

**IN THE
SUPREME COURT OF OHIO**

In the Matter of the Application of Icebreaker Windpower, Inc., for a Certification to Construct a Wind- Powered Electric Generation Facility in Cuyahoga County, Ohio	: : : : :	Case No. 21-153 On Appeal from the Power Siting Board, Case No. 16-1871-EL-BGN
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**AMICUS BRIEF OF THE OHIO ENVIRONMENTAL COUNCIL
IN SUPPORT OF APPELLEES**

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I. INTRODUCTION

Ohio has been a place of great innovation since its very inception—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 (“Project Icebreaker”), 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, leading us toward a cleaner, more equitable future.

Because it is the first offshore wind farm proposed in Ohio, as well as the first to be 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 (“OEC”) supports Project Icebreaker. The Appellants’ arguments before the Ohio Supreme Court lack sufficient legal basis to overturn the Ohio Power Siting Board’s decision. Therefore, OEC files this Amicus Brief in support of Project Icebreaker, and asks the Court to reject the claims of the Appellants. Ohioans

deserve to receive the economic and environmental benefits of the proposed six-turbine demonstration project in Lake Erie, and because it represents the minimum adverse environmental impact, this appeal should be denied.

II. INTERESTS OF AMICUS CURIAE

Amicus Ohio Environmental Council (“OEC”) is a state-wide non-profit, non-partisan environmental and conservation organization, composed of nearly 100 organizational groups and thousands of individual members throughout the state. Over the past 52 years, the OEC has advocated for policies to secure healthy air, land, and water for all who call Ohio home. Many of our members live, work, and recreate in Cuyahoga County, and on or near the waters of Lake Erie. Our organization’s Energy Program advocates strongly for more renewable energy development in order to meet our growing demand for emission-free energy, and to mitigate the causes of climate change. Through our Natural Resources program, the OEC also advocates strongly for the protection of water resources, and for critical habitats for native and migratory species.

As the OEC continues to push for a cleaner future, we are often met with resistance from the fossil fuel industry, an industry that is threatened by the need to shift our energy sources from carbon-intensive fossil fuel generation toward emissions-free generation options like wind and solar. The fossil fuel industry goes to great lengths to tamp down clean energy advocacy or, alternatively, to prop up anyone fighting against clean energy projects regardless of why they are opposed, and this case is no different. As the OPSB case proceeded, it was discovered that the Appellants’ legal fees were funded by Murray Energy Corporation, a coal company.¹ In the face

¹ *Deposition of Richard Brown*, OPSB No. 16-1871-EL-BGN, at 16-19 (September 20, 2018) (*See* Exhibit 1, Retention Letter from Appellants’ Counsel to Expert Richard Brown, Sept. 11, 2017, noting that Murray Energy Corporation, a coal company, was paying the Expert’s retention fees and expenses); *Deposition of Susan Dempsey*, OPSB No. 16-1871-EL-BGN, at 126 - 127 (August 2, 2018) (*See* Exhibit 3, Letter from Appellants’ Counsel to Expert Richard Brown, Sept. 11, 2017, noting that Murray Energy Corporation, a coal company, was paying the Expert’s retention fees and expenses); *see also Murray Energy paid over \$1 million to law firm that’s fought renewable energy*, Energy and Policy Institute, available at <https://www.energyandpolicy.org/murray-energy-renewable-energy/>.

of these impediments, the OEC and our allies continue to fight for innovative change to the energy industry, because shifting away from fossil fuels and reducing energy consumption is necessary and critical to creating a sustainable world for future generations. Project Icebreaker is one of those innovative projects that could turn the course of the climate fight should it succeed.

