

**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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**APPLICATION FOR REHEARING OF THE  
OHIO ENVIRONMENTAL COUNCIL AND SIERRA CLUB**

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Pursuant to Ohio Rev. Code § 4903.10 and Ohio Admin. Code 4906-2-32, the Ohio Environmental Council and Sierra Club (collectively, “Environmental Advocates”) file this application for rehearing of the May 21, 2020 Ohio Power Siting Board (the “Board”) *Opinion, Order, and Certificate* in Case No. 16-1871-EL-BGN (“Order”). While the Order approved the application of Icebreaker Windpower, Inc. to build a six-turbine offshore wind project in Lake Erie as proposed in the Revised Joint Stipulation, it approved it subject to modifications made by the Board. The modifications made by the Board are unreasonable and unlawful, and the Order fails to provide justification for the modifications while ignoring testimony and evidence provided at the hearing demonstrating that the Application, as modified by the Revised Joint Stipulation, meets the minimum adverse environmental impact as required by law, ensuring a proper balance is struck between protecting our wildlife and Lake Erie with the urgent need to develop clean generation in Ohio.

The Environmental Advocates object to the Board’s decision to modify the Revised Joint Stipulation for the reasons explained more fully in the accompanying Memorandum in

Support. The Board should remove the modification to the Revised Joint Stipulation, and approve the Revised Joint Stipulation in full.

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**MEMORANDUM IN SUPPORT OF THE APPLICATION FOR REHEARING OF  
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The modifications made to the Revised Joint Stipulation by the Ohio Power Siting Board ignores evidence and testimony presented at the public hearing that the Application and Revised Joint Stipulation represent the minimum adverse environmental impact, and that the project is in the public interest. As a result, approval of the Revised Joint Stipulation with the modifications made by the Board is unlawful and unreasonable. The Board's decision should be reversed, and the Revised Joint Stipulation should be approved, in full and without modification, by the Board.

**I. Facts and Procedure**

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 as well as 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 the Application be approved subject to thirty-four conditions contained in the Staff Report and confirming 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. It includes coordination with each of the member agencies 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. One component of the Staff Report required the turbines to be feathered, or shut down, for ten months of the year during the nighttime until a post-construction monitoring plan was proven effective as determined by the ODNR and Staff. (*Staff Report* at 24-25; 47 at Condition (19) (“Staff Report Condition (19)”).) 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 and the Application. In particular, the evidence presented by Icebreaker at the hearing demonstrated that it would be impossible for the project to proceed if Staff Report Condition (19) remained because it required feathering the turbines for ten months of the year during the nighttime. In both written testimony and during the hearing, Dave Karpinski emphasized how feathering for half-a-day, ten months a year, would make “financing the project virtually impossible.” App. Ex. 25, Page 12, line 17. *See also Icebreaker Hearing Testimony Volume II*, page 258, lines 3 - 6 (“the three conditions that I cite, in my opinion, render the project unfinanceable. The project is not unfinanceable; it’s those three conditions”). If Icebreaker were forced to move forward with Staff Report Condition (19) or a similarly written Condition, it “could be prevented from earning approximately 40% of the expected revenue that would be generated by the wind farm.” App. Ex. 25, page 13, line 4 - 5.

Rhett Good, a research biologist and Senior Manager and Bat Practice Group Lead for Western EcoSystems Technology, Inc., also emphasized, when testifying on behalf of Icebreaker, about the problematic nature of Staff Report Condition 19: it “is problematic because it creates a great deal of uncertainty, both scientifically and for financing . . . it is my understanding that this condition will also create uncertainty for potential investors.” App. Ex. 31, Page 24, Line 23. During the hearing, Good reiterated this point, noting that in his “20 years of experience in wind and completing post-construction monitoring, [he had] never seen a condition like [Staff Report Condition 19].” *Tr. Vol. III*, page 656, lines 3 - 5. After the hearing closed, the parties continued holding discussions to determine whether all

parties could collectively reach a revised settlement agreement. On May 14, 2019, Icebreaker filed its Fifth Supplement to the Application, which contains a commitment with Ohio Department of Natural Resources (ODNR) regarding language added to 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, including all previously signing parties as well as the Ohio Power Siting Board Staff. (*Revised Joint Stipulation*, Joint Ex. 2, May 15, 2019.)

