

In the Matter of the Application of **REPUBLIC** )  
**WIND, LLC** for a Certificate of Environmental )  
Compatibility and Public Need for a Wind- )  
Powered Electric Generating Facility in Seneca ) Case No. 17-2295-EL-BGN  
and Sandusky Counties, Ohio. )

critical factor—stating only that the new evidence is pertinent to the Project’s (alleged) threats to bald eagles, a “central issue in the case.” (Motion at p. 2.)

First, an alleged eagle fatality at an unrelated wind facility—that is still under investigation—is not, in fact, relevant to the issues before the Board. Second, newly built nests in the Project area is information that is merely duplicative of the substantial amount of evidence already presented at the hearing on this topic. While this evidence may technically be new, in substance it is not. As set forth below, the Local Residents had ample opportunity to—and indeed did—present considerable evidence at the hearing relating to eagles, including newly built eagle nest(s) in and around the Project. In short, this “new” evidence is unnecessary for the Board to fully evaluate the issues before it.

## **II. ARGUMENT**

### **A. There is more than sufficient evidence in the record for the Board to determine the nature of the probable impact to eagles and to evaluate whether the Project, with (or without some of) Staff’s recommended conditions, represents the minimum adverse impact to eagles.**

The record already contains ample evidence of bald eagles and eagle nests in and around the Project area, including evidence that new eagle nests have appeared during the pendency of the application. By way of just one example, the Local Residents submitted the written direct testimony of six of their members regarding their recent observations of eagles and eagle nests in the Project area. Indeed, a noteworthy part of the hearing related to evidence from the Local Residents of a new eagle nest within the Project area. This newly built nest was consistent with the testimony of both the Local Residents’ avian expert, Mark Shieldcastle, and Republic’s expert, Dr. Paul Kerlinger, that the bald eagle population in the area and in Ohio generally has proliferated.

Tellingly, the Local Residents provide no specificity as to the witness(es) who would present this “new” evidence. They simply attach a media report of an incident at an unrelated facility (an incident that is still under investigation by USFWS)—and maps of the locations of the alleged new nests. The record already contains maps submitted by the Local Residents of the locations of eagle nests, as well as their corresponding testimony. The May 20, 2020 media report includes commentary by hearing witness Mr. Shieldcastle, another member of Black Swamp Observatory, and an individual, Chris Aichholz, who testified at the September 19, 2019 local public hearing. It can be reasonably assumed that any witness(es) the Local Residents will call as to this “new” evidence will be duplicative of witnesses who have already provided similar testimony.

The issues to be determined by the Board are: (1) what are the potential impacts to eagles; and (2) what is needed to minimize potential impacts to eagles. Staff has concluded that the Project, with its recommended conditions, satisfies the R.C. 4906.10 criteria. In its post-hearing brief(s), Staff argues that its recommended conditions, including Condition 40 relating specifically to eagles, will adequately mitigate any ecological impacts.<sup>1</sup> There is more than enough evidence in the record for the Board to evaluate these issues, including whether to adopt Staff’s recommended conditions. If the Board were to reopen the hearing every time a new nest is discovered, this could lead to a never ending case. This would set a dangerous precedent for future Board proceedings and result in excessive litigation after the close of an already lengthy hearing and voluminous record.

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<sup>1</sup> Staff has also recommended that the Project submit a post-construction avian and bat monitoring plan for ODNR and Staff approval and that if any significant mortality is reported, a mitigation plan be developed. *See* Staff Report, App. Ex. 1 at pp. 30-31. Staff’s recommended Condition 30 would require the Project to submit a post-construction monitoring plan that is consistent with ODNR’s On-Shore Bird and Bat Pre- and Post-Construction Monitoring Protocols.

It has already been acknowledged by Republic that the eagle population is growing and that eagles may build nests in and around the Project area. The “new” evidence Local Residents seek to admit would, if accurate, merely identify repetitive examples of this acknowledged trend. This is nothing more than an attempt to amass duplicative evidence and delay the proceedings. The Local Residents have not shown good cause.