The OEC has followed the proposal to build wind energy generation in Lake Erie for well over a decade. Over these years, the OEC carefully studied and tracked the idea through its development and eventual proposal to the Ohio Power Siting Board (OPSB). Based on the years of studying the proposal and careful review of the Application and corresponding studies and analyses submitted to the OPSB as part of OPSB Case No. 16-1871-EL-BGN, the OEC was satisfied that Project Icebreaker was protective of the environment, and strongly supported this exciting six-turbine wind energy demonstration project in Lake Erie that would be the first freshwater offshore wind farm in North America. OEC determined that the project would be a strong win for our environment and our economy, helping us combat air pollution and climate change while also creating more than 500 jobs and injecting \$253 million into the local economy.²

As noted, the OEC was a party to the proceedings before the Ohio Power Siting Board (OPSB). The OEC team reviewed the extensive studies undertaken related to bird and bat impacts as well as fisheries and water resources impacts that were submitted in the OPSB proceeding, and plans to continue to track and review the additional studies and data collection that will continue throughout the pre-construction, construction and operational phases of the project now that it is approved. OEC's review of the Application, combined with the protections and restrictions built into the ongoing work by the conditions in the approved Certificate, satisfied the concerns of the OEC 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 and conditions resulting

² *Icebreaker Wind FAQs*, LEEDco, at 1, available at: http://www.leedco.org/files/Icebreaker_Wind_FAQs.pdf (Last accessed June 1, 2021)

from the Revised Joint Stipulation and Recommendations, 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 required under Ohio law for approving a stipulation. This appeal should be denied, and Project Icebreaker should be permitted to continue moving forward with the project subject to the guidance and requirements contained in the Certificate as granted by the Board on October 8, 2020.

III. STATEMENT OF FACTS

Amicus Curiae adopts the Statement of Facts as presented by Appellee, Ohio Power Siting Board and Counsel for Applicant-Intervening Appellee Icebreaker Windpower, Inc.

IV. STANDARD OF REVIEW

When considering whether to approve an application for a certificate to construct a wind farm, the OPSB makes its determination pursuant to R.C. 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. The Appellants primarily contest the Board's determination under R.C. 4906.10(A)(2) and (3), which require the Board both to determine the nature of the probable environmental impact and make a finding "that the facility represents the minimum adverse impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations." The Appellants also challenge the Board's decision under R.C. 4906.10(A)(6), claiming Project Icebreaker violates the Public Trust Doctrine and thus does not serve the public interest.

Additionally, because this Application was presented to the Board as part of a Revised

Stipulation agreement, the Board also had to 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?; and (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*.

When reviewing decisions of the Board, the Ohio Supreme Court reverses, modifies, or vacates an order only when its “review of the record reveals that the order is unlawful or unreasonable.” *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d at 491, 2016-Ohio-1513 at ¶7. The Court does not reverse or modify board decisions regarding questions of fact “when the record contains sufficient probative evidence to show that the board’s decision was not manifestly against the weight of evidence and was not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty.” *Id.* The Court defers to the expertise of the Board, and “Appellants bear the burden of demonstrating that the board’s decision is against the manifest weight of the evidence or is clearly unsupported by the record.” *Id.* The Court has “complete and independent power of review as to all questions of law in appeals from the board.” *Id.*

V. ARGUMENT

The OEC originally intervened in the proceeding before the Ohio Power Siting Board 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. The Applicant's effort to build 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. Project Icebreaker will significantly benefit Ohio's environment by helping to transition the state toward a renewable, clean energy future. Thus, we oppose the Appellants' arguments attempting to overturn the Board's certification of Project Icebreaker.

Contrary to the assertions of the Appellants, Project Icebreaker has conducted extensive studies relating to bird and bat impacts as well as fisheries and water resources impacts. Moreover, the project has committed to additional studies and data collection that will continue throughout the pre-construction, construction, and operational phases. Collectively, these environmental studies satisfy the concerns of the OEC as well as the requirements of 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, Project Icebreaker meets all requirements set forth by R.C. 4906.10(A). Moreover, 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 the Board for approving a stipulation.

For the reasons that follow, the Ohio Supreme Court should reject the arguments of the Appellants and uphold the Board's approval of the Application of Icebreaker Windpower, Inc. for a Certificate to Construct a Wind-Powered Electric Generation Facility in Cuyahoga County,

Ohio—poised to be the first freshwater offshore wind farm in North America.