Notably, Staff Report Condition (19) is not included in the Revised Joint Stipulation signed by OPSB Staff. Instead, the signed Revised Joint Stipulation contains new/revised Conditions (15), (18), (20)-(23), addressing requirements Icebreaker must adhere to in order to construct and operate the six turbine project. (Joint Ex. 2 at 6, 9.) Importantly, among those conditions are requirements including drafting an avian and bat impact mitigation plan, which includes survey results, post-construction avian and bat monitoring plan, and all measures that have been adopted to avoid and minimize potential adverse impacts to birds and bats. Additionally, it must include a collision monitoring plan, to be approved by the experts at ODNR and OPSB Staff, which includes language already agreed upon with ODNR and filed as part of the Fifth Supplement to the Application. (*See App. Ex. 57.*) The plans will be subject to audits by ODNR and third-party consultants. The Stipulation also requires consultation with experts at U.S. Fish and Wildlife Service. Both the impact mitigation plan and the collision monitoring plan are required to remain in place for the life of the project. (*See Joint Ex. 2 at 6; Condition (18).*) Condition (23) in the Revised Joint Stipulation contains specific requirements related to procedure and steps to be taken if a significant mortality event occurs, providing additional protections and precautionary measures

Icebreaker must implement within 24 hours to protect bird and bat species from harm. (Joint Ex. 2 at 9).

A hearing on the Revised Joint Stipulation was held August 20, 2019, at which time only the Bratenahl Residents challenged the Revised Joint Stipulation. Experts from Ohio Department of Natural Resources, OPSB Staff, and Icebreaker testified in support of the Revised Joint Stipulation, citing the importance of the protections provided for avian and bat species included in the Revised Joint Stipulation and that those protections would ensure minimum adverse impacts to wildlife. Erin Hazelton, on behalf of ODNR, said in revised testimony that “Stipulation Condition 18 is protective of wildlife because it can be applied to any technology and the applicant must demonstrate its collision detection technology is sufficient to ODNR’s satisfaction before construction can begin.” (*Revised Testimony of Erin Hazelton*, page 4, line 6. *See also Revised Testimony of Stuart M. Siegfried*, Page 2, Line 12 (“With my revised testimony, I am supporting the May 15, 2019, Revised Joint Stipulation and Recommendation . . . Staff supports the conditions contained in the Revised Stipulation, as they modify the Staff Report”)).

Per R.C. § 4903.10, the Environmental Advocates set forth the following arguments on Rehearing, because the Revised Joint Stipulation, as drafted, meets the criteria required for approval but the modifications made by the Board are unreasonable and unlawful. Accordingly, the modifications to the Revised Joint Stipulation should be removed and the certificate approved subject to the thirty-three conditions contained in the Revised Joint Stipulation.

#### **IV. Argument**

The Ohio Environmental Council and the Sierra Club (“Environmental Advocates”)

file this Application for Rehearing because the Board's Order modifying the Revised Joint Stipulation is unlawful and unreasonable. The Icebreaker project represents an opportunity for Ohio to explore a new realm of renewable energy technology, accelerating the transition toward a future where our systems do not rely on dirty energy sources of generation, but clean emissions-free sources of electricity instead. As Ohioans continuously experience the ever-growing impacts of climate change, the Power Siting Board must closely consider all of its decisions and how they impact the environment now and for future generations. The Revised Joint Stipulation included a package of Conditions collectively ensuring minimum adverse environmental impact, that was the product of serious bargaining between the parties, and is in the public interest. The Power Siting Board has subverted that process and implemented additional requirements that are unlawful and unreasonable.

