stipulation and Recommendation does not violate any important regulatory principle or practice.**

The Revised Joint Stipulation does not violate any important regulatory principle or practice and therefore the third part of the reasonable test used by this Board is satisfied. As discussed above, the Application, as modified by the Revised Joint Stipulation ensures that

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<sup>2</sup> See <https://www.puco.ohio.gov/be-informed/consumer-topics/how-does-ohio-generate-electricity/>

<sup>3</sup> See <https://www.eia.gov/environment/emissions/state/analysis/>

the project represents the minimum adverse environmental impact, and complies with all requirements of R.C. 4906.10(A).

## **V. Conclusion**

Icebreaker's six turbine demonstration project has been extensively vetted to ensure the clean power it will bring to the Cleveland area is acquired in an environmentally responsible manner. With Project Icebreaker, Cleveland has the chance to shed its image as a Rust Belt city recognized all too often as the city whose river burned. With Project Icebreaker, the city can begin a different kind industrial future. Cleveland and Cuyahoga County's commitment to clean energy shows it is a forward-thinking, dynamic community that cares about the health and well-being of its citizens and natural environment. By responsibly pioneering new clean energy sources, Cleveland and Cuyahoga County are showing their commitment to a sustainable future and cleaner air for citizens to breathe.

For the foregoing reasons, the Ohio Environmental Council and the Sierra Club respectfully request that the Board approve the Revised Joint Stipulation and Recommendation and grant Icebreaker Windpower, Inc. a Certificate to Construct a Wind-Powered Electric Generation Facility in Cuyahoga County, Ohio.

Respectfully submitted,

/s/ Miranda Leppla  
Miranda Leppla (0086351)  
Counsel of Record  
Trent Dougherty (0079817)  
Chris Tavenor (0096642)  
Ohio Environmental Council  
1145 Chesapeake Avenue, Suite I  
Columbus, OH 43212  
(614) 487-7506  
[mleppla@theoec.org](mailto:mleppla@theoec.org)

[tdougherty@theoec.org](mailto:tdougherty@theoec.org)  
[ctavenor@theoec.org](mailto:ctavenor@theoec.org)

*Counsel for the Ohio Environmental  
Council and Sierra Club*

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *Initial Post-Hearing Brief* by the *Ohio Environmental Council and Sierra Club*, was served by electronic mail, upon all Parties of Record on 11th day of October, 2019.

/s/Miranda Leppla  
Miranda R. Leppla

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