A. The Applicant provided sufficient evidence for the Power Siting Board to make findings as to the nature of the probable environmental impact and that Project Icebreaker represents the minimum adverse environmental impact, satisfying the statutory requirements of Ohio Revised Code 4906.10(A).

Project Icebreaker provided the necessary information to the Board so it could make its factual determinations under R.C. 4906.10(A)(2) and (3): the nature of the probable environmental impact, and that the project represents the minimum adverse environmental impact, when considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations. The Appellants attempt to minimize the ample and extensive studies and analyses conducted to determine the environmental impacts of the project, particularly impacts to birds and bats, by arguing that because more field surveys and analyses will be done as the project progresses through the pre-construction, construction, and operational phases, that means the information and data provided through the Application wasn't enough.

Yet, the Applicant submitted documentation of extensive baseline studies and information, as well as pre-construction, post-construction, and monitoring requirements to ensure this project has the minimum adverse environmental impact. Additionally, the Application and Revised Joint Stipulation include extensive checks and processes that detail what Project Icebreaker is required to do if, at any point during operation of the facility, it adversely impacts bird or bat populations. While the studies detail the nature of the probable environmental impact and show that the measures to be implemented as part of the project represent the minimum adverse environmental impact, the checks and cautionary measures included provide an extra layer of protection solidifying that the project and requirements represent the minimum adverse environmental impact.

Appellants' selectively choose to ignore the fact that some of the studies and analyses can

only be done as the project progresses. Because of the precautions included throughout the pre-construction, construction, and post-construction phases, this project will continue to be heavily monitored and studied to determine what impacts occur. The Appellants' arguments conveniently ignore the numerous studies submitted to the Board, attempting to portray Project Icebreaker's Certificate as if it were approved without adequate vetting. To the contrary, Project Icebreaker has undergone significantly more rigorous scientific assessment than most wind projects approved by the Board, especially because it is the first of its kind.³ As detailed below, Project Icebreaker provided the information necessary to demonstrate minimum adverse environmental impact throughout the Application and hearing process. It is important to emphasize the nature of Project Icebreaker as a demonstration project; its construction and small scale is appropriately designed to ensure we are learning from this project and can get an even better understanding of the risks larger scale offshore wind projects may present as environmental hazards. Thus, Project Icebreaker has developed, in conjunction with Board Staff and through the Board Certificate process, the necessary procedures to continually gather data to better inform future similar projects, and to ensure this project remains minimum adverse environmental impact as it proceeds through the construction process.

1. The Board properly determined that the Avian and Bat Risk Assessment and extensive studies demonstrate that Project Icebreaker is a low risk to the environment.

The Avian and Bat Risk Assessment (Applicant Ex. 6), based upon extensive and robust

³ The U.S. Department of Energy, in completing its final Environmental Assessment of Project Icebreaker, concluded there would be no significant environmental impact: "DOE evaluated the potential environmental impacts of providing federal funding to the Proposed Project The analysis provided in the EA support's DOE's determination that providing federal funding for the Proposed Project will not significantly affect the quality of the human and natural environment." *Finding of No Significant Impact: LEEDCo Project Icebreaker, Lake Erie, City of Cleveland, Cuyahoga County, Ohio, DOE/EA-2045*, United States Department of Energy, at 1, available at: <https://www.energy.gov/sites/default/files/2018/09/f55/EA-2045-LEEDCo%20FONSI-2018.pdf> (Last accessed June 1, 2021).

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 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. *Application - Fourth Supplement to Application*, OPSB No. 16-1871-EL-BGN, at 9 (March 22, 2018) (hereinafter “*Avian and Bat Risk Assessment*”). Applicant 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, supported Project Icebreaker because of the low risk of the project. *Transcript for hearing held on 09/27/18 - Volume IV*, OPSB No. 16-1871-EL-BGN, at 940: 7 - 9; 994: 7 - 9; 994: 21 - 995: 23 (Oct. 11, 2018) (hereinafter “Tr. IV”). In fact, Witness Erickson had “a hard time finding [a project] that’s lower risk” than Project 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.” *Id.* at 1002:14 - 1003:8. Thus, the area the Applicant 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.