First, the Board's decision to modify the stipulation contradicts clear and substantial evidence in the record that the Revised Joint Stipulation represents the minimum adverse environmental impact. The Board's decision to add heightened requirements is unlawful and unreasonable as it the Board's requirement for Icebreaker to return for a second hearing in order to have those restrictions removed. Second, the Board's decision is not based upon the proposal before the Board—a small, low risk six turbine project. Instead, the Board made its decision in anticipation of hypothetical future projects to come. Third, the Board did not provide explanation to justify the modifications, as required by statute and rule, failing to provide facts and analysis as to why the provisions included in the Revised Joint Stipulation weren't sufficient. Finally, the Board's decision violates public policy by failing to recognize the need to act as quickly as possible to reduce our carbon emissions and combat climate change, as established by the Intergovernmental Panel on Climate Change and the

United States's own climate experts. The failure of the Board to consider this aspect, in addition to the artificial barriers it imposed upon the project, is unreasonable. The decision should be revised to fully accept the Revised Joint Stipulation, a package of conditions beneficial to customers and in the public interest.

Through extensive negotiations over the course of several years, the parties reached agreement on the Revised Joint Stipulation containing thirty-three conditions that balance important and necessary protections for wildlife and Lake Erie while allowing this innovative clean energy project to move forward. The Revised Joint Stipulation was signed by Icebreaker, the Environmental Advocates, the Business Network for Offshore Wind, and the Indiana/Kentucky/Ohio Regional Council of Carpenters, and importantly, was also signed by the Ohio Power Siting Board Staff, with experts from the Ohio Department of Natural Resources testifying in support. The Revised Joint Stipulation meets each and every criteria required under Ohio law in order for a certificate to be granted. Therefore, the Board's modifications are unreasonable and unlawful. For the reasons that follow, the Board should revise its decision and approve the Revised Joint Stipulation as written.

**A. Despite the Board acknowledging that the Revised Joint Stipulation represents the minimum adverse environmental impact, it modified the Stipulation to add heightened requirements without any basis in law or fact.**

The decision to modify the stipulation contradicts clear and substantial evidence in the record that the Revised Joint Stipulation represents the minimum adverse environmental impact, as well as the Board's *own acknowledgement* in its Order that the protections provided by the Revised Joint Stipulation meet the stringent requirements required by R.C.

Section 4906.10(A)(3).<sup>1</sup> Instead, the Board’s modifications essentially require the project to have zero impact by mandating the turbines be feathered (shut down) for eight months of the year during nighttime, rejecting testimony from ODNR experts and OPSB Staff.

Icebreaker’s only other option pursuant to the unlawful and unreasonable Order is to return to the Board and go through a *second hearing process* for approval in order to operate.

**1. Evidence on the record confirms that the Revised Joint Stipulation, as drafted, represents the minimum adverse environmental impact.**

As the Board recognized, Icebreaker provided a “vast amount of information”, and the Board “emphasize[d] the extensive amount of information that has been provided by Icebreaker regarding the various protocols and measures adopted by [Icebreaker] in order to sufficiently respond to those risks.” *Order* at ¶ 149. Additionally, the Ohio Department of Natural Resources also provided extensive testimony on the protections and protocols contained in the agreement. ODNR Research and Management Team’s Wildlife Administrator and Wind Energy Administrator expert witness Erin Hazelton explained in her testimony that the conditions included in the Revised Joint Stipulation (*Joint Ex. 2*) ensure the project will have the minimum adverse environmental impact, as required by R.C. 4906.10(A). As Witness Hazelton testified, Conditions 15, 18, 20, 21, 22, and 23 all ensure that the project, which is already low risk due to its small size of just six turbines, provides appropriate protections for avian and bats as well as fisheries and aquatic species. The Conditions in the Revised Joint Stipulation require ODNR experts and OPSB Staff to be active participants as the project progresses, working through various stages of planning and

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<sup>1</sup> “(3) That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations;”

approval for radar monitoring, collision impact protocols, and more. Based on the Revised Joint Stipulation conditions, ODNR, OPSB Staff, and Icebreaker will jointly ensure the project has minimal impact on wildlife and the environment throughout each stage of the preconstruction, construction, and operational post-construction phases.

