

**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)	

**REPLY BRIEF OF THE OHIO
ENVIRONMENTAL COUNCIL AND SIERRA CLUB**

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I. Introduction

The Bratenahl Residents' Post-Hearing Brief focuses almost exclusively on purported impacts to birds and bats in the area of the proposed Icebreaker Windpower project ("Project Icebreaker" or "Project"). The Bratenahl Residents believe Icebreaker Windpower, Inc.'s ("Icebreaker") Application and the May 15, 2019 Revised Joint Stipulation and Recommendation ("Revised Stipulation") fail to submit data and information that ensures the project plan identifies the nature of the probable environmental impacts and represents the minimum adverse environmental impact, as required under R.C. §§ 4906.10(A)(2)-(3).

However, the area in Lake Erie where Project Icebreaker is proposed to be located has been thoroughly studied and analyzed for years in preparation for this Project and it has been identified as a low-risk area. Simply, the Application and Revised Stipulation conditions meet the standards required by the Ohio Revised Code and associated rules. The Project represents the minimum adverse environmental impact. Icebreaker has provided comprehensive risk assessments based on site-specific surveys and literature. It has worked closely with the Ohio Department of Natural Resources and Ohio Power Siting Board Staff to develop pre-construction and post-construction monitoring protocols that will be used to ensure the safety of wildlife in the area. As laid out in the Application and Revised Stipulation, extensive monitoring of the area will occur before, during, and after construction of the project, and Icebreaker has drafted a thorough bird and bat conservation strategy, included in the avian and bat impact mitigation plan, as well as adaptive management strategies and reporting procedures. Project Icebreaker has identified the nature of the probable environmental impacts and taken the steps necessary to ensure the project represents the minimum adverse environmental impact possible to the proposed site.

The Bratenahl Residents also include brief arguments related to delegation of Board authority and whether the project will serve the public interest, convenience and necessity under R.C. § 4906.10(A)(6). The arguments related to delegation of Board authority have been analyzed and disposed of previously by the Ohio Supreme Court, and the argument has no merit in this instance either. And, contrary to the arguments made by Bratenahl Residents' witness Dr. Richard Brown, the Project will in fact serve the public interest, convenience and necessity. Much of Dr. Brown's testimony is completely outside the scope of any of the requirements under R.C. § 4906.10(A)(6). Further, even when using his own "public need" standard, he ignores aspects of his own definition. For example, he recognizes that environmental benefits are in fact a component of public need; yet, he fails to recognize any of the environmental benefits the project will bring to the Cleveland area.¹

The goal of the Bratenahl Residents is not to ensure the Project achieves the minimum adverse environmental impact to protect bird and bat species or to ensure the Project serves the public interest, convenience and necessity. Rather, they wish to stop Project Icebreaker, or any other wind project in Lake Erie, from happening entirely.² However, Icebreaker's Application and Revised Stipulation meet the high bar and stringent standards required by the Ohio Revised Code and the Ohio Administrative Code rules for siting a wind-powered electric generation facility in the state, and Project Icebreaker's request for a certificate should be approved.

¹ Bratenahl Res. Ex. 21 at 28.

² See Tr. Vol V at 1250-51.

II. The Revised Stipulation and Record Enable the Board to Determine the Nature of the Probable Environmental Impact of Project Icebreaker, and the Project Represents the Minimum Adverse Environmental Impact, as required by Ohio Revised Code §§ 4906.10(A)(2)-(3).

The conditions agreed upon in the Revised Stipulation and the record thoroughly address the arguments made by the Bratenahl Residents related to Ohio Revised Code §§ 4906.10(A)(2)-(3). The sum total of the Bratenahl Residents' arguments is that, despite agreements and processes in place as part of the Revised Stipulation that create checkpoints and require approval by the Ohio Department of Natural Resources (ODNR) and Ohio Power Siting Board (OPSB) Staff before Icebreaker can move forward into the pre-construction, construction, and operational phases of the project, they believe the record is deficient. The Bratenahl Residents' witness Dr. Jeff Gosse, does the same. Ignoring restrictions and requirements contained in the conditions does not erase them or make them meaningless.