Appellants, however, ignore these important facts in their brief. In fact, Appellants do not even mention the Avian and Bat Risk Assessment study. Instead, Appellants focus most of their brief on the additional studies that will be done via radar monitoring, which was an important topic throughout the Application and hearing process, and argue that it is deficient because the information yet to be collected by radar is unknown. *Appellants’ Brief*. at 17. We agree with Appellants that this is accurate—and the radar monitoring studies are being required *specifically*

to determine the information that is needed for this project to safely progress, as discussed more fully in section (A)(2) below. However, considering all components together--the project's limited size, the analyses and studies already undertaken, and the protections and precautions built into the approved Certificate--Project Icebreaker meets the requirement for minimum adverse environmental impact.

2. The monitoring, impact mitigation, and adaptive management strategies included in the Application and Revised Joint Stipulation, and approved by the Board, ensure continued monitoring and processes to address potential risks to bird and bat populations.

In addition to the low risk nature of this project based upon the detailed studies and analyses presented, this project has extensive protections built into the Application and Revised Joint Stipulation conditions to ensure this project is protective of the environment. Project Icebreaker must also do additional monitoring to ensure continued monitoring and assessment of Project Icebreaker's impacts as the project moves forward into the development phase, and implement adaptive management strategies where necessary depending on the results of the monitoring. These strategies informed the Board's decision that Project Icebreaker represents the "minimum adverse environmental impact," R.C. 4906.10(A)(3), while also "considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations." Using Project Icebreaker as a demonstration project, to determine more precisely the impacts of wind turbines to birds and bats over Lake Erie, is a pertinent consideration for the Board. In particular, the following conditions outline the necessary precautions and strategies developed to ensure minimum adverse environmental impacts.

Condition 15 requires Project 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) and the Fisheries and Aquatic Resources MOU that have been agreed upon by Project Icebreaker and the Ohio Department of Natural Resources to ensure proper monitoring at each stage of development of the project. *In the Matter of the Application of Icebreaker Windpower Inc*, OPSB No. 16-1871-EL-BGN, at 21 (May 21, 2020) (hereinafter “*May 21, 2020 Order*”).

Condition 18 memorializes the requirement that Project 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. *May 21, 2020 Order* at ¶¶ 22, 117, 131, 157; *In the Matter of the Application of Icebreaker Windpower Inc*, OPSB No. 16-1871-EL-BGN, at ¶¶ 32-33, 38 (Oct. 8, 2020) (hereinafter “*October 8, 2020 Order on Rehearing*”). Condition 20 ensures that at any point a state or federally listed endangered or threatened species is identified, Project 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. *May 21, 2020 Order* at ¶¶ 142, 164.

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*, OPSB No. 16-1871-EL-BGN, 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 Project 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 App., App. Ex. 57, OPSB No. 16-1871-EL-BGN, at 2 (May 14, 2019) (emphasis added); *see also Hazelton Revised Testimony* 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).

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. *May 21, 2020 Order* at ¶¶122, 153, 197; *October 8, 2020 Order on Rehearing* at ¶¶ 32-33.

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. *May 21, 2020 Order* at ¶¶ 135-36.

These additional conditions included in the Revised Joint Stipulation and Recommendation address the requirements for monitoring as the project progresses. Further, the Board noted that these conditions ensure the radar data collection required to be collected is sufficient to ensure the minimum adverse environmental impact in the *October 8, 2020 Order on Rehearing*:

[...] Condition 21 of the Revised Stipulation requires Icebreaker to acquire two years of radar data at the project site prior to construction. That information must meet the specific requirements outlined in the Revised Stipulation⁴ and, pursuant to the May 21 Order, is subject to Board approval. Similarly, Condition 18 directs Icebreaker to submit an avian and bat mitigation plan, including the collision monitoring plan, at least 120 days prior to construction, which is also subject to Board approval.