Specifically, regarding Revised Joint Stipulation Condition 18, expert witness Hazelton said it is “protective of wildlife because it can be applied to any technology and the applicant *must demonstrate* its collision detection technology is sufficient *to ODNR’s* satisfaction before construction may begin.” *Revised Testimony of Erin Hazelton*, Staff. Ex. 14 at 4 (July 29, 2019) (“Hazelton Revised Testimony”). Revised Joint Stipulation Condition 18 ensures Ohio’s experts (ODNR) have proper supervision over the collision detection technology Icebreaker uses. Hazelton establishes it as sufficiently protective of wildlife and thus the minimum adverse impact. Beyond just control, ODNR can also audit the technology to confirm it meets the standards established in the post-construction monitoring plan. *Id.* Finally, Revised Joint Stipulation Condition 18 ensures the impact mitigation plan “survives the MOU for the life of the project.” *Id.* Together, these aspects of Revised Joint Stipulation Condition 18 “ensure minimum adverse impacts to wildlife,” satisfying the requirements of R.C. 4906.10(A). *Id.*

Hazelton further established, as part of her Revised Testimony, how Revised Joint Stipulation Condition 18 protects birds and bats in the event collision monitoring technology doesn’t function properly. Specifically:

...if the ODNR and Staff determine, once operation commences, that the technology is not working as set forth in the collision monitoring plan such that there is a defect preventing accurate detections of collisions, ***ODNR and Staff may require turbines be feathered***, either partially or completely, until the technology has been demonstrated to work as set forth in the

collision monitoring plan.

*Collision Monitoring Plan*, Fifth Supplement to the Application, App. Ex. 57 at 2 (emphasis added); *see also Hazelton Revised Testimony*, Staff. Ex. 14 at 5. Hazelton once again emphasizes that the “language in the collision monitoring plan ensures the minimal adverse environmental impact, because the Applicant’s operations will be restricted in the event its collision monitoring technology is not operating.” *Id.* These factors, especially when also considering that Revised Joint Stipulation Condition 18 applies to any technology developed, satisfy the requirements of R.C. 4906.10(A).

When the Board modified the Revised Joint Stipulation conditions, it ignored the expertise of ODNR, which concluded that the protections provided per the Revised Joint Stipulation met the requirement of minimum adverse environmental impact. The overly restrictive modifications imposed by the Board in lieu of Revised Joint Stipulation Condition 18 will make it impossible for the project to proceed according to evidence in the record. In both written testimony and during the hearing, Dave Karpinski emphasized how feathering for half-a-day, ten months a year, just two months less than the modifications made by the Board, would make “financing the project virtually impossible.” App. Ex. 25, Page 12, line 17. *See also Tr. Vol..II*, page 258, lines 3 - 6 (“the three conditions that I cite, in my opinion, render the project unfinanceable. The project is not unfinanceable; it’s those three conditions”). If Icebreaker were forced to move forward with Staff Report Condition (19) or a similarly written Condition, like the one imposed by the Board’s modification, it “could be prevented from earning approximately 40% of the expected revenue that would be generated by the wind farm.” App. Ex. 25, page 13, line 4 - 5.

During the hearing on August 20, 2019, Hazelton further emphasized that ODNR’s

approval of particular protocols and plans were necessary and sufficient to ensure minimum adverse environmental impact. Because the Ohio Department of Natural Resources has the ability to say “no” to the project if Icebreaker doesn’t develop sufficiently protective environmental programs, “DNR and Staff approval of the monitoring plan and the protocols therein are integral to ensuring minimum adverse impact to wildlife.” Tr. Vol. VIII at 1759. Hazelton further states that “each condition on its own helps to ensure [minimum adverse impact to wildlife], and as a package, it ensures [minimum adverse impact.]” Tr. Vol. VIII at 1762. As a package, the Revised Joint Stipulation ensures minimum adverse impact to the environment. The package also benefits customers and the public interest without violating important regulatory principles. It appropriately balances the need for environmental protections while ensuring Icebreaker can acquire financing to move this innovative clean energy project forward.