The Bratenahl Residents point to a lack of radar monitoring data as the problematic component in determining the density of birds and bats, and the impacts on that wildlife. Yet, Conditions 21-22 in the Revised Stipulation clearly spell out what is required of the radar monitoring program Icebreaker is required to implement, specifically ensuring the type of pre-construction collection will be sufficient to provide data comparable to the monitoring done during construction and after the project is operational. Condition 21 is comprehensive, requiring specific parameters for the radar monitoring system, including determination of the movement and altitude of individual 10-gram or larger vertebrates; continuous data collection; identifying that the radar must be able to produce viable data 75% or greater of the hours of the survey period, which must then be submitted to ODNR and OPSB Staff for review to confirm compliance; information regarding the flight altitude of migrants within

the rotor-swept zone to inform collision-risk; determination of behavioral avoidance or attraction to turbines; what seasons the data must be collected in during pre-construction; and the frequency of post-construction monitoring.³ Condition 22 further requires demonstration that Icebreaker has satisfied the requirements contained in Condition 21 through implementation of the radar-monitoring program throughout one spring, summer and fall migration season, which must then be confirmed by ODNR and Staff at least 90 days prior to construction commencing.⁴

Further, Staff's previous concerns were addressed by the revisions made to Condition 21 and included in the Revised Stipulation, which ensures Icebreaker can collect the data required and reach a reasonable viable data target. It also extends the collection period by a month and a half, which will assist in gathering more information related to bat activity during the summer months.⁵ The revision also further clarifies the exact size of bird/bat that must be tracked by the radar monitoring system, and exclusively permits ODNR to determine whether or not to require a second post-construction radar season.⁶ As Staff Witness Hazelton noted, the condition "helps to ensure the minimum adverse environmental impact."⁷

To suggest that there is a lack of rigor around the protocol to track the density of birds and bats, as well as monitor impacts to those species, means the radar protocol included in the Revised Stipulation is simply being ignored. Icebreaker is still evaluating the technology for radar monitoring, but strict parameters and requirements regarding what type of technology and the rigorous data that must be collected are *prerequisites to Icebreaker being*

³ Joint Ex. 2 at 7-8.

⁴ *Id.* at 8.

⁵ Staff Ex. 14, Revised Prefiled Testimony of Erin Hazelton at 7-8.

⁶ *Id.* at 8-9.

⁷ *Id.* at 10

permitted to move forward with the project, as noted by Staff Witness Hazelton.⁸ If Icebreaker does not select technology that can meet the requirements laid out in the Revised Stipulation, they cannot move forward with construction. It's that simple. The Bratenahl Residents' speculation as to whether or not Icebreaker can achieve the radar monitoring requirements laid out in the Revised Stipulation does not mean the Revised Stipulation lacks clear guidelines or requirements that ensure the project represents the minimum adverse environmental impact; in fact, the opposite is true.

But the radar monitoring protocol is just one example of the measures put in place by the conditions in the Revised Stipulation that ensure the Project represents the minimum adverse environmental impact with respect to birds and bats. In addition to pre- and post-construction radar monitoring, Icebreaker is also required to comply with all terms set forth in the avian and bat memorandum of understanding⁹ (MOU) signed by Icebreaker and ODNR, including the monitoring plans attached to those documents and *any other protocols or documents resulting from the MOU*.¹⁰ The MOU is a living document, but if any modifications to the MOUs or resulting documents are made, ODNR must accept them via written communication.

Additionally, Condition 18 lays out the avian and bat impact mitigation plan,¹¹ which encompasses the bird and bat conservation strategy that Icebreaker has drafted and must be finalized in coordination with U.S. Fish & Wildlife Service (USFWS), ODNR, and other stakeholders. Included in it are avoidance and mitigation measures, adaptive management

⁸ Tr. Vol. VIII at 1771:11-16.