**B. The alleged eagle take incident in Bowling Green is irrelevant to the Republic matter and, in any event, is still under investigation; accordingly, the incident reported by the media does not give rise to good cause to reopen the proceeding.**

Although it is unclear, it appears the Local Residents wish to: (1) admit the newspaper article attached their motion into the record; and/or (2) call witnesses to testify regarding the incident. The Local Residents fail to assert how this evidence would be relevant. They do not explain how the death of a bald eagle at an unrelated wind project—whose circumstances relating to eagles are not provided, much less their similarity with (or difference from) the Republic Project—bears on whether the Republic Project would impact eagles. Besides failing to allege why this incident would be relevant, there are various evidentiary objections to simply admitting the article, such as hearsay. To the extent the Local Residents want to call witness regarding this alleged incident, the article itself points out that the matter is still under investigation by USFWS.<sup>2</sup>

It would be entirely inappropriate to reopen the proceeding to introduce evidence of an alleged eagle take that is still under investigation by USFWS. It would also severely prejudice Republic by forcing it to litigate an unproven eagle take incident at an unrelated wind farm. For

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<sup>2</sup> The newspaper article attached to Local Residents’ Motion is incomplete, and it is assumed this was an inadvertent error. The entire article is attached hereto. Among parts of the article missing from the Local Residents’ reproduction is a quote from USFWS representative, Tina Shaw, who states that USFWS’s “investigation is currently ongoing.”

this additional reason, the Local Residents have failed to show good cause to reopen the proceedings.

**C. As a matter of federal law, the Project is already subject to continuous monitoring of present-time eagle use in and around the Project area and coordination of same with USFWS.**

The fact that new eagle nests may have been discovered in the Project area since the close of the evidentiary hearing changes nothing in regard to the Project's obligations under federal law. As already established, and what is not in dispute, is that bald eagles are present in the Project's vicinity. Consequently, the Project is and has been subject to federal law protecting bald eagles. *See* Bald and Golden Eagle Protection Act ("Act") 16 U.S.C. §§ 668-668c. Federal protection for eagles is comprehensive, and wind energy projects are subject to industry-specific regulations and compliance programs. These regulations and programs impose a multi-layered, site-specific system of protection developed through *ongoing* consultation between affected wind projects and USFWS.

USFWS regulates wind projects in part through its *Land-Based Wind Energy Guidelines* (2012) ("WEGs"). The WEGs establish a tiered system of steps requiring wind projects to assess, minimize, and monitor risk to avian species, including eagles. The steps begin early in project planning, before siting, and *continue through project operation*. *See* WEGs (Tiers 1 - 3, consisting of pre-construction studies and planning, and Tiers 4 and 5, consisting of post-construction monitoring and research). Specific to eagles, USFWS applies more targeted measures. Projects with eagles in the vicinity must specifically evaluate eagle take risk. If take of eagles is expected, despite minimization efforts taken under the WEGs, USFWS can conditionally allow limited, specified (unintended) take by issuing incidental take permits. *See* 50 CFR 22.26; 22.27. Such permits involve project-specific eagle conservation plans in

accordance with the USFWS's published guidance (*Eagle Conservation Plan Guidance, Module 1 – Land Based Wind Energy* [2013]).

Because it is undisputed that bald eagles are in the Republic Project area, the federal regulatory framework outlined above applies as it would for any similarly situated facility. This is true irrespective of state law siting.<sup>3</sup> Indeed, those efforts have continued to date and will continue during Project operations. Any developments regarding eagles in the Project area, for example—new nests, abandoned nests, evolving roost site usage, or other factors deemed relevant under USFWS's multi-layered regulatory framework—will be accounted for and acted upon by the Project under USFWS oversight. The Project's protection of eagles is assured by federal law.

### **III. CONCLUSION**

If the mere identification of new evidence, relevant to an issue before the Board, was a sufficient basis alone to reopen a hearing, a party could delay the proceedings indefinitely. As set forth above, there was an abundance of evidence presented at the hearing, by both sides, as to the proliferation of eagles in Ohio and the increasing number of eagle nests in and near the Project. As required by federal law, the Project continuously monitors the Project area and coordinates with USFWS. It would be absurd for the Board to establish a precedent that allows the record to be reopened every time a new nest or species habitat were to be discovered, when it would not substantially add to or alter evidence already entered for the Board's consideration.

The record here contains more than sufficient evidence for the Board to determine the potential impacts to eagles, as well as to evaluate Staff's recommendations, including any

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<sup>3</sup> Staff's recommended Condition 40 acknowledges the federal eagle protection regulatory framework, which applies independent of the condition. Recommended Condition 40 shows, however, that any evolving matters such as new eagle nests (or possible incidents at other facilities, if somehow relevant) would be addressed through the more detailed federal eagle protection requirements and the Project's ongoing engagement with USFWS.

recommended condition relating to mitigation of impacts to bald eagles. Local Residents have not shown, and cannot show, that good cause exists to reopen the hearing to present such duplicative evidence. Accordingly, the Board should deny Local Residents' motion to reopen the proceedings.