The Board’s decision to modify the package, at worst, undermines the integrity of that package. At best, it irrationally changes a stipulated agreement that already ensures minimum adverse impact—and as a result, prevents the project from moving forward, an outcome that was predictable given it was clearly spelled out in the evidence and testimony. *See App. Ex. 25, Page 12, line 17. See also Tr. Vol. II, page 258, lines 3 - 6.* Because there is clear evidence and testimony that such a feathering requirement at the outset would make the project unable to move forward, in conjunction with the fact that the Revised Joint Stipulation already assured minimum adverse environmental impact, the Board’s modifications to the Revised Joint Stipulation unreasonable and unlawful, and the Board should remove the modifications and implement the Revised Joint Stipulation as agreed upon by the parties. The Revised Joint Stipulation already satisfied Ohio requirements for a

certificate to construct a wind generation facility, benefiting customers and the public interest; there was no reason for the Board to substitute its own approach given the evidence and testimony presented by Icebreaker, OPSB, and ODNR experts.

**2. The modifications made by the Board require zero impact by requiring the turbines to be shut down at night for eight months a year, or alternatively require Icebreaker to go back to the Board for another hearing.**

The Board recognized the “stringent requirements” (*Order* at ¶ 154) and protections included in the Revised Joint Stipulation, that will “*further bolster* the protection of various wildlife species that may be impacted by the project” above those included in the Application (emphasis added):

The Board acknowledges significant improvements were garnered in the Revised Stipulation that will further bolster the protection of various wildlife species that may be impacted by the project. Of the notable differences between the Initial Stipulation and the Revised Stipulation, we emphasize six essential modifications pertaining to the protection of wildlife: (1) the collision-detection technology must be demonstrated to ODNR’s satisfaction through lab and field testing prior to start of construction; (2) the collision-detection technology must now be installed and fully functioning prior to operation; (3) as dictated by the collision monitoring plan, ODNR and Staff will have the authority to direct mandatory feathering from March 1 through January 1, during all nighttime hours, in the event the collision-detection system does not accurately detect collisions; (4) the reliability threshold for avian radar data will be set at 75 percent viable data, with no exceptions; (5) the length of the radar monitoring seasons was extended to include all days from April 1 through November 15, which includes the summer residency period; and (6) the number of collisions before adaptive management is triggered has been lowered from up to 330 collisions, facility-wide, within a 24-hour period to up to 21 collisions, facility-wide, within a 24-hour period (Joint Ex. 2 at 6-9; Staff Ex. 14 at 4-6; Icebreaker Ex. 57 at 3).

*Order* at ¶ 152. The Board reviews each of these in its Order, describing the protections provided. It also recognizes the requirement in the Revised Joint Stipulation for experts from

ODNR and OPSB Staff to approve protocols and technology choices throughout the pre-construction, construction, and post-construction phases. (*See, e.g., Order* at ¶153, noting that radar monitoring “will allow for a comparative analysis of the pre- and post-construction conditions to determine if adaptive management is necessary to protect wildlife affected by the project” and the 75% viable data threshold “will help ensure that the project will represent the minimum adverse environment impact” while any modifications to the operations would have to be in accordance with the adaptive management plan *and* approved by experts at ODNR and OPSB Staff; *Order* at ¶ 157 noting that “[w]e also agree with the Signatory Parties that Revised Stipulation Condition 18 helps ensure that the facility will represent the minimum adverse environmental impact to wildlife by requiring that a collision monitoring plan, and the associated collision-monitoring technology, will be approved prior to construction (Joint Ex. 2 at 6)”.)