Because Project Icebreaker is a demonstration project, the pre- and post-monitoring plans are essential for determining the precise impact of wind turbines to birds and bats once the project is completed. The Certificate, and its conditions, collectively ensure minimum adverse impact from Project Icebreaker, taking into account all economic and environmental factors. The pre- and post-monitoring plans will provide the Board and Ohio with additional data to determine the precise impacts, useful when determining the environmental impact of any future offshore wind turbines in the Great Lakes.

⁴ “Among other requirements, the radar monitoring program must produce viable data at least 75 percent of the time; must be able to determine the flight altitude of birds and bats near and within the rotor-swept zone; and must be able to provide information that can be used to determine and quantify behavioral avoidance or attraction to turbines in the open water setting.”

3. Water protections satisfy R.C. 4906.10(A)(2)-(3).

Similarly, the Application and conditions contained in the Revised Joint Stipulation and Recommendations, as approved by the Board, ensure Lake Erie and aquatic life are protected and that the project represents the minimum adverse risk to those resources. Of note, the Board determined that the Aquatic Assessment done by Project Icebreaker showed that any impact would be minimal and the thorough assessment determined that there were no vital habitation areas near the facility locations. *May 21, 2020 Order* at ¶ 94. Additionally, the Fisheries and Aquatic Resources Memorandum of Understanding, which Icebreaker must comply with per Condition 15, requires Project Icebreaker to continue to monitor aquatic life near the project site, ensuring any unexpected impacts can be addressed and remedied. *Id.* The Project will also be required to obtain various state and federal permits related to water, including Sections 404 and 10 of under the Clean Water Act and a Section 401 Water Quality Certificate from Ohio EPA. *Id.* at ¶ 179.

B. The Board reasonably and lawfully removed the Feathering Condition in its Order on Rehearing.

The Board's May 21, 2020 Order modified the Revised Joint Stipulation to include a condition⁵ that essentially required the project to have zero impact, rather than the minimum adverse 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 that this requirement wasn't necessary due to other protections included in the certificate. This "Feathering Condition" contradicted clear and substantial evidence in the record that the Revised Joint Stipulation

⁵ The added condition required "the turbines remain completely feathered during nighttime hours, from dusk to dawn, from March 1 through November 1 of each year of operation, until or unless the Board directs otherwise." *May 21, 2020 Order* at ¶160.

represented the minimum adverse environmental impact as required by R.C. 4906.10(A)(3).⁶ As part of this alteration, Project Icebreaker’s options were two-fold: either shut the turbines down for three-fourths of the year, or return to the Board and go through a *second hearing process* for approval in order to operate without the Feathering Condition.

When the Board modified the Revised Joint Stipulation to include the Feathering Condition, 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 modification imposed by the Board in lieu of Revised Joint Stipulation Condition 18 would have made it impossible for the project to proceed, despite evidence in the record that the added Feathering Condition was not necessary. A similar provision was originally proposed as part of the Staff Report, as Condition 19, and thoroughly dispensed as both unnecessary and not feasible. 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.” *Testimony of David P. Karpinski*, OPSB No. 16-1871-EL-BGN, at 25 (September 6, 2018). *See also Transcript for hearing held on 09/25/18 - Volume II*, OPSB No. 16-1871-EL-BGN, at 258: 3 - 6 (October 9, 2018) (hereinafter “*Tr. Vol. II*”) (“the three conditions that I cite, in my opinion, render the project unfinanceable. The project is not unfinanceable; it’s those three conditions”). If Project 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.” *Testimony of David P. Karpinski*, at 13: 4 - 5. Under R.C. 4906.10(A)(3), the Board must take into account economic and

⁶ “(3) . . . 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;” R.C. 4906.10(A)(3).

other pertinent considerations when determining the “minimum adverse environmental impact,” and the effect of the feathering requirement in Condition 19 did not appropriately consider those other factors.

