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Hon. Pam Bondi, U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

PETITION UNDER APRIL 8, 2025 EXECUTIVE ORDER

Dear Attorney General Bondi:

On behalf of the Coalition of Concerned Citizens, an association of well over 100 landowners opposed to state siting approval for wind farms, please accept this letter Petition pursuant to President Trump's Executive Order, "Protecting American Energy From State Overreach" (April 8, 2025) (hereafter, the "EO"). We request that you seek preliminary and permanent injunctive relief in an appropriate federal court to halt the application and enforcement of New York's unconstitutional distinction between wind farm "project participants" and "non-participants". By contract with the developer, the former waive generally applicable setbacks and health and safety protections to facilitate the siting of wind farms. Their neighbors who have not agreed to waive these protections suffer the consequences. This differential treatment, (hereafter, the "Unconstitutional Distinction"), violates Section 1 of the 14th Amendment guaranteeing equal protection of the laws.

The Unconstitutional Distinction is applied pursuant to New York's police power and New York's policy to reduce "greenhouse gas" emissions, and to facilitate wind farms. The Unconstitutional Distinction has never been applied to other types of power plants. The Unconstitutional Distinction must be declared by a court to be unenforceable, (*see* (EO, sec. 2(a)), and is therefore the type of state law the EO directs you to "expeditiously . . . stop". EO, sec. 2(b).

This matter is timely, requiring your immediate attention, because proposals for commercial wind farms in New York are being fast-tracked in order to evade new federal policies based on energy realism. By seeking a federal court injunction against the application and enforcement of the Unconstitutional Distinction, your Office would be implementing Section 2(a) of the EO, which directs you to:

> identify all State and local laws, regulations, causes of action, policies, and practices (collectively, State laws) burdening the identification, development, siting, production, or use of domestic energy resources that are or may be unconstitutional . . . [and to] prioritize the identification of any such State laws purporting to address "climate change" or involving . . . "greenhouse gas" emissions . . .

BRIEF BACKGROUND

Wind energy developers in New York (and other states)[1] consistently site their projects by offering leases to property owners that require the property owner to waive restrictions in local or state law on wind turbine setbacks, noise and visual impacts, and otherwise agree not to oppose the proposed projects regardless of impacts that come to light later.[2] Using the Unconstitutional Distinction, New York siting regulations and practice enforce such private waivers.

Modern wind turbines generate highly annoying noise and light strobing ("shadow flicker") at distances over a mile. A "participating" lessor cannot contain these health and safety harms within his or her own property. A contract waiving protections from such harms necessarily imposes the same harms on "non-participating" neighbors, destroying the quiet use and enjoyment of their property. In addition to the destruction of landscapes, modern wind turbines emit pulsating low-frequency noises at over 100 decibels, requiring about one mile to degrade to the pre-existing sound level in a rural community (which is about 25 decibels). Rural residents are exposed to shadow flicker, caused by moving wind turbine blades interfering with sunrise and sunset, at distances of several miles. Excessive wind turbine noise and shadow flicker are serious public health harms.[3]

The Fourteenth Amendment, Section 1, prohibits governments from approving private landowner waivers of health and safety protections when those protections are afforded the public in the exercise of the state's police power.[4] 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."[5]

In 2019, then New York Governor Andrew Cuomo signed into law the Climate Leadership and Community Protection Act (CLCPA), which purports to reduce the "severity of current climate change and the threat of additional and more severe [climate] change", in alignment with the 2015 Paris Agreement "to limit global warming to no more than 2°C and ideally 1.5°C, and thus minimize the risk of severe impacts from climate change."[6] The CLCPA created Section 66-p of New York's Public Service Law (PSL), which directs the New York State Public Service Commission (PSC) to require electric utilities that serve "end-use customers in New York [S]tate" ("jurisdictional load serving entities") to secure adequate amounts of renewable energy to serve at least 70% of load in 2030 (the 2030 Target or "70 X 30" Target), and by 2040 to achieve zero emissions electricity statewide.[7] In addition, the CLCPA directs the establishment of programs to increase reliance on specific "renewable" technologies, including the deployment of 6 GW of photovoltaic solar generation by 2025, 3 GW of energy storage resources by 2030, and at least 9 GW of offshore wind by 2035.[8]

In 2020 the "CLCPA targets" of "70 X 30" and zero emissions by 2040 became the basis for the "Accelerated Renewable Energy Growth and Community Benefit Act", a new state siting program specifically for the approval of large-scale wind and solar projects.[9] This Act created the Office of Renewable Energy Siting (ORES), supplanting the previous power plant siting law, PSL Article 10.[10] Article 10 preempts local zoning and land use laws and requires a state Siting Board to apply local laws it determines are not "unreasonably burdensome" in light of the type of energy technology proposed.[11] The successor Act requires ORES to apply local laws unless they are

