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## **PETITION TO IMMEDIATELY SUSPEND, REVIEW AND REVOKE FEDERAL AUTHORIZATIONS AND ONGOING PERMITTING PROCESSES IN CONNECTION WITH THE ALLE-CATT WIND PROJECT IN WESTERN NEW YORK AND TO ADDRESS CONSTITUTIONAL ISSUES**

Dear Attorney General Bondi, Secretaries Wright and Burgum, Administrators Zeldin and Rocheleau, and Biologist Leput and Physical Scientist Rowley:

On behalf of the Coalition of Concerned Citizens, an active party in the state siting proceeding reviewing this wind farm proposal, we hereby submit this letter Petition requesting that your respective agencies take immediate steps to suspend all preexisting authorizations, and to halt all ongoing federal approvals and permitting processes. We request such action pursuant to President Trump's Executive Order, "Temporary Withdrawal of All Areas on the Outer Continental Shelf from Offshore Wind Leasing and Review of the Federal Government's Leasing and Permitting Practices for Wind Projects" ("Executive Order on Wind Projects"), § 2(a) (January 20, 2025),<sup>1</sup> and "Unleashing American Energy" ("Executive Order on Energy"), §§ 2, 3 and 7 (January 20, 2025).<sup>2</sup> Under Section 2(d) of the Executive Order on Wind Projects, the U.S. Attorney General may "seek other appropriate relief consistent with this order". Accordingly, we also request that Attorney General Bondi take appropriate steps to address constitutional violations presented by New York's conditional approval of the project.

This matter is timely, requiring your immediate attention, because Alle-Catt, a subsidiary of Chicago-based renewable energy giant Invenergy, has not obtained approval from the State of New York to commence construction of wind turbine pads or wind turbines.<sup>3</sup>

As explained in more detail below, the project would result in serious harm to the regional environment and to *rural residents* forced to host it, and its costs cannot be justified based on its own stated need and purpose. The project would be the largest wind farm in the state of New York if it is built: Alle-Catt requires 30,000 acres of private leaseholds and its project area would be about 100 square miles. The project must also connect to the nearest utility substation by means of a newly constructed 75-foot-wide nine-mile transmission corridor from the project area, through mostly forested land.

**This letter Petition requests relief with regard to the following federal approvals or permits:**

1. Federal Aviation Administration “No Hazard” Determinations (83 wind turbines)
2. U.S. Fish and Wildlife Service approval for the taking of protected wildlife (*cf.* 2023-0037807)
3. U.S. Army Corps of Engineers Clean Water Act Section 404 Permit (LRB-2021-00420)

The impacts discussed in the next Section were found in the course of the state proceeding but have been disregarded by the Siting Board. This disregard has been explicitly justified in the name of an ideologically driven but physically impossible state energy policy seeking 70% of the state’s electricity from renewable energy projects like this one by the year 2030, and 100% of the state’s electricity from “zero emissions” sources, including 85% renewables by 2040.<sup>4</sup>

## ENVIRONMENTAL IMPACTS

Alle-Catt proposes to site 83 turbines in the heavily forested area of western New York towns of Arcade, Centerville, Rushford, Farmersville and Freedom, across Wyoming, Allegany and Cattaraugus counties. Each turbine would have a maximum tip height of 591 feet and maximum blade diameter of 518 feet. The project would require 82 miles of access roads, and eleven additional non-generating towers, including a 100-foot microwave communication tower, three aircraft detection towers up to 125 feet in height, and seven 98.5-foot tall towers to detect the presence of eagles.<sup>5</sup>

The hearing examiners in the state siting proceeding found that between 480 and 515 birds will be killed annually, (RD, 55-56, 75, 84); at least 41 Bald Eagles will be killed over 30 years, attributed to one active nest within the project area, and there are “six other active breeding nests in close proximity”, (*id.*, 72-73); the endangered Northern Long-Eared Bat will be killed, (*id.*, 58-59, 65); 688 acres of forested bat habitat would be cleared, and even Invenergy acknowledged that local bat populations will not survive the mortality rate;<sup>6</sup> the project would clear-cut 1,550 acres of interior forest, (RD, 25-26, 29); and another 1,686 acres of unbroken forest would be fragmented with interconnection lines and access roads, (*id.*, 25).<sup>7</sup> The Siting Board did not dispute these findings.<sup>8</sup>