Respectfully submitted on behalf of  
REPUBLIC WIND, LLC



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## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing memorandum contra was served upon the following parties of record via regular or electronic mail on this 19<sup>th</sup> day of June 2020.



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## Bald eagle killed by wind turbine at Wood County site

5/1/2020

BY MATT MARKEY / THE BLADE



One of the two bald eagles sits on a branch as ZOOTO event guests go by at the Toledo Zoo in Toledo on Friday, June 21, 2019.

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BOWLING GREEN — As they labored trying to start a broken down truck near the north end of the Wood County Landfill, Ken Vollmar, superintendent of the facility, and one of his employees felt the bite of the winter chill. Their cold hands had their attention as one of the four wind turbines located at the site spun nearby.

But then they heard a loud thump and turned to witness a large bird tumbling to the frozen ground. What they soon learned was the severed wing of the bird floated in its slower descent and landed about 50 feet away.

“We looked around as soon as we heard the turbine hit something, but at first we couldn’t tell exactly what it was,” Mr. Vollmar said. He immediately called his superiors downtown and then reported the incident to the Ohio Department of Natural Resources.

Reid Van Cleve, a veteran officer with the Division of Wildlife assigned to Ottawa County, who was also covering Wood County that January day, responded to the site in about an hour. The report he filed on the kill indicated the dead bird was an adult bald eagle, a species safeguarded under the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act.

“The wing was ripped off,” Officer Van Cleve said last week. “It was definitely a turbine strike.”

Following protocol with incidents involving federally protected species, he took the dead eagle to an evidence storage facility and contacted the U.S. Fish and Wildlife Service, and one of their investigators picked up the carcass.

Amy Weller, who lives near the Bowling Green wind farm, said she had been concerned since the first two turbines went up in 2003 that their large blades would claim many birds, bats, hawks, or even bald eagles. Two more of the 1.8-megawatt turbines were added the following year. Bowling Green owns about a 50-percent share in the facility and the wind farm provides just 1.5 percent of the electrical needs for the city, according to Daryl Stockburger with the Bowling Green Utilities Department.

“I was opposed to those windmills from the start because of the impact they could have on wildlife,” Ms. Weller said. “I had been out to California about 20 years ago and saw the carcasses on the ground under the wind turbines. From an environmental standpoint, I can’t believe they would want to do that here, with all of the migration we have in this area and the bald eagles.”

The situation at the landfill became more critical when a pair of adult bald eagles built a large nest in one of the tall trees just east of the site. John Hageman, a retired biologist who lives a few miles from the site and travels past the landfill area often, was likely the first to report that active bald eagle nest earlier this spring when he photographed two mature bald eagles on the rim of the nest. Out of concern over the safety of the eagles nesting so close to the turbines, Mr. Hageman called USFWS and ODNR and learned an eagle had been killed at the site back in January.

“The USFWS representative took the location information and mentioned that since there were so many nests in Ohio, they probably could operate [the turbines] as they pleased,” Mr. Hageman said.

Mr. Vollmar said he is not sure how long the nest has been there and that it “seemed to come out of nowhere.”

“We’ve been seeing bald eagles here and there for years, but that nest is huge, and they seemed to have built it pretty quickly,” he said. “The ODNR told us not to be driving close to it while they’re nesting, so we’ve stayed away.”

Elizabeth Wick lives on Green Road where her family’s property butts up against the landfill, and she recalled seeing a group of bald eagles — two adults and two eaglets — in a nearby field a couple of years ago, and she assumed at the time the birds were just passing through the area.

“I was really excited to hear that they were nesting here at the landfill. I just love seeing them,” she said. “I still whip out my cellphone every time and try to get a picture. It is just really cool to have them around.”

Besides their striking appearance — a deep, dark brown body that appears almost black, with a bright white head and tail — bald eagles also stand out for their size. Adults have a wingspan of about 6 1/2 feet, making them one of the largest raptors in North America.

More than three months after the bald eagle was killed at the landfill, the USFWS has released no pictures or written reports on the incident, and has given out very little basic information.

“Our investigation is currently ongoing,” said Tina Shaw, public affairs specialist with the USFWS office in Bloomington, Minn., where the case is being handled.

This past week, Holly Karg, the director of media relations and communications with American Municipal Power, Inc., which operates the wind turbines at the Bowling Green site, said AMP had not received a report of the eagle being killed by the turbine, so an investigation was started in response to The Blade’s inquiry.

“The investigation provided no evidence of the claim,” Ms. Karg later stated in a Thursday afternoon email.

The lack of information being disseminated about the incident does not surprise Mr. Hageman, who serves on the conservation committee for the Black Swamp Bird Observatory. What makes this incident so significant is it has provided a habeas corpus moment.

