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In re Application of Icebreaker Windpower, Inc.

Supreme Court of Ohio - August 10, 2022 - N.E.3d - 2022 WL 3220040 - 2022-Ohio-2742

Residents sought judicial review of decision of Ohio Power Siting Board granting certificate of environmental compatibility and public need for six-turbine wind-powered electric-generation facility to be built on submerged land in Lake Erie.

The Supreme Court held that:

- Evidence supported Board's determinations as to probable environmental impact on migrating birds and bats and steps for reducing such impact;
- Board properly determined that conditions on its grant of certificate were sufficient to protect birds and bats and ensure that facility represented minimum adverse environmental impact; and
- Board lacked jurisdiction to consider contention that proposed construction of facility violated public-trust doctrine.

Evidence supported Ohio Power Siting Board's determinations as to probable environmental impact with respect to migrating birds and bats and steps for reducing such impact, as relevant to request for certificate of environmental compatibility and public need for six-turbine wind-powered electric-generation facility to be built on submerged land in Lake Erie; Board cited studies that monitored birds and bats flying in vicinity of project site, Board cited evidence showing that small scale of project and location between eight and ten miles offshore severely reduced impact that facility would have on birds and bats, and Board cited radar studies showing that most migrating birds were expected to fly above rotor-swept zone of turbines.

Ohio Power Siting Board properly determined that conditions on its grant of certificate of environmental compatibility and public need for six-turbine wind-powered electric-generation facility to be built on submerged land in Lake Erie were sufficient to protect birds and bats and ensure that facility represented minimum adverse environmental impact; Board found that moving facility farther from shore and small scale of project minimized several potential adverse environmental impacts on wildlife, Board required certificate applicant to submit radar-monitoring plan prior to construction, and Board required applicant to install fully functioning collision-monitoring technology prior to operation.

Ohio Power Siting Board lacked jurisdiction to consider residents' contention that proposed construction of six-turbine wind-powered electric-generation facility to be built on submerged land in Lake Erie violated public-trust doctrine and, therefore, that project would not serve public interest, convenience, and necessity, so as to preclude certificate of environmental compatibility and public need; statutory provision setting forth condition that facility serve public interest, convenience, and necessity did not include language giving Board authority to make public-trust determinations concerning Lake Erie, nor did provision make mention of any obligation of state to hold waters and submerged land of Lake Erie in trust for people of Ohio.