Specific to the modifications made by the Board to the Revised Joint Stipulation, the Board noted that, “[i]mportantly, the collision-monitoring technology must be ‘installed and fully functioning’ prior to the Applicant commencing operation of the facility and will be subject to audits conducted by ODNR or a third-party consultant (Joint Ex. 2 at 6; Staff Ex. 14 at 4).” *Order* at ¶ 159. Further, the Board recognized that “the Revised Stipulation does afford some discretion to ODNR and Staff to subject the facility to feathering requirements during nighttime hours over the spring and fall migration periods, as well as the summer residency period (collectively, March 1 through January 1), as detailed in the collision monitoring plan. (Staff Ex. 14 at 5; Joint Ex. 2 at 6; Icebreaker Ex. 57 at 6)”. Yet instead of accepting the analysis of ODNR and OPSB Staff, trusting their expertise to determine if and when heightened feathering requirements must be implemented, the Board substituted its

own judgment for that of the experts, modifying the Revised Joint Stipulation to require feathering at the outset of the project for eight months of the year at night. *Order* at ¶ 160.

Worse, the Board makes itself the arbiter of whether or not lifting restrictions is permissible by requiring Icebreaker to come back to the Board for determination as to whether those restrictions can be lifted, instead of relying on the opinion of the state's experts at ODNR and OPSB Staff. *Order* at ¶ 161.

Not only did the Board unlawfully violate its obligation to “render a decision upon the record” by granting, denying, or granting with modification an application as required under R.C. 4906.10(A), it unreasonably ignored the expertise of ODNR Staff, including testimony of ODNR Research and Management Team's Wildlife Administrator and Wind Energy Administrator Erin Hazelton. It also ignored the authority of OPSB Staff who determined the appropriate restrictions necessary to ensure minimum adverse environmental impact were included in the Revised Joint Stipulation. ODNR experts and OPSB Staff determined that Revised Joint Stipulation Condition (18)'s requirement gave them the ability to implement restrictions necessary in order to ensure minimum adverse environmental impact. The Board unreasonably ignores the expertise of ODNR Research and Management Team's Wildlife Administrator and Wind Energy Administrator Erin Hazelton, who states that “Stipulation Condition 18 is protective of wildlife because it can be applied to any technology and the applicant must demonstrate its collision detection technology is sufficient to ODNR's satisfaction before construction can begin.” *Revised Testimony of Erin Hazelton*, Staff Ex. 14 at 4, line 6.

Further, the Board violated R.C. 4906.10(A) by implementing a modification to the Revised Joint Stipulation requiring Icebreaker to come back for a *second hearing before the*

*Board* in order to have the unreasonable modification removed. While the Environmental Advocates searched to find another case where an applicant was required to come back before the Board again despite being granted a certificate, we simply cannot find another example where the Board has required a developer to come for a second approval in order to move forward with a project in this manner. In fact, once a certificate is issued, other provisions of the Ohio Revised Code then take effect and regulate implementation and any certificate violations that may occur as the project proceeds into the construction phases. *See* R.C. §§ 4906.97 - 4906.98. Certainly, the Board has never required an additional appearance in order to remove a component of the project that was *clearly and explicitly rejected through evidence and testimony* as an absolute roadblock to building the project, as it was in this case. *See* App. Ex. 25, Page 12, line 17; *see also* *Tr. Vol. II*, page 258, lines 3 - 6.

**B. The Board's Order is Unreasonable because it Hinges the Modification on Anticipated Future Projects not before the Board now.**

The Board's decision is not based upon the proposal before the Board—a small, six turbine project already found to be low risk. Because of the heightened restrictions placed upon the small project, it is apparent that the Board modified the Revised Joint Stipulation based upon anticipation of future projects to come. As the Board stated,

We observe that the application describes this undertaking as a demonstration project, where a primary purpose is exploring the viability of other, larger-scale offshore wind facilities in the Great Lakes region (Icebreaker Ex. 1 at 3). This project constitutes a novel undertaking, not only in the state of Ohio, but the entire country; as such, we must ensure that all necessary precautions have been taken and all necessary measures are in place to mitigate both projected and unanticipated risks associated with avian and bat migratory behavior. Thus, to the extent that the Board has required more information compared to other terrestrial projects, or the requirements set forth in the Revised Stipulation and this Order appear to set a more comprehensive approach to pre-, during-, and post-construction radar and collision requirements, these adjustments are warranted.