“We have these discussions all of the time about how the turbine operators are being so secretive about the number of bird and bat kills that take place at these sites. They are absolutely petrified about the general public knowing how many eagles and bats are killed by wind turbines,” he said.

A recent report by Audubon indicated wind turbines in North America kill up to 328,000 birds each year, “making it the most threatening form of green energy,” Audubon said. Many experts believe the actual death toll from wind turbines is much higher due to random sampling protocols and the proliferation of turbines across the landscape. The Audubon report also cited the rapid expansion of wind energy in the United States and added “the wind industry has the incentive to stop the

slaughter” by giving serious consideration to the potential impact on birds and wildlife when determining where wind farms are developed.

“Especially with bald eagles, are we going to fight so hard to save something that was almost extinct, and then say it’s OK to kill them?” Mr. Hageman said, referencing the fact bald eagles, revered since they were designated as the national symbol of the United States in 1782, teetered on the verge of extirpation a few decades ago.

Bald eagle numbers were decimated during the middle of the 20th century by the loss of habitat, the use of pesticides that ruined the shells of their eggs, and illegal hunting.

By 1979, there were only four nesting pairs left in Ohio, and none of those nests were producing any young.

A ban on the use of DDT and better protection of the eagles and their habitat with the Endangered Species Act allowed the bald eagle to start a steady recovery. By 2007, bald eagle numbers had recovered to the point that the USFWS removed them from the endangered species list. A recent survey by the ODNR indicated there are 707 bald eagle nests in the state and bald eagles are nesting in 85 of Ohio’s 88 counties.

Bald eagles have been a dominant factor in the debate over a half dozen proposed massive wind farms in Seneca, Huron, Erie, Sandusky, and Crawford counties. The Republic Wind, Seneca Wind, Emerson Creek Wind, Honey Creek Wind, Buck Springs Wind, and Emerson West Wind projects could add hundreds of wind turbines to a part of Ohio that is used by many migratory birds, and is now home to many bald eagle nests.

Chris Aichholz is an activist with Seneca Anti-Wind Union, a grassroots group that has been battling with the large power brokers seeking to add these new wind farms across northwest Ohio’s agricultural midsection, and in the middle of what has become very active bald eagle nesting grounds. An ODNR study earlier this spring revealed Seneca County ranks fifth in Ohio with at least 24 active bald eagle nests.

Mr. Aichholz, who lives in rural Seneca County, said he now regularly sees adult bald eagles soaring and hunting across the farm fields and woodlots near his home. His concern for the fate of the bald eagles spiked when he learned that the Seneca Wind project, now in a state of limbo, would have included 27 wind turbines twice the height of those at the Bowling Green wind farm within two miles of his home.

“What happened with the turbine blade killing that bald eagle over in Wood County — that just confirmed our worst fears,” he said. “That dead eagle is the reality of this issue, and it shows that this can happen right here in our backyard. It is awful, and you just hope you can find someone who is interested on the federal level and get them to take some kind of action.”

Mark Shieldcastle, a retired avian biologist from the ODNR who is widely recognized as the region’s preeminent expert on birds and bald eagles, said the flying and hunting patterns of bald eagles put them in a very precarious position when wind turbines sprout in their habitat.

“They do a lot of crepuscular movement, before dawn and after dark, and that would make it very difficult for them to see things such as the moving blades of a wind turbine,” he said. “I’m sure these wind companies don’t want to get the word out that a turbine killed an eagle, but these turbines might be directly between their feeding area and the nest, so I could see their style of flight being very problematic.”

Mr. Hageman, who retired in 2011 after a quarter of a century working for Ohio Sea Grant and Ohio State University’s Stone Laboratory, said any new wind projects should be heavily scrutinized for their potentially devastating impact on birds, bats, bald eagles, and hawks, while existing facilities such as the Bowling Green wind complex should modify the use of the turbines to give the resident bald eagles a chance to survive.

“I would like to see them turn the darned things off at least through the early part of the year when they are raising young and teaching them to fly,” he said. “That seems like a small sacrifice to keep these birds alive. Bald eagles are the most valuable player in the bird world, but I get the impression that some people look at them as expendable these days, since we have more around.”

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**Commission of Ohio Docketing Information System on**

**6/19/2020 12:57:42 PM**

**in**

**Case No(s). 17-2295-EL-BGN**

Summary: Text Republic Wind, LLC'S Memorandum In Opposition To Local Residents' Motion To Reopen Proceedings electronically filed by Teresa Orahod on behalf of Devin D. Parram