

# CLIENT ALERT

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## OHIO SUPREME COURT UNANIMOUSLY AFFIRMS SITING BOARD CERTIFICATE FOR NEW WIND FARM

Emerson Creek Project in Huron and Erie Counties Now Expected to Move to Construction

By Terrence O'Donnell, Christine M.T. Pirik, Matthew C. McDonnell, and Kevin Shimp

### Introduction

On July 27, 2023, the Supreme Court of Ohio, in a 7-0 decision, affirmed the Ohio Power Siting Board ("Board")'s decision to issue a certificate for environmental compatibility and public need ("Certificate") to construct the Emerson Creek Wind Farm, effectively authorizing Firelands Wind LLC ("Firelands") to proceed to construct the 297-megawatt wind-generation project in Huron and Erie counties.<sup>1</sup> In a unanimous decision authored by Justice Pat DeWine, the Court found the Board did not act unlawfully or unreasonably when evaluating the wind farm's application and issuing a certificate to Firelands Wind.<sup>2</sup>

The Court rejected all of the arguments raised by project opponents, a small group of nearby residents, and the Black Swamp Bird Observatory ("Black Swamp"). They had contended that the Board failed to determine: the project's probable environmental impact under R.C. 4906.10(A)(2), whether the project represents the minimum adverse environmental impact under R.C. 4906.10(A)(3), and whether the facility will serve the public interest, convenience, or necessity under R.C. 4906.10(A)(6).<sup>3</sup> Project opponents alleged that the project could disrupt the area's water supply, create excessive noise and "shadow flicker" for residents near the wind farm, and harm bald eagles and migrating birds.<sup>4</sup> They also claimed that the Board improperly delegated its duties to staff and other government agencies, failed to follow administrative rules, and should have required additional testing before granting the certificate.<sup>5</sup> We briefly summarize key aspects of the decision below.

### Standard of Review Clarified

Before evaluating arguments from the residents and Black Swamp, Justice DeWine clarified how the Court's statutorily mandated standard of review only allows the Court to reverse, modify, or vacate the Board's order if the Board's conduct is either "unlawful or unreasonable."<sup>6</sup>

The decision explains that the law limits the Court's review of what qualifies as unlawful to the review of legal questions, such as whether the Board correctly interpreted a statute. It further states the Court performs this type of review *de novo* (i.e., without consideration for

the decision of an agency or lower court) and how the court is "never required to defer to an agency's interpretation of the law."<sup>7</sup>

When reviewing what is unreasonable, the opinion explains: "The agency's exercise of its implementation authority must fall within the zone of permissible statutory construction."<sup>8</sup> As such, if the statute gives an agency a degree of discretion, which is the case for the Board when determining whether to issue certificates, the court should:

"Examine the reasonableness of an agency's decision about such things as whether a facility represents the "minimum adverse environmental impact," or whether it will serve the "public interest," by looking to whether the agency's decision falls within that zone."<sup>9</sup> (Citations Omitted).

Applying this standard, the opinion rejects each of the propositions of law raised by the residents and Black Swamp.

### 1. Avian Impacts

#### *Migratory Birds:*

The residents and Black Swamp argued that Firelands failed to properly determine the impact the project would have on migrating birds, particularly "passerines."<sup>10</sup> The residents and Black Swamp claim that without such a study, the Board could not determine "[t]he nature of the probable environmental impact."

The Court rejected this argument, concluding that the record contained sufficient probative evidence for the Board to determine the nature of the probable environmental impact to passerines<sup>11</sup>:

Firelands conducted numerous site-specific studies, including surveys relating to migrating passerines, in accordance with the ODNR protocol and the USFWS guidelines. The board also reviewed hundreds of bird studies from existing wind farms. Firelands' witness, Good, explained why Firelands did not conduct nighttime radar studies for this project: ODNR has mapped areas of Ohio that are high-risk for nocturnal migrating passerines, and the wind farm here does not fall within such an area. As the residents and Black Swamp's own witness, Shieldcastle, acknowledged, ODNR only recommends that wind developers conduct nighttime radar monitoring for high-risk project areas.<sup>12</sup>

<sup>1</sup>In *re Application of Firelands Wind, LLC*, Slip Opinion No. 2023-Ohio-2555; Justice Patrick R. DeWine authored the opinion with Justices Sharon L. Kennedy, Patrick F. Fischer, Michael P. Donnelly, Melody Stewart, Jennifer Brunner, and Joseph T. Deters concurring. Firelands Wind was also supported by amicus briefs from the Ohio Environmental Council and the Ohio Chamber of Commerce.

<sup>2</sup>*Id.* at ¶ 3.  
<sup>3</sup>*Id.* at ¶ 9.  
<sup>4</sup>*Id.* at ¶ 2.  
<sup>5</sup>*Id.* at ¶ 2.  
<sup>6</sup>*Id.* at ¶ 11.

<sup>7</sup>*Id.* at ¶ 13; Quoting *TWISM Ents, LLC v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677.

<sup>8</sup>*Id.* at ¶ 15.  
<sup>9</sup>*Id.* at ¶ 15.

<sup>10</sup>Passerines are a wide variety of small birds, mostly songbirds. See *Id.* at ¶ 47.

