



3. Blue Creek develops and operates renewable energy projects, including over 60 projects in the United States, in 18 different states, including Ohio.

4. ODNR is a regulatory body of the State of Ohio organized pursuant to Ohio Revised Code § 1501.01 *et seq.*

5. OPSB is a board organization within the Public Utilities Commission of Ohio pursuant to Ohio Revised Code § 4906.02 and Ohio Administrative Code Chapter 4906-1 *et seq.*

### **JURISDICTION AND VENUE**

6. This Court has subject matter jurisdiction over Defendants pursuant to Ohio Revised Code § 2305.01.

7. This Court has general personal jurisdiction over Defendants.

8. Venue is proper in this Court pursuant to Ohio Civil Rule 3(B)(3) because the Defendants' activities in this case occurred within Franklin County.

### **THE BLUE CREEK WIND PROJECT**

6. In late 2006 and early 2007, predecessor companies of Blue Creek began to explore development of the Blue Creek Wind Farm in Van Wert County and Paulding County, Ohio as well as Allen County, Indiana (referred to herein as the "Wind Project"). As part of that process, Blue Creek conducted extensive environmental studies and coordinated with the Ohio Power Siting Board ("OPSB").

7. Following extensive environmental studies and coordination with the OPSB, Blue Creek received a Certificate of Environmental Compatibility and Public Need (the "Certificate") from the OPSB in 2010. The Certificate authorized Blue Creek to begin construction of the Wind Project. OPSB Case No. 09-1066-EL-BGN (Opinion, Order & Certificate, dated August 23, 2010).

8. By reviewing the appropriate information and subsequently granting Blue Creek the Certificate, the OPSB found that no significant impact was expected to bird species as a result of the Wind Project, and that the Wind Project represented the minimum adverse environmental impact.

9. The Wind Project is located in Van Wert County and Paulding County, Ohio.

10. The area of the Wind Project is approximately 80 square miles (the “Project Area”), but the footprint of the wind turbines on the land is less than one acre each.

11. Over 95% of the Project Area is agricultural, and it does not contain any unique wildlife areas or habitats of any species that are either listed or recommended for listing pursuant to the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* Further, the Project Area contains no Audubon Important Bird Areas (IBAs).

12. The Project Area was carefully sited and constructed in agricultural fields to avoid breeding birds, forested areas, larger woodlots, and impacts to wetlands and waters of the state. ODNR asked Blue Creek to design the facility under certain parameters to further minimize wildlife risk, and Blue Creek granted every such request, including: a one-half mile setback from a Blue Heron rookery northwest of the site; allowing no machinery staging or operation within the setback during the breeding season of February 1 through July 1; a 500-meter setback from certain large woodlots identified by ODNR; and a 800-foot setback from smaller forested areas.

13. Commercial operations began at the Wind Project in June 2012.

14. Currently, approximately 25% of the Ohio State University’s Columbus, Ohio campus is powered by energy supplied by the Wind Project. The Wind Project provides additional power to American Municipal Power, Inc. (AMP) and First Energy Corp. (First Energy).

15. The amount of power provided by the Wind Project is equivalent to the amount needed to power approximately 76,000 homes annually, and avoids the consumption of 408 million gallons of water per year. Moreover, as compared to other power sources, the Wind Project offsets carbon dioxide emissions by approximately 1.6 billion pounds per year—the equivalent to planting an estimated 138,000 acres of trees, taking 114,000 cars off the road, or reducing consumption of oil by over 2.1 million barrels for the same one-year period.

### **OHIO'S WIND POWER INDUSTRY**

16. The geographic area including and immediately surrounding the Wind Project is an extremely competitive real property market for wind energy developers. This is due to several factors, including: high average wind speeds; access to high voltage interstate transmission lines; flat topography; favorable soil conditions; low wildlife impacts; and low wetlands and other environmental impacts.

17. Blue Creek itself is developing another wind project, the Dog Creek Wind Farm, in the immediate vicinity of the Wind Project, immediately east of the Wind Project.

18. Blue Creek is actively seeking to develop other wind energy projects in Ohio as well, including a project about 40 miles northeast of the Wind Project in Putnam County.

19. Because of these favorable conditions, several of Blue Creek's competitors are also developing wind energy projects in the immediate vicinity of the Wind Project.

20. EDP Renewables operates the Timber Road II Wind Farm approximately one mile west of the Wind Project boundary, and EDP Renewables has announced further plans to complete permitting and construct the Timber Road I Wind Farm and Timber Road III Wind Farm approximately eight miles north of the Wind Project.

21. In addition, Northwest Ohio Wind Energy, LLC (now Trishe Wind Ohio, LLC) holds an OPSB certificate (*see* OPSB Case No. 13-197-EL-BGN) and has commenced limited construction on its facility, which is immediately north of the Wind Project.

22. Finally, Apex Clean Energy has announced plans to construct their Long Prairie Wind Farm approximately ten miles south of the Wind Project.

23. Across the State of Ohio, there are at least nine other wind farms that are in the process of becoming operational (collectively referred to herein as “Competitor Projects”).