The Siting Board disregarded the impacts Alle-Catt can be expected to have on the Amish in Freedom and Farmersville. My expert on the Amish from Elizabethtown College, Pennsylvania

testified that the 22-family community will migrate out *en masse* if the project is built.<sup>9</sup> A Constitutional religious infringement claim was brought to New York’s highest court, which declined to hear the claim “upon the ground that no substantial constitutional question is directly involved”.<sup>10</sup>

The Siting Board also disregarded testimony by a state Department of Health (DOH) research scientist. New York noise policy classifies a 10 decibel increase over the pre-existing sound level in a community from a new noise source as intrusive, and 20 decibels as very intrusive to intolerable.<sup>11</sup> The Coalition submitted background sound studies conducted in five rural communities in western New York showing that the pre-existing sound levels are about 25 dBA, and lower at night.<sup>12</sup> However, the Siting Board allowed 45 dBA (Leq, or average) of wind turbine noise.

DOH testified that wind turbines generate over 100 decibels of noise, and “health-related effects of audible noise include annoyance, sleep disturbance, cognitive performance reduction, effects on social behavior, cardiovascular effects, and psycho-physiological effects (e.g., noise induced stress reaction)” unless properly regulated.<sup>13</sup> DOH recommended a regulatory limit of 45 dBA Lden (or 39-40 dBA average), and the Department of Public Service recommended 42 dBA average.<sup>14</sup>

Alle-Catt’s project manager (a non-expert) testified that “[t]he global warming crisis” calls for projects that “meet New York’s clean energy goals” to be accommodated with a 45 dBA average limit, even though DOH’s health-protective recommendation “may be technologically achievable.”<sup>15</sup> The Siting Board credited his testimony and ordered the noise limit Alle-Catt requested.<sup>16</sup>

Finally, the Siting Board disregarded uncontested evidence from my energy systems expert, that continued siting of large-scale intermittent wind energy facilities in New York progressively destabilizes the grid and cannot deliver electricity to the downstate metropolitan New York City region—where electricity is only 9% carbon-free—without massive investments in new transmission capacity.<sup>17</sup> The Board agreed but speculated that Alle-Catt’s electricity generation will be transported downstate “in the future”. The Board concluded that the project proposal is “consistent with the State’s energy policy and planning objectives.”<sup>18</sup>

## COSTS ASSOCIATED WITH THE INTERMITTENT GENERATION OF ELECTRICITY

Under Section 2(a) of the Executive Order on Wind Projects federal agencies must “consider the economic costs associated with the intermittent generation of electricity and the effect of subsidies on the viability of the wind industry.” In addition, under Section 7 of the Executive Order on Energy, “[a]ll agencies shall immediately pause the disbursement of funds appropriated through the [Inflation Reduction Act]”.

The U.S. Treasury’s fiscal year 2026 report puts the 10-year cost of renewable energy tax credits under the IRA at \$421 billion, a nearly 7-fold increase since 2021, the year before the IRA became law. This compares to \$23.5 billion in tax credits for all hydrocarbons during the same period.<sup>19</sup> The IRA allows these credits to be monetized and transferred to unrelated entities, providing Alle-Catt with over \$600 million over the life of the project.<sup>20</sup>

Additional state and local costs of the Alle-Catt proposal should be considered. The project

would be spread across three rural counties and Alle-Catt has obtained sales tax and mortgage recording tax breaks and property tax abatement from two of these county’s industrial development authorities. In Cattaraugus County, Alle-Catt is seeking financial assistance in the amount of \$51.7 million in return for creating no more than 10 permanent part-time and full-time jobs—that is, an average of \$4.3 million in foregone tax revenue for each job.<sup>21</sup>

Although difficult to quantify, modifications to the state’s electric system that would not be needed but for projects like Alle-Catt require substantial additional costs. The state’s independent grid operator has found that large-scale renewables operate within several transmission-constrained “pockets” that occur between western New York and New York City, preventing renewable energy generated upstate from reaching the City.<sup>22</sup> Because they remain bottled upstate for the foreseeable future, NYSIO has had to double the rate that it orders wind projects to curtail operations in order to avoid overloading the system.<sup>23</sup> Thus, to utilize Alle-Catt’s intermittent energy outside western New York, where electricity is today 91% carbon-free owing to nuclear and hydropower, will require costly system changes.