During the hearing on August 20, 2019, Hazelton further emphasized that ODNR’s approval of particular protocols and plans were required under the Revised Joint Stipulation and those protections and approvals were sufficient to ensure minimum adverse environmental impact. Because the Ohio Department of Natural Resources has the ability to say “no” to Project Icebreaker if it 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.” *Transcript Volume VIII*, OPSB No. 16-1871-EL-BGN, at 1759 (September 4, 2019) (hereinafter “*Tr. Vol. VIII*”). Hazelton further stated that “each condition on its own helps to ensure [minimum adverse impact to wildlife], and as a package, it ensures [minimum adverse impact.]” *Id* 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 balanced the need for environmental protections while ensuring Project Icebreaker can acquire financing to move this innovative clean energy project forward.

The Board’s decision to modify the package irrationally changed a stipulated agreement that already ensured minimum adverse impact—and as a result, would have prevented the project from moving forward, an outcome that was predictable given that the feathering concept was thoroughly discussed and identified as a poison pill for the project in the evidence and testimony. *See Testimony of David P. Karpinski* at 12: 17. *See also Tr. Vol. II* at 258: 3 - 6.

Additionally, pursuant to R.C. 4903.09 as applied to OPSB proceedings through O.A.C.

4906, 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 in its original Order, it failed to set forth the reasons prompting the decision to add the Feathering Condition, and it didn’t give further commentary aside from citing unexplained sections of the transcript. *See May 21, 2020 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 stated:

[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.

May 21, 2020 Order at ¶ 160. The Board’s statement above directly contradicted the previous *pages* of explanation on why the project will have minimum adverse environmental impact, including the two prior paragraphs in which the Board explained 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.

Finally, the Board's decision was unreasonable because it violated public policy, 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, was unreasonable. Its decision to remove the Feathering Condition in its October 8, 2020 Order on Rehearing righted this wrong.

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.⁷

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 Joint Stipulation to include the Feathering Condition, making it nearly impossible for the project to move forward, the Board was continuing Ohio's historic trend of preferring carbon dioxide-

⁷ 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.

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

Because there was 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 properly removed their modified Condition 19. *October 8, 2020 Order on Rehearing* at ¶¶ 30-32.

In its October 8, 2020 Order on Rehearing, the Board recognized that:

[...] Condition 21 of the Revised Stipulation requires Icebreaker to acquire two years of radar data at the project site prior to construction. That information must meet the specific requirements outlined in the Revised Stipulation⁸ and, pursuant to the May 21 Order, is subject to Board approval. Similarly, Condition 18 directs Icebreaker to submit an avian and bat mitigation plan, including the collision monitoring plan, at least 120 days prior to construction, which is also subject to Board approval.

The Board went on to indicate that because of these significant precautionary measures included in the Application and conditions of the Revised Joint Stipulation, the Feathering Condition, or

⁸ “Among other requirements, the radar monitoring program must produce viable data at least 75 percent of the time; must be able to determine the flight altitude of birds and bats near and within the rotor-swept zone; and must be able to provide information that can be used to determine and quantify behavioral avoidance or attraction to turbines in the open water setting.”

“poison pill,” should be removed.

With this process, and the oversight that is involved, the Board is persuaded that the default risk mitigation protocol can be eliminated without distracting from the effort to establish the risk mitigation protocols that will apply to this project. Therefore, the May 21 Order should be revised to strike the default bird and bat mitigation protocol modification made in paragraph 160.

Id. at ¶ 32.

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 Project Icebreaker, OPSB, and ODNR experts. There is no sufficient basis for the Supreme Court to now overturn the Board’s decision in its Order on Rehearing.

C. Project Icebreaker supports the public interest, as required by R.C. 4906.10(A)(6).

1. The Appellants misstate the Public Trust Doctrine as it pertains to Lake Erie; Project Icebreaker does not require the state to cede an interest in the submerged land of Lake Erie.