"unreasonably burdensome in light of the CLCPA targets".[12]

Differential treatment of "project participants" and "non-participants" is applied by both New York's Article 10 Siting Board (but only to wind energy projects) and by regulation, by ORES.[13] The Unconstitutional Distinction prohibits municipalities and residents from raising differential impacts as an issue for adjudication in an ORES proceeding.[14] Even if local laws provide reasonable uniform protections, they will be waived as "unreasonably burdensome" in light of state's renewable energy targets.[15] It is the intent of the Unconstitutional Distinction to accommodate the development of a checkerboard of "project participants" within a residential community of mostly "non-participants" by enforcing the participants' lease contracts at the expense of their neighbors. This amounts to constitutionally prohibited regulation of the public's health and safety by contract.[16]

CONCLUSION

Millions of acres of upstate rural land will be ruined in pursuit of New York's renewable energy goals and targets, and energy security and affordability will be eroded without action to stop the state's program. However the program is vulnerable to challenge on constitutional grounds because the siting of land-sprawling wind projects relies on the ability of "project participants"—who are agents of the wind energy developer—to vary by private contract the basic health and safety protections that should be generally applicable. This outcome is driven by "burdensome and ideologically motivated 'climate change' or energy policies that threaten American energy dominance and our economic and national security", (EO, sec. 1), an energy policy identified under the EO as "unconstitutional" and "unenforceable". EO, sec. 2(a).

Respectfully submitted,

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Attorney for the Coalition of Concerned Citizens

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cc: client

ENDNOTES

1 *See*, *e.g.*, Emmanuel, Curt, and Martin, Chad, Purdue Extension, *A Landowner's Guide to Commercial Wind Energy Contracts* (Purdue University Aug. 2012), available at <https://www.extension.purdue.edu/extmedia/ABE/RE-5-W.pdf>.

2 *See* Letter from M. Krista Barth, Esq., to Roger V. Barth (January 15, 2015), available at <http://lakeontarioturbines.com/PDF/20150115151216566.pdf>. In addition to land leases, wind farm developers obtain "good neighbor" agreements waiving health and safety regulations when their property is too close to infrastructure to comply with health and safety restrictions. For examples of such contracts requiring the lessor to "waive those Setback Restrictions and Noise Limitations" that would be "imposed by any local . . . laws, regulations and/or governmental approvals", or requiring a non-lessor in close proximity to wind farm infrastructure to "waive[] any all setbacks and setback requirements to [the landowner's] common boundary, whether imposed by applicable law or by any person or entity" can be found in the electronic docket, NY PSC Case 14-F-0490, *Application of Cassadaga Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to Construct a Wind Energy Project*, "Lind Memo of Lease 6-30-2015", ¶5; "Goot Memo of Lease 12-2-2010", 2 (both filed September 11, 2011).

3 Testimony of Henry M. Spleithoff, Research Scientist, New York State Department of Health (September 2019), submitted in 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*.

4 Where a law 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." *Eubank v. City of Richmond*, 226 U.S. 137, 143-144, 33 S. Ct. 76 (1912). Accordingly, adjacent property owners' ability to command set-back lines for neighboring property by ordinance violates due process as an unconstitutional delegation to private parties. *Id.* "Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others." *Jacobson v. Massachusetts*, 197 U.S. 11, 26, 25 S. Ct. 358, 361, 1905 U.S. LEXIS 1232, *28 (1905). *See also Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886); *Eastlake v. Forest City Ents., Inc.*, 426 U.S. 668, 677, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976) (it is unconstitutional for the government 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"); *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000) (an equal protection claim lies "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment"); *General Electric Co. v. N.Y. Dept. of Labor*, 936 F.2d 1448 (2d Cir. 1991); *Church v. Town of Islip*, 8 N.Y.2d 254, 259, 203 N.Y.S.2d 866, 869 (1960) ("All legislation 'by contract' is invalid in the sense that a Legislature cannot bargain away or sell its powers."); *In re N.Y., New Haven & Hartford R.R. Co.*, 98 N.Y.S.2d 353, 355, 1960 N.Y. Misc. LEXIS 3982, *2 (Westchester Co. 1960) (approval of land use changes "may not be delegated to neighboring property owners but must be considered by the local legislative body in the light of the relation of the change to the general welfare of the entire community. Otherwise power would be conferred upon a limited number of property owners to virtually control and dispose of the property rights of others"); Maryland PSC, Case 9413, *In the Matter of the Application of Dan's Mountain Wind Force, LLC for a Certificate of Public Convenience and Necessity to Construct a 59.5 MW Wind Energy Generating Facility in Allegany County, Maryland*, Proposed Order of the Public Utility Law Judge (January 25, 2017), 56-57, affirmed by Maryland PSC, Order No. 88260 (June 16, 2017), both available at <http://www.psc.state.md.us/electricity/> (search on Case Docket No. 9413) ("requiring compliance with the setback and separation distances in the WECS Ordinance for those property owners that are willing to agree to live in close proximity to a turbine is not reasonable"); *Leiper v. The Baltimore & Philadelphia Railroad Company*, 105 A. 551, 554, 262 Pa. 328, 335, 1918 Pa. LEXIS 646 (1913) (land contracts adversely affecting the "greater good resulting to the public at large" are not "inviolable"); *PPM Atlantic Renewable v. Fayette County Zoning Hearing Board*, 93 A.3d 536, 2014 Pa. Commw. Unpub. LEXIS 311 (Pa. Commw. Ct. 2014), aff'd by supp. decision at 111 A.3d 817, 2015 Pa. Commw. Unpub. LEXIS 186, appeal denied 121 A.3d 497,