## SPECIFIC FEDERAL PERMITS AND APPROVALS REQUESTED FOR SUSPENSION, REVIEW AND REVOCATION

### 1. Federal Aviation Administration (FAA) “No Hazard” Determinations for wind turbines

On March 10, 2023 FAA issued notices to Alle-Catt that “No Hazard” Determinations for 83 individual wind turbine sites “will expire on 09/10/2024 unless otherwise extended, revised, or terminated by this office.”<sup>24</sup> None of these determinations have been extended or revised. Accordingly, “No Hazard” Determinations have expired for Alle-Catt’s wind turbines.

Under the Executive Order on Wind Projects, Section 2(a), President Trump directs “the heads of all” federal agencies not to “issue new or *renewed approvals* . . . for onshore or offshore wind projects pending the completion of a comprehensive assessment and review of Federal wind . . . permitting practices.”

### 2. U.S. Fish and Wildlife Service (USFWS) approvals for the taking of federally protected wildlife

The Northern Long-eared Bat (*Myotis septentrionalis*) (NLEB) listed as endangered under Endangered Species Act (ESA), occurs within the Alle-Catt project area and is on the verge of extinction.<sup>25</sup>

The Bald Eagle, protected under the Bald and Golden Eagle Protection Act and the Migratory Bird Act, occurs within the Alle-Catt project area. The Project area is a USFWS Category 1 - High Mortality Risk to Eagles.<sup>26</sup> One nest would be surrounded by five wind turbines one mile or less from the nest, resulting in the taking of 41 Bald Eagles during the projected 30-year life of the project.<sup>27</sup>

To mitigate the loss of 41 Bald Eagles, and another 41 eagles at a second Invenergy wind project in the region, the Siting Board approved a compensatory mitigation proposal under which Invenergy would make a payment of \$1,997,000.00 to a wildlife hospital at Cornell University.<sup>28</sup> However, the mitigation plan makes no provision for developing or protecting Bald Eagle habitat,

nor does it estimate how many rehabilitated eagles are likely to be returned to the wild.<sup>29</sup>

There is no indication that USFWS has ever considered Alle-Catt’s proposed taking of protected wildlife species.<sup>30</sup>

Pursuant to the Executive Order on Wind Projects, USFWS has ceased to issue permits for the incidental taking of eagles for wind energy facilities.<sup>31</sup> In light of the absence of any consultation with USFWS regarding Alle-Catt’s projected takings of protected wildlife species, USFWS should suspend the state Siting Board’s approval for the takings.<sup>32</sup>

### 3. Clean Water Act Section 404 Permit (U.S. Army Corps of Engineers, Project No. LRB-2021-00420)<sup>33</sup>

On November 14, 2024, the U.S. Army Corps of Engineers, Buffalo District, (USACE), issued a conditional Section 404 Permit for the proposed Alle-Catt project. The Section 404 Permit may be suspended and revoked where significant new information surfaces that was not considered in reaching the original public interest decision “at the request of . . . a third party”.<sup>34</sup>

Because the Alle-Catt project proposal is not dependent on access to wetlands and streams—it is not “water dependent”—the Army Corps was required to deny a permit under NEPA and the U.S. Environmental Protection Agency’s Clean Water Act Section 404 (b)(1) Guidelines.<sup>35</sup> According to the Army Corps’ *Alternatives Analysis Framework*, “[u]nder NEPA, the Corps must evaluate a ‘no action’ alternative”, which results from project modification that fully avoids stream and wetlands impacts—thus obviating the need for a permit—or from the Corps’ denial of the Section 404 permit.<sup>36</sup> The *Framework* clarifies that an applicant’s self-serving description of need precludes permitting where the description is so narrow as to preclude alternatives, or where the described need is speculative.<sup>37</sup> Both grounds for permit denial are present here, as Alle-Catt stated that no alternative sites exist that would advance New York’s renewable energy policy, but as noted above, the project’s energy cannot be utilized downstate and is not needed in upstate New York.

Purpose and need for a project must be in the public interest to support issuance of a Section 404 permit.<sup>38</sup> Here, the project purpose—to contribute to New York’s “clean energy” goals—is clearly inconsistent with the Executive Orders invoked in this letter Petition. Accordingly, the Army Corp should immediately suspend Alle-Catt’s Section 404 Permit and, upon review, revoke the Permit.