The OEC has long been a proponent and protector of the Public Trust Doctrine and the State’s obligation to the people of Ohio as it relates to the trust property, including Lake Erie. From our advocacy to pass the Great Lakes Compact to appearing before this Court as Intervening Defendants in *State ex. rel. Merrill*, we defend the state’s Public Trust obligation against overuse and misuse of the waters, shoreline, and submerged lands of our northern coast. As proponents of the state’s public trust obligation, it is unclear what the true argument of the Appellants is as it relates to the Public Trust Doctrine, other than to use it as an opportunity to draw the court’s attention to the fact that there is a foreign corporation involved in the overall project. Appellants’ fear of a Norwegian invasion aside, what is clear is that the Board’s approval of Icebreaker does not violate the Public Trust Doctrine as it relates to the waters or the submerged lands of Lake Erie.

Authority vested in a state through the public trust doctrine is based upon its power over state property, rather than a state's regulatory powers through its sovereign police powers. The lands and waters under the doctrine are governed and managed by a state as its own property. This is in sharp contrast to a state regulating a citizen's private property through its police powers. *See State v. Cleveland & P. R. Co.*, 94 Ohio St. 61, 113 N.E. 677 (1916).

The State of Ohio's sovereign proprietorship is in the hands of the citizens of Ohio, and in that character, the State holds the absolute right to all of Lake Erie for its citizens' common use, subject only to the rights surrendered by the Constitution to the general government. The ownership of a state and the nature of its title to submerged lands of the Great Lakes was expressed by the United States Supreme Court in the first and second syllabi of *Illinois Central Railroad*, *supra*:

“The ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found ... and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.

The same doctrine as to the dominion and sovereignty over and the ownership of lands under the navigable waters of the great lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under the tide waters on the borders of the sea, and the lands by the same right in one case as in the other and subject to the same trusts and limitations.”

(Emphasis added). The Ohio Supreme Court followed the lead of the United States Supreme Court, and recognized the public trust doctrine as the law of Ohio in the landmark public trust doctrine decision *Cleveland & P. R. Co.*, *supra*. The third and sixth syllabi of *Cleveland & P. R. Co.* describe the interest held by the State:

“The title of the land under the waters of Lake Erie within the limits of the state of Ohio, is in the state as trustee for the benefit of the people, for the public uses to which it may be adapted.

The ownership of the waters of Lake Erie and of the lands under them within the state is a matter of public concern. The trust with which they are held is governmental, and the state, as trustee for the people, cannot by acquiescence or otherwise abandon the trust property or permit a diversion of it to private uses different from the object for which the trust was created. The littoral owner is charged with knowledge that nothing can be done by him that will destroy the rights of the public in the trust estate.”

The Ohio Supreme Court further defined the responsibilities and duties of the State under the doctrine, holding that the State of Ohio could not abandon any of its Lake Erie public trust property, nor abdicate any of its control over that public trust estate:

“The state as trustee for the public cannot, by acquiescence, abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created.

If it is once fully realized that the state is merely the custodian of the legal title, charged with the specific duty of protecting the trust estate and regulating its use, a clearer view can be had.

An individual may abandon his private property, but a public trustee cannot abandon public property. Mere nonuse of the trust property by the public cannot authorize the appropriation of it by private persons to private uses, and thus thwart the purposes of the trust.”

Cleveland & Pittsburgh Railroad Co., supra, at 80.

Having recognized and defined the public trust doctrine as the law of Ohio, the Ohio Supreme Court urged the General Assembly to provide for the regulation and control of the State’s Lake Erie public trust lands and waters, stating at the conclusion of its opinion:

“It is presumed that the legislature, in the enactment of legislation on the subject will appropriately provide for the performance by the state of its duty as trustee for the purposes stated . . .”

Cleveland & Pittsburgh Railroad Co., supra, at 84.

The next year, the General Assembly passed the Fleming Act (currently R.C. 1506.10-.11) which declared that the public trust doctrine has existed as the law of Ohio since statehood, and regulated the right to make private use of the “territory.” The purpose of the Act and the subsequent

versions of the public trust law was to regulate the development of the Lake Erie shore through the medium of granting leases to those persons maintaining structures upon the submerged lands of Lake Erie. Though the entities delegated responsibility to oversee this submerged land management process has changed over the years, and the declaratory section of the Fleming Act has been amended slightly in subsequent legislation, its current version in R. C. 1506.10 remains the steadfast declaration of public trust law in Ohio.

