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A New Twist for Wind Energy Plan for Lake Erie?

By Kevin Cronin, Attorney at Law

Lake Erie Energy Development Corp. (LEEDCo), an Ohio company in partnership with Norwegian firm Fred.Olsen Renewables, is developing a plan for six wind turbines on Lake Erie, approximately seven miles from shore, northeast of Cleveland. Green Energy, good for the environment, who could complain? Well, representatives of the fishing, travel and tourism industry who count on the \$15.1 billion in annual tourism spending to support 128,000 jobs and generate nearly \$2 billion in taxes through clean water and lake access, along with the birding community do. Everybody agrees Lake Erie is a national treasure. “Can you imagine wind turbines in the Grand Canyon?” they say and filed a lawsuit in Federal District Court in Washington, DC to stop or modify it.

What's This All About?

The LEEDCo project, dubbed Icebreaker, is a demonstration project, utilizing innovative engineering, and would be the first freshwater wind energy project, informing other potential projects for Lake Erie, elsewhere on the Great Lakes or worldwide. LEEDCo has received approximately \$42 million in grants from the US Department of Energy (DOE) and LEEDCo says this could jumpstart a new engineering niche, with potential world leading engineering and jobs at stake for Northeast Ohio. LEEDCo projects construction to begin in 2021 and commercial operation in 2022.

Who wins? Who knows, that's why we have lawsuits. The birder, travel and tourism coalition asserts that the federal agencies' review and evaluation, primarily the Department of Energy, conducted inadequate environmental review of Icebreaker, violating federal environmental laws, the National Environmental Protection Act (NEPA), the Clean Water Act (CWA) and the Administrative Procedure Act (APA).

In December 2019, the Black Swamp Bird Observatory of Ohio (BSBO) and the American Bird Conservancy (ABC), a national non-profit organization based in Virginia, sued the US Department of Energy and the Army Corps of Engineers, asserting they failed to develop an Environmental Impact

Statement as required by NEPA. The bird groups, along with the Lake Erie Marine Trades Association, Lake Erie Foundation, Michigan Boating Industries Association and others ask the Court to set aside the DOE decision until adequate evaluation is completed. Rather than require an Environmental Impact Statement ("EIS") to evaluate the Icebreaker Project, DOE concluded an EIS was unnecessary and reviewed Icebreaker using the less rigorous Environmental Assessment ("EA"). Under the EA analysis, DOE concluded that Icebreaker would have no significant environmental impact. During the DOE review process, the US Fish and Wildlife Service ("FWS") had urged DOE to develop a full EIS in evaluating Icebreaker and that some of the data utilized was flawed, but those comments were set aside. FWS also noted the DOE Draft EA failed to meaningfully discuss any alternatives other than the proposed action and the no-action alternative, and therefore did not analyze other potential solutions.

FWS also criticized the Draft EA's failure to meaningfully discuss the project's cumulative impacts, particularly considering the explicit goal of creating more commercial wind energy in the Great Lakes. "This reasonable outcome" is neither analyzed nor anticipated by the cumulative impacts section of the Draft EA. FWS was critical of the decision-making process, emphasized that the Icebreaker Project is likely to "establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration." The Project will be the "first installation of offshore wind anywhere in the Great Lakes, and likely only the second offshore wind facility in the western hemisphere" and that LEEDCo's "ultimate intent is to expand from an initial 20-30 megawatt demonstration project to a 1,000 MW build out" in the near future. FWS stressed that "an EA is inadequate to fully address the potentially significant, precedent setting aspects of this project." The lawsuit asserts further that while the full EIS was warranted, even under the minimal EA investigation, the review fails to meet the NEPA requirement to review and consider less impactful alternatives.

As for LEEDCo, they say they are blameless and have done everything asked of them and as for future wind turbines, they would each need their own rigorous approval process. At this point, LEEDCo is pursuing an Icebreaker project of six turbines, nothing more. They also point to an October 2019 grant from DOE to deploy innovative sensor technology to track bird activity near the turbines, splitting \$10 million with the University of Maine.