## CONSTITUTIONAL ISSUES

In the absence of a “compelling” governmental interest, the Constitution’s Free Exercise Clause protects citizens’ right to practice their religion as they please. U.S. Const. § 1. Here, the state Siting Board’s interest in ignoring the right to practice the Amish religion, discussed previously, is based on a speculative and ideologically motivated interest in achieving a “net zero” electric system, which falls far short of a compelling governmental interest.

The 14th Amendment to the Constitution provides that no state can “deny to any person within its jurisdiction the equal protection of the laws.” Here, although they are similarly-situated residents, the state Siting Board ordered different health-based standards for any “participant

residence”, defined as a residence whose owner contracted with Alle-Catt, compared to a “non-participant residence”, defined as a residence whose owner did not so contract.<sup>39</sup> Thus, the Siting Board allows any participant residence to be exposed to up to 55 dBA of wind turbine noise, compared to 45 dBA for a non-participant residence,<sup>40</sup> and unlimited exposure to shadow flicker, compared to 30 hours per year allowed for “non-participants”.<sup>41</sup> Differentiating residents by their contract status lacks any rational basis, and the state Siting Board offered none.<sup>42</sup>

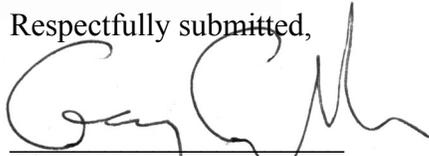
Under the 5th Amendment to the Constitution, adjacent property owners’ ability to command setback distances for neighboring property by ordinance is an unconstitutional delegation to private parties.<sup>43</sup>

The Coalition urges Attorney General Bondi to pursue these Constitutional claims, in an appropriate federal court, to enjoin New York State and its agencies from finally approving the Alle-Catt project, and to consider similar action to enjoin New York from advancing any wind farms.

## CONCLUSION

Alle-Catt would cause the “grave harm” to wildlife;<sup>44</sup> would impose “economic costs” that cannot be justified by providing “intermittent energy”, including the need for staggering subsidies to ensure “the viability of the wind industry”,<sup>45</sup> such as “funds appropriated through the Inflation Reduction Act of 2022”,<sup>46</sup> and is “unduly burdensome” on reliable “domestic energy resources” including low-emissions natural gas and nuclear power.<sup>47</sup> Under the Executive Orders, and for the reasons provided in this letter Petition, you should take immediate action to ensure that the Alle-Catt project is not built.

Respectfully submitted,



Gary A. Abraham, Esq.