Order at ¶151. Yet the Board is required under R.C. § 4906.10 to render a decision upon the application *as filed*. In this case, the Board is only permitted to consider the six turbine offshore demonstration project and its impacts. If companies propose additional wind powered electric generation facilities on Lake Erie, the Board should consider those applications separately *when they are proposed*. There are currently no other applications before the Board for such generation facilities, and even if there were, Icebreaker is required by Ohio law to be analyzed based upon its application alone. And in fact, the entire purpose in moving a small, six-turbine project forward first is to ensure that whatever the data and radar studies show related to impacts to birds and bats, the project will be low risk. One of the reasons the Environmental Advocates support this project is specifically because it is small and low risk, and will provide data that can determine whether it would be safe to move forward with any type of large scale clean energy project in Lake Erie as we continue the fight against climate change.

As the Board stated, “we have already concluded that the project is anticipated to represent a low, yet incrementally higher, level of risk to avian and bat species that they would otherwise not be subjected to, given the fact that the facility will be comprised of only six turbines” Order at ¶ 156. If the Board were basing its decision on the project before it, it is clear from the evidence and testimony presented that this project represents the minimum adverse impact, and further, meets all criteria required for approval of a certificate under R.C. 4906.10. Further, an application under R.C. 4906.10 is not required to prove *no* adverse impact—it is required to prove “minimum” adverse impact for a project of its type. The only explanation left, then, is that this Board is basing its decision to modify the Revised Joint

Stipulation on the possibility of future projects being built in Lake Erie, something it is specifically not permitted to consider in its decision to grant, deny or modify a proposed Application.

**C. The Board failed to provide evidence to justify the modification.**

Pursuant to R.C. 4903.09 as applied to OPSB proceedings through O.A.C. 4906.12, the Board is required to file “findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.” While the Board certainly rendered a written decision, it failed to set forth the reasons prompting the decisions it arrived at, and it didn’t give further commentary aside from citing unexplained sections of the transcript. *See Order* at ¶¶160-161. Ohio law requires the Board to provide findings of fact and a written explanation as to why the provisions included in the Revised Joint Stipulation weren’t sufficient. *See* R.C. 4906.11 (“In rendering a decision on an application for a certificate, the power siting board shall issue an opinion stating its reasons for the action taken”). *See also* OAC 4906-2-30 (“Within a reasonable time after the conclusion of the hearing, the board shall issue a final decision *based only on the record*, including such additional evidence as it shall order admitted”), emphasis added. After going through lengthy descriptions of the testimony and evidence supporting the fact that the project will have minimum adverse environmental impact and the fact that the project has been identified as low risk, the Board merely states:

[A]s explained above, the ability to calculate and assess the actual environmental impact relies on technology and data that is, to an extent, unknown. Notably, this is to be expected given the unprecedented nature of this project and that the purpose of this demonstration project is to explore these uncertainties. Given these uncertainties, the Board finds necessary risk mitigation measures should be installed from the beginning.

*Order* at ¶ 160. The Board’s statement above directly contradicts the previous *pages* of explanation on why the project will have minimum adverse environmental impact, including the two prior paragraphs in which the Board explains that the collision protocols in Conditions 18 and 23 provide for appropriate oversight representing the minimum adverse environmental impact to wildlife through the collision monitoring plan and the significant mortality event protections. *Id.* at ¶158-159. Precautions and protections built into the Revised Joint Stipulation allow continued oversight by experts at ODNR and OPSB Staff and imposition of additional protections, *including feathering if ODNR and OPSB Staff deem it necessary*, making the modifications made by the Board unreasonable. *Fifth Supplement to the Application*, App. Ex. 57 (Collision Monitoring Plan language). The Board’s modifications should be rejected, and the Revised Joint Stipulation approved in full.