⁹ Joint Ex. 2 at 6, Condition 15. Note that Condition 15 contains requirements for Icebreaker to comply with the Fisheries and Aquatic Resources MOU as well, but since the Bratenahl Residents do not challenge the requirements for fisheries or aquatic resources in their Post-Hearing Brief it is not addressed here.

¹⁰ *Id.*

¹¹ Joint Ex. 2 at 6, Condition 18.

strategies, reporting requirements and more. Further, Condition 18 requires the impact mitigation plan to incorporate the most current survey results, and the post-construction avian and bat monitoring plans. Icebreaker must also implement measures to avoid and minimize potential impacts to birds and bats. Condition 18 also requires a collision monitoring system, implemented in consultation with ODNR and OPSB Staff, and operation of the chosen technology is subject to audits by ODNR or its third-party consultant. The impact mitigation plan must be approved by ODNR prior to construction, and Icebreaker must consult with USFWS as well.¹²

Additional mitigation and adaptive management strategies are also referenced in Condition 23, which contains specific protocol on how Icebreaker must handle any significant mortality events (other than state or federally listed endangered or threatened species, which are dealt with in Condition 20).¹³ This condition ensures that if there is an unexpected mortality event, a process is in place for reporting to ODNR and measures are taken to modify operation activities and determine the problem. These procedures could result in revisions to the adaptive management strategy for Icebreaker's impact mitigation plan. In that case, the revised plan must be approved by ODNR prior to implementation. Condition 20, as mentioned above, more specifically lays out the requirements if state or federally listed endangered or threatened species are encountered during construction, operation or monitoring activities.¹⁴ In such an event, Icebreaker must contact OPSB Staff, ODNR, and USFWS, and modify operations in order to minimize risk to the animals within 24 hours. It then creates a long-term strategy to remedy the situation—all of which is done

¹² *Id.*

¹³ Joint Ex. 2 at 9, Condition 23.

¹⁴ Joint Ex. 2 at 7, Condition 20.

with oversight from ODNR and OPSB Staff—and requires approval of any revised adaptive management strategy by ODNR.¹⁵

Finally, should the construction process be delayed more than five years of the date that a certificate is issued, the Board has authority to require certain wildlife and aquatic surveys are updated and approved by OPSB Staff and ODNR.¹⁶

The Revised Stipulation is littered with protocol requiring Icebreaker to gain additional approvals and report to ODNR and other agencies in order to receive approval to move forward with the Project at various steps along the way. The comprehensive approach to ensuring minimum adverse environmental impact laid out by the conditions of the Revised Stipulation means the project moves forward if, and only if, it meets the requirements identified by OPSB Staff and ODNR, and the required approvals of ODNR and other agencies are given. Icebreaker has provided extensive information showing the nature of the probable environmental impact and has shown that the Project represents the minimum adverse environmental impact.

III. The Revised Stipulation and Record show that the Project will Serve the Public Interest, Convenience and Necessity, as required by Ohio Revised Code § 4906.10(A)(6).

The Bratenahl Residents' Post-Hearing brief argues that the project fails to serve the public interest, convenience and necessity by referencing the testimony of their witness Dr. Richard Brown¹⁷, who opines as to whether there is a “public need” for Project Icebreaker.¹⁸ Yet the standard required by Ohio Revised Code § 4906.10(A)(6) is not whether there is a

¹⁵ *Id.*

¹⁶ Joint Ex. 2 at 9, Condition 25.

¹⁷ Bratenahl Res. Post-Hearing Brief at 38-40.

¹⁸ Bratenahl Ex. 21 at 4

“public need” for a project, but whether the project serves the “public interest, convenience and necessity”—and the answer is yes—the project does serve the public interest, convenience and necessity.