*Attorney for the Coalition of Concerned Citizens*

gaa/  
cc: client

- 1 Available at <<https://www.whitehouse.gov/presidential-actions/2025/01/temporary-withdrawal-of-all-areas-on-the-outer-continental-shelf-from-offshore-wind-leasing-and-review-of-the-federal-governments-leasing-and-permitting-practices-for-wind-projects/>>.
- 2 Available at <<https://www.whitehouse.gov/presidential-actions/2025/01/unleashing-american-energy/>>.
- 3 See NY PSC Case 17-F-0282, *Application of Alle-Catt Wind Energy LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for a Proposed Wind Energy Project, Located in Allegany, Cattaraugus, and Wyoming Counties, New York, in the Towns of Arcade, Centerville, Farmersville, Freedom, and Rushford*. The most recent Order in the state proceeding (discussed further below) provides: “A Full Construction ‘Notice to Proceed’ will not be issued until the Final Decommissioning Plan, as required by . . . the compliance filings on noise, as required by Certificate Condition 68, are approved by the Commission.” *Id.*, Order Approving Multiple Compliance Filings Subject to Conditions (December 24, 2024), 36, Condition 20. To date the compliance filings on noise, requiring a demonstration that project will not expose nearby residents to excessive noise, have not been approved. The e-docket for this case is readily available by searching “NY PSC 17-F-0282”.
- 4 NY PSC Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and Clean Energy Standard*, Order Adopting Modifications to the Clean Energy Standard (October 15, 2020).
- 5 NY PSC Case 17-F-0282, Application of Alle-Catt Wind Energy LLC, Alle-Catt “Certificate Amendment Overview”, filed January 30, 2023.
- 6 *Id.*, Application Exhibit 22 (“Terrestrial Ecology and Wetlands”) (December 18, 2018), 26.
- 7 *Id.*, Recommended Decision of the Hearing Examiners (February 27, 2020), 25, cited as “RD”.
- 8 *Id.*, Order Granting Certificate, 4 and *passim*.
- 9 The Amish migrated to the area 20 years ago to escape suburbanization in Ohio. Their religious beliefs require that they live away from industrial influences, and they will not tolerate the industrialization of their community with 600-foot-high wind turbines. See *id.*, Direct Testimony of Stephen M. Nolt, Ph.D (October 7, 2019); Rebuttal Testimony of Stephen M. Nolt, Ph.D (November 1, 2019). The hearing examiners ruled that the religious practices of the Amish are irrelevant, and they should be treated like anybody else. *Id.*, RD at 146-147. The Siting Board noted only that concerns about the Alle-Catt project’s impacts on the Amish were raised. *Id.*, Order Granting Certificate, 11.
- 10 *Coalition of Concerned Citizens and Dennis Gaffin, as its President v. New York State Board, on Electric Generation Siting and the Environment, and Alle-Catt Wind Energy LLC*, 182 N.E.3d 350, 37 N.Y.3d 1168, 161 N.Y.S.3d 654, 2022 N.Y. LEXIS 96, 2022 WL 402366 (February 10, 2022).
- 11 NYS Department of Environmental Conservation, “Assessing and Mitigating Noise Impacts” (2001), 15, available at <[https://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/noise2000.pdf](https://www.dec.ny.gov/docs/permits_ej_operations_pdf/noise2000.pdf)>.
- 12 PSC Case 17-F-0282, *Application of Alle-Catt Wind Energy LLC*, Direct Testimony of Richard R. James, INCE, (October 7, 2019), Exhibits 2 through 6.
- 13 *Id.*, Direct Testimony of Henry M. Spliethoff, DOH (November 26, 2019), 5:10-18.

- 14 *Id.*, 6:11-17 and *passim*. “[T]he Lden is an equivalent 1-year sound level where no penalty is added to the daytime hours, but 5 and 10 dBA penalties are added to the evening time and the nighttime periods respectively.” *Id.*, Testimony of Miguel Moreno-Caballero (NY Department of Public Service) (DPS), 52:9-13. DPS testified that 45 dBA Lden converts to “40 to 41 dBA short-term noise limits” and recommended “a short-term noise level of 42 dBA Leq 8-hour, because a 40 dBA limit would be unreasonably restrictive.” *Id.*, Testimony of Miguel Moreno-Caballero, 52:19-53:11.
- 15 *Id.*, Rebuttal Testimony of Eric Miller (November 1, 2019), 8.
- 16 *Id.*, Order Granting Certificate, Appendix A, Condition 68 (ordering a “design goal” of 45 dBA Leq 8-hour). As noted above in footnote 3, Alle-Catt has not demonstrated this is achievable.
- 17 *Id.*, Rebuttal Testimony of Thomas Kreutz (December 2, 2019); Statement in Lieu of Kreutz Testimony (October 4, 2019).
- 18 *Id.*, Order Granting Certificate, 81-84.
- 19 U.S. Department of the Treasury, “Tax Expenditure Budget for Fiscal Year 2026” (November 27, 2024), Table 1 (items 22 and 23 for renewables; items 9 through 20 for hydrocarbons), available at <https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2026.pdf>.
- 20 Under the IRA, the PTC is currently valued at 2.75 cents per kilowatt-hour of electricity generated, with the value adjusted annually for inflation. A functionally similar Clean Energy Production Tax Credit replaces the PTC after January 1, 2025. *See* U.S. EPA, “Summary of Inflation Reduction Act provisions related to renewable energy”, available at <https://www.epa.gov/green-power-markets/summary-inflation-reduction-act-provisions-related-renewable-energy> (citing Section 13701 of the IRA). The IRA also allows qualified renewable energy facilities “to directly monetize specific tax credits”, including the Clean Energy Production Tax Credit, by “transfer[ing] all or a portion of certain tax credits, including the ITC and PTC, to an unrelated party.” *Id. Cf.* Internal Revenue Code § 6417, enacted by IRA §§45, 45Y. Wind energy projects in New York have operated in the last few years within a range of 23-25% efficiency. *See* New York Independent System Operator (NYISO), “NYCA Renewables 2023”, at 9, available at <https://www.nyiso.com/documents/20142/29609937/2023-NYCA-Renewables-Presentation.pdf/b4b189e8-e213-baf1-9f81-ac425342a2ea>. At 2.75 cents per kWh, or \$27.50 per MWh, assuming a 25% annual capacity factor for Alle-Catt’s 340 MW design (340 MW X 0.25X 8,760 hrs./yr.), under the IRA Alle-Catt may monetize \$30,714,750 in tax credits per year, or \$614.25 million over the anticipated 30-year life of the project.
- 21 County of Cattaraugus Industrial Development Agency, “Notice of Public Hearing and Contemplated Deviation” (December 16, 2024), 2, available at <https://cattcoida.com/wp-content/uploads/2024/12/PH-Deviation-Letter-to-ATJ-Letter-re-Public-Hearing-Notice-Exhibits-Multi-Municipalities-Alle-Catt-4927-0937-2679-1.pdf>. Lesser amounts of financial assistance have been secured from the other two counties.
- 22 NYISO, *Power Trends 2022*, 40, available at <https://www.nyiso.com/-/power-trends-2022-annual-grid-and-markets-report>. Recently, NYISO reported optimism that these transmission constraints would soon be resolved, based largely on a proposal by the New York Power Authority (Invenergy was a partner) to build a new bulk transmission line from the Catskills to Queens, the Clean Path NY project. NYISO, “2023-2042 System & Resource Outlook” (July 23, 2024), 62, available at <https://www.nyiso.com/documents/20142/46037414/2023-2042-System-Resource-Outlook.pdf>. The line would originate about 180 miles east of the Alle-Catt project site, so it would not transport energy from western New York. However, late last year Clean Path NY’s REC contract was canceled and the project has been suspended indefinitely. PSC Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and Clean*