ENDNOTES

632 Pa. 696, 2015 Pa. LEXIS 1815 (Pa. Sup. Ct.) (where a developer "proposes to construct a wind power facility on land it does not own; rather, all the land is leased . . . , a court cannot allow private individuals to waive the need for zoning variances" since the project could harm the public welfare based on the risk of ice throws from the wind turbine blades"; and generally applicable setbacks cannot be waived merely because "all of the adjoining landowners specifically consent to the wind farm use").

5 *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; *Browning v. Hooper*, 269 U.S. 396, 46 S. Ct. 141 (1926)).

6 2019 N.Y. Laws 106 (July 18, 2019), § 2.

7 PSL §§ 66-p(1)(a), 66-p(2).

8 PSL § 66-p(5). *See also* 6 NYCRR Part 496 Statewide Emission Limit.

9 2020 N.Y. Laws 58, c. 58, Part JJJ.

10 *Id.*, § 4.

11 PSL § 168(e).

12 Exec. L. § 94-c(5)(e).

13 *See*, *e.g.*, NY PSC Case 17-F-0282, *Application of Alle-Catt Wind Energy LLC*, Certificate Order (June 3, 2020), Appendix A (Certificate conditions), Condition 80 ("Noise levels from all noise sources from the Wind Generating Facility, related facilities and ancillary equipment shall: a) Comply with a maximum noise limit of 45 (dBA) Leq (8-hour) at any permanent or seasonal non-participant residence existing as of the issuance date of this Certificate and 55 dBA Leq (8-hour) for any participant residence existing as of the issuance date of this Certificate. . . . (d) Comply with a maximum noise limit of 65 dB Leq at the full octave frequency bands of 16, 31.5, and 63 Hertz outside of any non-participant residence existing as of the issuance date of this Certificate . . ."). *See id.*, Condition 30 ("Shadow flicker caused by wind turbine operations shall be limited to a maximum of 30 hours annually at any nonparticipating residential receptor . . ."). Since enacted in 2011, every PSL Article 10 wind farm siting decision has ordered such differential exposure limits. Note that *no limits* are imposed on "participants" for exposure to shadow flicker or low-frequency noise. Differential limits have been incorporated into the regulations of New York's recently created Office of Renewable Energy Siting. "Participating" property owner are subject to up to 55 dBA of project noise, "non-participating" property owners are subject to a lower limit of 45 dBA. 19 NYCRR §§ 900-2.8(b)(1)(i) (wind projects), (2)(i) (solar projects).

14 19 NYCRR § 900-8.3(c)(2) ("An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry."). *Cf.* Exec. L. § 94-c(5)(d) (authorizing this regulation).

15 Exec. L. § 94-c(5)(e). *Cf. also* NY PSC Case 17-F-0282, *Application of Alle-Catt Wind Energy LLC*, Certificate Order, 83-84 (despite agreeing that transmission constraints make upstate wind generation ineffective at reducing emissions, concluding that "the proposed Facility is a beneficial addition to the electric generation capacity of the State" in light of policy targets for renewables).

16 "Project participants" do not accept more lax protections with informed consent. New York requires "participating" properties to be disclosed with the developer's application for approval, generally long after the developer has

contracted to use such properties and prior to considering potential adverse impacts. *See* 16 NYCRR § 1001.4(c); 19 NYCRR § 900-2.5(a).