As Icebreaker wrote in its Initial Brief, public need is related to regulated utilities subject to the jurisdiction of the state under R.C. 4905.¹⁹ It is inapplicable to the Icebreaker application, and since the majority of Dr. Brown’s testimony is completely outside the scope of the requirements set forth by the R.C. 4906.10(A), it should be disregarded.

The reality is that this project serves the public interest. There is broad public support for it, with various cities, counties, and foundations²⁰ involved as part of the Lake Erie Energy Development Corporation, a regional economic development public-private partnership which has spearheaded the offshore effort for nearly a decade. Further, the project has engaged local stakeholders for years to ensure the community benefits from the project, and is supportive of the project as well as purchasing its power.²¹

Further, the project serves the public interest, convenience, and necessity because Ohio desperately needs more renewable resources to come online if we are going to fight climate change at the level necessary to head off catastrophic consequences. A groundbreaking project like Icebreaker will help Ohio shift the paradigm for Ohio, ensuring our energy begins coming from cleaner, sustainable sources and we reduce our reliance on fossil fuels. For these reasons, Project Icebreaker meets the requirements set forth in R.C. 4906.10(A)(6).

¹⁹ Initial Brief of Icebreaker Windpower, Inc. at 11-12.

²⁰ See <http://www.leadco.org/index.php/about>.

²¹ App. Ex. 1 at 29.

IV. The Conditions in the Revised Stipulation Do Not Constitute Unlawful Delegation of the Board’s Decision-Making Authority to ODNR.

The Revised Stipulation does not constitute unlawful delegation of the Board’s decision-making authority. The same argument made by Bratenahl Residents here has been disposed of previously in an Ohio Power Siting Board case appealed to the Ohio Supreme Court, and the decision is twisted by the Bratenahl Residents’ brief to somehow land in their favor. *In re Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869. The Ohio Supreme Court very clearly stated in *In re Buckeye Wind* that the Board’s order,

. . . recognizes that proper facility siting is subject to modification as the process continues—proposals are tested and ***matched to the defined conditions***. Simply because certain matters are left for further review and possible public comment does not mean they have been improperly delegated to staff.

In re Buckeye Wind, 2012-Ohio-878 at 17.

The thirty-three conditions included in the Revised Stipulation, as discussed above, contain detailed requirements and establish processes with which Icebreaker must comply before being permitted to move forward in the process. Further, continued collaboration with stakeholders and agencies is both contemplated and defined throughout the Revised Stipulation. As in *In re Buckeye Wind*, approval of the certificate with conditions that “allow[] for further fleshing out of certain conditions of the certificate” does not amount to the Board “improperly delegat[ing] its responsibility to grant or deny a provisional certificate.” *In re Buckeye Wind*, 2012-Ohio-878 at 18. The Bratenahl Residents’ argument is incorrect—it should be rejected, and the Certificate should be granted.

V. Conclusion

The Revised Stipulation and record show that Icebreaker has met each of the requirements set forth in R.C. 4906.10(A) in order to obtain a certificate to construct the proposed Project Icebreaker. The Bratenahl Residents' arguments that Icebreaker has failed to demonstrate that the project meets the minimum adverse environmental impact fails. The conditions in the Revised Stipulation contain stringent requirements regarding what type of technology is acceptable for monitoring, and identify rigorous data collection requirements—prerequisites to the Project moving forward throughout various stages of pre-construction and construction. There are clear processes laid out for what Icebreaker must do to protect wildlife once the project is operational as well.

For the reasons analyzed above and in our Initial Post-Hearing Brief, 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.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Reply Brief of the Ohio Environmental Council and Sierra Club*, was served by electronic mail, upon all Parties of Record on 15th day of November, 2019.

/s/Miranda Leppla
Miranda R. Leppla

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Summary: Reply Brief of Ohio Environmental Council and Sierra Club electronically filed by Ms. Miranda R Leppla on behalf of Ohio Environmental Council and Sierra Club