*Energy Standard*, Termination of CPNY Agreement for Procurement of Tier 4 Renewable Energy Certificates (November 27, 2024).

- 23 NYISO, *Power Trends 2024*, 47 (noting that annual curtailment orders jumped from 84 GWh in 2021 to 162 GWh in 2022 and 2023), available at <<https://www.nyiso.com/https://www.nyiso.com/power-trends>>.
- 24 PSC Case 17-F-0282, *Application of Alle-Catt Wind Energy LLC*, Alle-Catt, “FAA Information Filing Combined” (filed March 31, 2024) (reproducing 83 “No Hazard” determinations under Aeronautical Study Nos. 2019-WTE-159-OE through 2019-WTE-273-OE).
- 25 *Id.*, RD, 55-72. On November 29, 2022 USFWS reclassified the Northern Long-Eared Bat as endangered under the ESA, effective on March 31, 2023. 87 Fed.Reg. 73488 (November 30, 2022). “The bat faces extinction due to the range-wide impacts of white-nose syndrome, a deadly disease affecting cave-dwelling bats across the continent.” USFWS, “Northern Long-eared Bat”, available at <<https://www.fws.gov/species/northern-long-eared-bat-myotis-septentrionalis>>.
- 26 *Id.*, “Net Conservation Benefit Plan (NCBP) for Northern Long-Eared Bat (NLEB)” (May 24, 2023), Appendix C, “Post-Construction Avian and Bat Monitoring and Adaptive Management Plan”, 79-80.
- 27 *Id.*, RD, 73.
- 28 *Id.*, “Net Conservation Benefit Plan for the Bald Eagle (filed May 4, 2023), 6.
- 29 *Id.*, Coalition Comments (May 24, 2023), Attachment, Hickory Creek Consulting LLC, “Review of Proposed Mitigation for Bald Eagle Impacts, Net Conservation Benefit Plan Alle-Catt Wind Farm”, 5. It should be noted that U.S. EPA’s Clean Water Act Section 404 (b)(1) Guidelines, (40 CFR § 230), at pp. 5-6 provides: “Compensatory mitigation may *not* be used as a method to reduce environmental impacts in the evaluation of alternatives under the Guidelines. . . . Compensatory mitigation cannot be used to ‘buy down’ environmental impacts when determining the LEDPA [least environmentally damaging practicable alternative].” (emphasis in orig.).
- 30 *See* USFWS, Project 2023-0037807, “Record of project representative’s no effect determination for ‘Alle-Catt Wind Energy Permittee Responsible Mitigation’” (June 7, 2024).
- 31 *See* USFWS, “Eagle Incidental Take (General Permit)”, at <[https://fwsepermits.servicenowservices.com/fws?id=fws\\_kb\\_view&sys\\_id=63943c8edbb042900a66e46b13961966](https://fwsepermits.servicenowservices.com/fws?id=fws_kb_view&sys_id=63943c8edbb042900a66e46b13961966)>.
- 32 New York regulations (6 NYCRR Part 182) require avoidance and mitigation of the taking of protected wildlife species under a federal delegation, and were applied in the Article 10 proceeding.
- 33 On June 30, 2023, the Coalition submitted comments opposing this permit based on the environmental impacts discussed above, and on the purely speculative need for the project given the inability to utilize Alle-Catt’s electric output downstate where it is needed, as previously discussed, rather than upstate where it is not needed. These comments are incorporated as if fully set forth here.
- 34 33 CFR § 325.7(a). *Cf.* 33 CFR §§ 325.7(c), (d).
- 35 40 CFR Part 230.