24. While the Wind Project has been operational since June 2012, the Timber Road II Wind Farm is the only other operational wind farm of all the Competitor Projects.

25. Blue Creek and the Competitor Projects operate in close proximity.

26. Other energy companies actively compete with Blue Creek to develop these nearby wind sites.

27. Specifically, other energy companies actively compete with Blue Creek to lease and maintain wind rights, development rights, and development assets as they relate to these nearby sites.

28. Further, other energy companies develop their projects to actively compete with Blue Creek to sell energy and Renewable Energy Credits (RECs) to potential customers. Energy and REC sale agreements are typically entered into before a project is even built.

**POST-CONSTRUCTION MONITORING (“PCM”)**

29. Following commencement of commercial operations in June 2012, from April 1 through November 15, in the calendar years 2012 and 2013, Blue Creek carried out extensive bird and bat monitoring protocol, pursuant to specific cooperation and guidance from ODNR, commonly called “Post-Construction Monitoring” (“PCM”).

30. As coordinated through and approved by ODNR, PCM for the Wind Project included standardized carcass searches of selected turbines, searcher efficiency trials, carcass removal trials, and acoustic bat monitoring.

31. The Wind Project PCM was the most rigorous and intensive monitoring Blue Creek has completed.

32. Blue Creek completed this PCM for 2012 and 2013 at total costs approaching two million dollars (\$2,000,000.00).

33. As a result of these extensive monitoring efforts, Blue Creek gathered data and developed two confidential reports: (1) "Post-Construction Fatality Surveys, Blue Creek Wind Farm, Van Wert County, Ohio, April-November 2012," dated January 2013 (the "2013 Report"); and (2) "Post-Construction Fatality Surveys, Blue Creek Wind Farm, Van Wert County, Ohio, April-November 2013," dated January 31, 2014 (the "2014 Report").

34. The 2013 Report and 2014 Report summarize Blue Creek's methodology in conducting PCM at the Wind Project.

35. More specifically, the 2013 Report and the 2014 Report, together with the underlying PCM data, contain the results of studies, data compilations and assessments, and other proprietary information.

36. While the 2013 and 2014 Reports followed the methodology required by ODNR as described in their *On-Shore Bird and Bat Pre- and Post-Construction Monitoring Protocol for Commercial Wind Energy Facilities in Ohio* (dated May 4, 2009, and as amended), all PCM data collected, and analysis of that data, as implemented and executed at the Wind Project, as well as other proprietary information submitted to ODNR, constitute confidential and protected information (hereafter, "the Protected Information").

37. Per permit requirements, Blue Creek submitted information, including Protected Information, to ODNR, the Public Utilities Commission of Ohio (“PUCO”), and the United States Fish and Wildlife Service (“USFWS”). Blue Creek emphasized that the submissions contained confidential trade secret-protected information, and asked that the Protected Information be protected and kept confidential as trade secrets.

38. If the Protected Information is disclosed, Blue Creek’s competitors could benefit from a reduction in the monitoring effort required at their Competitor Projects.

39. The Protected Information would be extremely valuable to any competitor of Blue Creek, and if disclosed, would be available without any expenditure or effort on their part.

40. Blue Creek’s commercial success as a business depends on protection of its lawful trade secrets.

#### **BLACK SWAMP’S FOIA REQUEST**

41. On or about June 27, 2013, Black Swamp Bird Observatory (“Black Swamp”), a birding organization based in Oak Harbor, Ohio, submitted a Freedom of Information Act (“FOIA”) request to the USFWS requesting “the post-construction monitoring report produced for the first year of monitoring at the Blue Creek Wind Farm Paulding County, Ohio that was submitted to USFWS and ODNR.”

42. On March 3, 2014, Black Swamp modified its request to further request “all post-construction monitoring reports that have been submitted for this project.”

43. By correspondence dated February 25, 2014, the USFWS offered Blue Creek the opportunity to comment on Black Swamp’s FOIA request, noting Blue Creek’s request that the 2013 Report be treated as confidential and withheld under FOIA Exemption 4.

44. On March 17, 2014, Blue Creek sent correspondence to the USFWS in which it re-asserted that the 2013 Report and the 2014 Report were submitted to the USFWS voluntarily and with express requests for confidential treatment pursuant to Exemption 4 (for “trade secrets”). Blue Creek provided justification for why the 2013 Report and the 2014 Report are privileged and confidential, constituting commercial information and trade secrets, and notified the USFWS that it objected to the release of the 2013 Report and the 2014 Report, or any portions thereof.

45. The USFWS agreed with Blue Creek. On August 20, 2014, the USFWS notified Black Swamp that the PCM reports that it requested were being withheld from disclosure pursuant to FOIA Exemption 4, which allows an agency to withhold from public disclosure trade secrets and commercial or financial information that is privileged or confidential.