**D. The Board’s ruling violates public policy by failing to take into account the need to act as quickly as possible to reduce our carbon emissions and combat climate change.**

Finally, the Board’s decision is unreasonable because it violates public policy, by failing to recognize the need to act as quickly as possible to reduce our carbon emissions and combat climate change. The failure of the Board to consider this aspect, in addition to the artificial barriers it imposed upon the project is unreasonable, and the decision should be revised to accept the Revised Joint Stipulation in full.

In 2018, the Intergovernmental Panel on Climate Change (IPCC), the top scientific body studying climate change, released a Special Report in October 2018 (“IPCC Special Report”), indicating that nations must take “unprecedented” action to cut carbon emissions over the next decade. IPCC, 2018, *Global Warming of 1.5°C*, V. Masson-Delmotte, et al. World Meteorological Organization, Geneva, Switzerland, *available at*

<https://www.ipcc.ch/sr15/>. The IPCC Special Report determined that the world must hold its warming below 1.5 degrees Celsius to prevent the most damaging impacts of climate change, and that the world's annual carbon dioxide emissions (more than 50 billion tons per year) must be on an extreme downward slope by 2030 to prevent those impacts from materializing. *Id.* Yet, global emissions are still rising. We continue to burn fossil fuels, all while knowing a dramatic shift to carbon-free energy sources, like wind energy, is necessary for a sustainable future.<sup>2</sup>

When the Board weighs its decisions, it must consider the overarching impact that results from continued reliance on fossil fuels as part of its calculation regarding whether a project represents “the minimum adverse environmental impact.” By modifying the Revised Stipulation to make it nearly impossible for the project to move forward, the Board is continuing Ohio’s historic trend of preferring carbon dioxide-intensive energy sources, rather than carbon-neutral sources. Climate change must be a part of the calculus. Ohio has the opportunity to reduce its reliance on fossil fuels by increasing the percentage of wind-generated electricity in the state. Shifting away from dirty energy sources will not only help combat the worst effects of climate change, including the negative impact to human health, it will also boost the economies of the communities hosting those turbines (like the Icebreaker project). The Board failed to account for climate change in its decision-making process, unreasonably violating public policy and the need to approve a project with “minimum adverse environmental impact.” By approving the project with Conditions that make the

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<sup>2</sup> The IPCC Report calls for human-caused emissions of carbon dioxide to be reduced by about 45 percent from 2010 levels by 2030, reaching net zero by 2050 in order to prevent the most damaging aspects of climate change from materializing. *IPCC, 2018: Summary for Policymakers*, Global warming of 1.5°C, available at [https://www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15\\_SPM\\_High\\_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15_SPM_High_Res.pdf).

project financially unviable, the Board has, in fact, approved a Certification which may result in a longer reliance on fossil fuels statewide, exacerbating Ohio's contributions to climate change.

## **V. Conclusion**

Icebreaker's six turbine offshore wind project has been extensively vetted to ensure the clean power it will bring Cleveland is acquired in an environmentally responsible manner. Working with OPSB Staff, ODNR experts, the Environmental Advocates, and other intervening partners, Icebreaker developed the Revised Joint Stipulation to ensure minimum adverse impact to the environment while benefiting the public interest. The Board's unlawful and unreasonable decision ignores years of extended deliberation and negotiation. It ignores the experts used by OPSB Staff and ODNR, as well as the experts testifying on behalf of Icebreaker.

The Board must revise its Order and remove the modifications it made to the Revised Joint Stipulation. 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 of 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. But due to the uncertainty created by the Board's modifications, Icebreaker may not have the opportunity to help create that future Cleveland.

For the foregoing reasons, the Ohio Environmental Council and the Sierra Club respectfully request that the Board reconsider its decision, remove the modifications to the Revised Joint Stipulation, renewing Icebreaker's opportunity to advance Cleveland's role in Ohio's clean energy future.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing, *Application for Rehearing of the Ohio Environmental Council and Sierra Club*, was served by electronic mail, upon all Parties of Record on 22<sup>nd</sup> day of June, 2020.

/s/Miranda Leppla  
Miranda Leppla

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