<sup>11</sup>*Id.* at ¶ 52.  
<sup>12</sup>*Id.* at ¶ 52.

### Bald Eagles:

The residents and Black Swamp contended that because the project will impact bald eagles, the Board failed to determine that the facility represents the minimum adverse environmental impact.<sup>13</sup> Firelands committed to (1) developing and implementing, prior to turbine construction, an “eagle conservation plan” in accordance with USFWS guidance for wind farms; and (2) apply for an “eagle take permit” from USFWS before the facility becomes operational.<sup>14</sup> An eagle-take permit authorizes unintentional eagle death resulting from an otherwise lawful activity.

The Court explains that the question before the Board is whether 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,” R.C. 4906.10(A)(3) and does not question the reasonableness of the Board’s determination. The Court concluded:

Firelands’ application represented that the project’s anticipated short- and long-term operational impacts on wildlife were expected to be minor. The application described ways in which Firelands had designed the facility to minimize or mitigate bird mortality, including siting turbines so as “to avoid bald eagle nests and areas of concentrated eagle use.” And the stipulation ensured that the wind farm would be built and operated in accordance with USFWS guidelines for protecting bald eagles. We cannot say that the board’s determination that the facility represents the minimum adverse environmental impact was unreasonable.<sup>15</sup>

### 2. Economic Impact

The residents and Black Swamp claim that Firelands’ economic impact study was inadequate because it failed to account for potential negative economic impacts. The Court disagreed and explained the applicant met the applicable rule:

The administrative code provision did not require Firelands to specifically quantify potential losses to tourism, farmers, or other energy providers. And nothing prevented the residents and Black Swamp from submitting evidence of such potential losses. The rule required only that Firelands provide an estimate of the economic impact on local commercial and industrial activities, which it did. We find nothing unlawful about the board’s interpretation of the rule and nothing unreasonable about its determination that the project “will serve the public interest, convenience, and necessity,” R.C. 4906.10(A)(6).<sup>16</sup>

<sup>13</sup>*Id.* at ¶ 59.

<sup>14</sup>*Id.* at ¶ 60.

<sup>15</sup>*Id.* at 68.

<sup>16</sup>*Id.* at 58.

### Shadow Flicker

The residents argued that the Board failed to require Firelands to meet the shadow-flicker standard set forth in the Ohio Administrative Code.<sup>17</sup> The Board determined that the project would not cause adverse shadow-flicker impacts, based on (1) a requirement in the stipulation that Firelands submit a final study 30 days prior to construction showing that the shadow-flicker impacts will not exceed 30 hours per year at any nonparticipating receptor, and (2) Firelands’ ability to employ mitigating measures to maintain shadow flicker within the permissible limit.<sup>18</sup> The residents contended that because Firelands’ study did not show compliance with the administrative-rule shadow-flicker standard, the Board should not have approved the project.

The residents argued that allowing Firelands to submit a post-certification study violates their right to participate in the review process and divests the board of its nondelegable duty under R.C. 4906.10(A) to make required findings.<sup>19</sup> The Court disagreed, stating the applicable administrative rule requires only that an applicant design the facility “to avoid unreasonable adverse shadow flicker effect” and that “the facility \* \* \* be operated so that shadow flicker levels do not exceed thirty hours per year at any” nonparticipating receptor. (Emphasis added).<sup>20</sup> Thus, the Court concluded the Board acted lawfully when it conditioned its approval on Firelands’ submission of a study showing that the shadow-flicker requirements would be met.

### 3. Sound

The residents argued the sound assessment was unlawful and failed to comply with Ohio Adm.Code 4906-4-09(F)(2), which establishes the maximum increase in nighttime average sound levels for areas surrounding the project. The residents contended the sound assessment did not comply with the rule since two sound monitors (out of nine) were installed just outside of the project area and were not representative of the sound level in the project area.

The Court disagreed. After interpreting Ohio Adm.Code 4906-4-09(F)(2) and pointing out the rule does not specify how to calculate nighttime average sound levels, the Court found the Board did not act unlawfully since the rule did not require the Board to adopt a specific methodology for performing sound assessments.<sup>21</sup>

### 4. Evaluation of Impact on Water Supplies

The residents argued that Board erred by failing to require Firelands to conduct a hydrogeological study at each turbine site rather than the geotechnical survey provided in support of the application. The Court, looking to the language of the administrative rule and the geotechnical report provided in the application determined that the residents failed to show that the Board violated its obligations to determine the nature

<sup>17</sup>“Shadow flicker” refers to the moving shadows that a wind turbine casts on a building when the turbine is between the sun and the structure.

<sup>18</sup>*Id.* at 42.

<sup>19</sup>*Id.* at 48.

<sup>20</sup>*Id.* at 33.

<sup>21</sup>*Id.* at ¶ 37.

of the probable environmental impact of the project and that the facility represents the minimum adverse environmental impact under R.C. 4906.10(A)(2) and (3).

Dickinson Wright attorneys Christine M.T. Pirik, Matt McDonnell, Terrence O'Donnell, and Jon Secrest represented Firelands Wind through the siting and litigation phases of the project. Jon delivered oral argument at the Ohio Supreme Court for the firm's client.

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