- 36 *Framework*, 1, available at <[https://www.nwp.usace.army.mil/Portals/24/AlternativesAnalysisFrameworkenclosure\\_5-29-20.pdf](https://www.nwp.usace.army.mil/Portals/24/AlternativesAnalysisFrameworkenclosure_5-29-20.pdf)>.
- 37 *Id.*, 2-4.
- 38 *Id.*, 3 (“when appropriate, the Corps will revise the project purpose based on a public interest perspective”).
- 39 PSC Case 17-F-0282, *Application of Alle-Catt Wind Energy LLC*, Order Granting Certificate, Appendix A, Condition 7(b) (defining non-participant and participant residences).
- 40 *Id.*, Conditions 68(d)(v) and 72(a).
- 41 *Id.*, Condition 57. Shadow flicker is the annoying light-strobing caused by wind turbine blades moving when the sun rises or sets behind them. DOH testified in the Article 10 proceeding that “high annoyance” that results from exposure to shadow flicker for more than eight hours per day is a potential adverse health impact, extending more than a mile from wind turbines. DOH also testified that wind turbine noise is a potential adverse health impact. The Siting Board rejected this testimony.
- 42 It has long been held in this nation that contracts may not interfere with regulatory protections that “relate to the safety, health, morals and general welfare of the public”. *Lochner v. New York*, 198 U.S. 45, 53, 25 S. Ct. 539, 541, 1905 U.S. LEXIS 1153, \*13-14 (1905). See *PPM Atlantic Renewable v. Fayette County Zoning Hearing Board*, 93 A.3d 536, 2014 Pa. Commw. Unpub. LEXIS 311 (Pa. Commw. Ct. 2014) (allowing more lax height and setback requirements for “participants” compared to “non-participants” in a wind project project is an improper restriction on health, safety and welfare protections). Where “[t]here is no provision for review under the ordinance” and the neighbors’ determination as to land uses in the areas “is final . . . [and t]hey are not bound by any official duty, but are free to [act] for selfish reasons or arbitrarily and may subject [their neighbor] to their will or caprice”, . . . [t]he delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment.” *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122, 49 S. Ct. 50, 51, LEXIS 7, \*8 (1928) 122, 214, 8 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 366, 368; *Eubank v. Richmond*, 226 U.S. 137, 143 (1912); *Browning v. Hooper*, 269 U.S. 396 (1926). See also *Eastlake v. Forest City Ents., Inc.*, 426 U.S. 668, 677, 96 S.Ct. 2358 (1976) (it is unconstitutional for a city to delegate its “legislative power, originally given by the people to a legislative body, . . . to a narrow segment of the community, not to the people at large”); *Kenney v. Blackwell*, No. 99-3975, 2000 U.S. App. LEXIS 16205 (unpub. 6th Cir. 2000) (discussing the delegation doctrine).
- 43 *Eubank v. City of Richmond*, 226 U.S. 137, 143-144, (where an ordinance allows “[o]ne set of owners [to] determine not only the extent of use but the kind of use which another set of owners may make of their property . . . [,] conferring the power on some property holders to virtually control and dispose of the proper rights of others, [with] no standard by which the power thus given is to be exercised . . . , the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously.”).
- 44 Executive Order on Wind Projects, § 2(a).
- 45 *Id.*
- 46 Executive Order on Energy, § 7.
- 47 *Id.*, § 2(i).