The Ohio Supreme Court reaffirmed the State of Ohio’s interest and duties under the public trust doctrine as set forth in both its prior opinion in *Cleveland & P. R. Co.*, and by the Legislature in the Fleming Act, in *State ex rel. Squire*, supra, where syllabus ¶ 2 states:

“The state of Ohio holds the title to the subaqueous soil of Lake Erie, which borders the state, as trustee for the public for its aid in navigation, water commerce or fishery, and may, by proper legislative action, carry out its specific duty of protecting the trust estate and regulating its use.”

The State of Ohio’s public trust authority does not negate private use of the trust estate, but requires regulation of that use - regulation embodied by the Ohio Power Siting Board’s Certificate and ODNR’s Submerged Lands Lease.

2. Project Icebreaker is fundamentally in pursuit of the public interest, as required under R.C. 4906.10(A)(6), because it sets Ohio on a path toward a clean energy future and climate mitigation.

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, Project Icebreaker represents a small step in the right direction in the fight against climate change.⁹ Ohio ranks 6th¹⁰ in the nation for carbon pollution,

⁹ See *Ohio Net Electricity Generation by Source*, Energy Information Administration, <https://www.eia.gov/state/?sid=OH#tabs-4> (Last accessed June 1, 2021)

¹⁰ See *Energy-Related Carbon Dioxide Emissions by State, 2005-2016*, Energy Information Administration, <https://www.eia.gov/environment/emissions/state/analysis/> (Last accessed June 1, 2021)

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, *Transcript of Proceedings of the Ohio Power Siting Board Public Meeting*, OPSB No. 16-1871-EL-BGN, at 12 (Nov. 7, 2017). When considering all economic factors and other considerations pertinent to its decision under R.C. 4906.10(A), the co-benefits of Project Icebreaker cannot be understated. Not only does it present a minimum adverse environmental impact to birds and bats, it represents an opportunity to transition Ohio's current generation capacity, primarily coal and natural gas, toward renewable sources of generation. If Project Icebreaker successfully demonstrates the long-term economic and environmental viability of offshore wind turbines in Lake Erie, it will provide significant environmental benefits for many future generations of Ohioans. Fundamentally, Project Icebreaker serves the public interest, as required under R.C. 4906.10(A)(6).

VI. CONCLUSION

Project Icebreaker represents a new chapter in Ohio's renewable energy future. For over a century, Ohio's electric generation portfolio has relied almost exclusively on fossil fuels, especially coal. As climate science has identified the risks of climate change facing Ohio and the

world, the need to transition away from dirty forms of energy has become more pressing with each passing day. However, it is imperative that we ensure the construction of new energy sources, like wind turbines, do not impact the environment in other ways. Project Icebreaker has been proven to be a project with minimum impact to Ohio's environment while being able to provide significant environmental benefits through climate mitigation.

As demonstrated, the arguments of the Appellees, and the extensive record provided for the OPSB's consideration, Project Icebreaker was lawfully approved by the Board. Similarly, the Board reasonably removed the Feathering Condition in its Order on Rehearing. Contrary to the assertions of the Appellants, Project Icebreaker does not impact Ohio's submerged lands in Lake Erie, held for the benefit of the public. In fact, the six proposed wind turbines represent one of Ohio's best paths toward ensuring future generations can enjoy the resources and environmental treasures of Ohio, especially Lake Erie.

If we are to take seriously the threats posed by climate change, we must swiftly transition our energy grid toward clean, renewable sources of generation. Project Icebreaker is a key step in that work. If the demonstration project and its monitoring plans confirm the risk assessments and numerous studies conducted to assess its probable environmental impact, Lake Erie could become a key resource over the next few decades for Ohio. Moving wind generation forward on our north shore will produce clean energy jobs and other economic benefits, all while mitigating Ohio's contribution to climate change. Therefore, the Ohio Supreme Court should uphold the Board's Certification of Project Icebreaker.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was served upon the following parties of record via electronic transmission this 1st day of June, 2021.

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