ABC points out that the DOE approval process did not adequately consider potential impacts on birds, especially those deemed "Threatened" or "Endangered" under the Endangered Species Act ("ESA"), and needlessly places birds at risk in a globally important bird habitat. ABC asserts Icebreaker will impair bird surveillance for scientific, recreational, as well as aesthetic benefits and establish a low threshold of review that will increase the risk that other wind power projects will be constructed elsewhere in major migratory bird corridors and nesting areas of ESA-listed protected birds.

Casual observers might be tempted to dismiss this criticism from bird groups as a fringe activity, but the nonprofit Black Swamp Bird Observatory ("BSBO") notes its event, a ten day birding festival in May, "The Biggest Week in American Birding," which, in 2019 alone, drew 90,000 birders from all 50 states and 52 countries to visit the area to watch birds, spending more than \$40 million in the area from mid-April to mid-May. So much for fringe activity.

What's the Law Say?

The lawsuit cites the violation of three federal laws: The National Environmental Protection Act (NEPA); The Clean Water Act (CWA); and the Administrative Procedure Act (APA). Here's an abbreviation of what the laws require:

National Environmental Protection Act requires federal agencies to prepare a "detailed statement," an Environmental Impact Statement (EIS) for all "major federal actions significantly affecting the quality of the human environment," describing "the environmental impact of the proposed action," "the adverse environmental effects which cannot be avoided, and "alternatives to the proposed action." The review of alternatives is part of the Icebreaker debate. NEPA requires that, in evaluating the alternatives of a proposed action, agencies take a "hard look" at the effects of the proposed action as compared to all reasonable alternatives. The alternatives under the DOE review were "go" or "no go," without consideration of less harsh alternatives. In determining whether an EIS is required, an agency must consider whether the proposed action has a "significant" effect on the human environment. The "significance" determination is based on numerous factors, but includes "[t]he degree to which the action may establish a precedent for future actions with significant effects."

The Clean Water Act is designed to "restore and maintain the chemical, physical and biological integrity of the Nation's waters," and generally prohibits the discharge of pollutants, including dredged and fill material into the waters of the US unless authorized by a permit, issued by the Army Corps of Engineers. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process," including "conservation, economics, aesthetics, general environmental concerns, . . . fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, . . . water quality, energy needs, safety, . . . and, in general, the needs and welfare of the people."

The Administrative Procedures Act requires that a reviewing court "shall" set aside agency actions, findings, or conclusions when they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or when they are adopted "without observance of procedure required by law." The standard for "arbitrary" and "capricious" is generally if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem."

How Will This End?

That's what court cases are all about. The birder/tourism coalition says Icebreaker is sited directly in the heart of the Lake Erie Central Basin Important Bird Area, a designated Global Important Bird Area, adjacent to the Cleveland Lakefront Important Bird Area and the Lake Erie Western Basin Important Bird Area. The Central Basin and Cleveland Lakefront Areas were designated by global bird and habitat conservation organizations, BirdLife International and the National Audubon Society, due to the

significant concentrations of various waterfowl, as well as migrating landbirds. Despite the importance of the area, the coalition asserts the DOE approval process provided inadequate environmental review contrary to the environmental and procedural laws and needs to stop and start over. LEEDCo says they've done everything required of them and they have gotten approvals from the Ohio and federal regulators, with only the Ohio Power Siting Board (OPSB) approval remaining. An OPSB staff investigation report, recommending approval of the LEEDCo application, was filed in July 2018. The LEEDCo application is listed as pending on the OPSB agenda, with no date set for consideration. OPSB approval will be challenged by the coalition as well. The Icebreaker proceedings, in court, at the Ohio Power Siting Board and the all-important court of public opinion, are being closely monitored elsewhere in the Great Lakes. A full-scale wind project of 100 to 200 turbines in Lake Michigan was proposed and subsequently abandoned. Following a proposal for 50 turbines in Lake Erie near Buffalo, a New York state lawmaker introduced legislation to establish a moratorium on wind turbines in any freshwater body within New York boundaries. Stay tuned!

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