46. Neither Black Swamp nor any other entity appealed the USFWS’s decision denying Black Swamp’s FOIA request.

**BLACK SWAMP’S OHIO PUBLIC RECORDS REQUEST**

47. On July 8, 2014, Black Swamp sent a public records request by email to the ODNR, requesting “bird survey data from Iberdrola Renewable’s Blue Creek Wind Farm in Tully, Union, and Hoaglin Townships of Van Wert County, Ohio, and Benton, Blue Creek, and Latty Townships of Paulding County, Ohio.”

48. Black Swamp submitted an identical request to the OPSB.

49. At ODNR’s request, Blue Creek provided a detailed factual and legal analysis outlining precisely why Blue Creek’s bird survey data is exempt from Ohio’s public records law due to the trade secret exemption. Blue Creek also forwarded ODNR its correspondence with the USFWS regarding Black Swamp’s FOIA request.

50. In response on September 3, 2014, ODNR informed Blue Creek that it did not find that the requested “bird survey data” qualified for the trade secret exemption.

51. Blue Creek voluntarily agreed to work with Black Swamp and share information not protected by trade secrets law in order to satisfy Black Swamp’s public records request, as described in the section below entitled “Blue Creek’s Meeting with Black Swamp”.

**BLUE CREEK’S MEETING WITH BLACK SWAMP**

52. Blue Creek, in an attempt to provide Black Swamp with additional information about the Wind Project, met with Black Swamp and ODNR on January 7, 2015 at the Wind Project.

53. The agreed objective was to discuss Black Swamp’s request for information and for Blue Creek to voluntarily provide Blue Creek and ODNR with information about PCM at the Wind Project.

54. In particular, Black Swamp requested the methodology Blue Creek employed when conducting its PCM.

55. In the meeting, Blue Creek described that the methodology employed followed ODNR’s published methodology on PCM, and was explicitly approved by ODNR. Blue Creek’s presentation included a PowerPoint presentation.

56. Then, on March 12, 2015, Blue Creek provided the methodology regarding the PCM, in the form of redacted portions of the 2014 Report, which was clearly marked as “**Confidential and Privileged Trade Secret and Commercial Information.**”

**WITHOUT A COURT ORDER, ODNR INTENDS TO DISCLOSE  
THE PROTECTED INFORMATION**

57. On March 18, 2016, ODNR informed Blue Creek that Black Swamp sought to obtain the remainder of the information from ODNR that it had not voluntarily obtained from

Blue Creek, and that ODNR would release the requested information absent a court order enjoining such release.

58. Accordingly, absent an order from the Court enjoining ODNR and OPSB from releasing these records, Blue Creek's highly confidential and valuable trade secrets will forever be released to the public—including to Blue Creek's competitors.

**COUNT I**  
**DECLARATORY JUDGMENT**

59. Blue Creek incorporates by reference the preceding paragraphs as if fully restated herein.

60. Ohio Rev. Code § 149.53 sets forth the definition of a public record as “records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units . . . .”

61. However, there are several exceptions to the definition of public record in R.C. 149.43. Specifically, R.C. 149.43 states that the definition of public record does not include “records the release of which is prohibited by state or federal law.”

62. Trade secrets are prohibited from disclosure under the “state or federal law” exemption of R.C. 149.43.

63. Blue Creek's Protected Information is subject to protection as a trade secret under R.C. 1333.61 *et seq.*, Ohio's Trade Secrets Act.

64. Blue Creek has taken beyond reasonable precautions to ensure the Protected Information is kept secret.

65. Blue Creek derives independent economic value from maintaining the Protected Information secret.

66. Blue Creek seeks a declaratory judgment from the Court that the Protected Information is a valid trade secret under Ohio's Trade Secrets Act and therefore exempt from public records requests under R.C. 149.43.

**COUNT II**  
**INJUNCTIVE RELIEF**

67. Blue Creek incorporates by reference the preceding paragraphs as if fully restated herein.

68. As alleged above, the Protected Information is a valid trade secret under Ohio's Trade Secrets Act and is exempt from public records requests under R.C. 149.43.

69. Absent an order from this Court, ODNR has threatened to release the Protected Information pursuant to Black Swamp's public records request.

70. Disclosure of the Protected Information would inflict immediate and irreparable injury on Blue Creek.

71. There is no adequate remedy at law for the harm that would be caused by the disclosure of the Protected Information.

72. Unless coupled with injunctive relief, declaratory relief alone will not be adequate to ensure ODNR and OPSB do not release the Protected Information.

73. The public interest will be served by issuance of injunctive relief.

74. Accordingly, Blue Creek prays for an entry of temporary, preliminary, and permanent injunctive relief prohibiting the Defendants, ODNR and OPSB, from releasing the Protected Information.

WHEREFORE, Blue Creek prays for judgment against ODNR and OPSB accordingly:

A. As to Count I, a declaration that the Protected Information is confidential trade secrets under R.C. 1333.61, exempt from disclosure under R.C. 149.43.

B. As to Count II, temporary, preliminary, and permanent injunctive relief prohibiting ODNR and OPSB from releasing the Protected Information pursuant to Black Swamp's public records request.

C. For all such further legal and equitable relief to which Blue Creek may be shown to be entitled to at trial.

Respectfully submitted,

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