

BEFORE  
THE OHIO POWER SITING BOARD

|                                  |   |                         |
|----------------------------------|---|-------------------------|
| In the Matter of the Application | ) |                         |
| of Kingwood Solar I LLC, for a   | ) |                         |
| Certificate of Environmental     | ) | Case No. 21-0117-EL-BGN |
| Compatibility and Public Need    | ) |                         |

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**APPLICATION FOR REHEARING OF CITIZENS FOR GREENE ACRES,  
INC., JENIFER ADAMS, P. CHANCE BALDWIN, JACOB CHURCH, VERITY  
DIGEL, JED HANNA, KRAJICEK FAMILY TRUST, JAMES JOSEPH  
KRAJICEK, KAREN LANDON, NICOLE MARVIN, CHAD MOSSING,  
KAREN MOSSING, NICHOLAS PITSTICK, KYLE SHELTON,  
MARLIN VANGSNESS, JEAN WEYANDT, JERALD WEYANDT, THE BOARD OF  
TRUSTEES OF CEDARVILLE TOWNSHIP, THE BOARD OF TRUSTEES OF MIAMI  
TOWNSHIP, AND THE BOARD OF TRUSTEES OF XENIA TOWNSHIP**

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Intervenors Citizens for Greene Acres, Inc. (“CGA”), its above-named members (collectively with CGA, the “Citizens”), the Boards of Trustees of Cedarville, Miami, and Xenia Townships, (collectively with the Citizens, the “Intervenors”), hereby file their Application for Rehearing. The Intervenors are appreciative of and support the decision of the Ohio Power Siting Board (“Board” or “OPSB”) to deny the application (“Application”) for certificate requested by Kingwood Solar I LLC (“Kingwood”). Nevertheless, the Intervenors submit that the Opinion, Order, and Certificate (“Opinion”) of the Ohio Power Siting Board (“Board”) dated December 15, 2022 is in part unlawful and unreasonable, because it failed to determine that there are other grounds for denying the certificate. The Intervenors request that the Board add these grounds to the Opinion as reasons for denying the certificate.

As their grounds for rehearing, the Intervenors submit that the Opinion is unlawful and unreasonable for the reasons expressed in the following assignments of error:

Assignment of Error No. 1: The Ohio Power Siting Board Has Acted Unlawfully And Unreasonably By Failing To Identify The Facts And Reasoning Supporting Many Of Its Conclusions.

Assignment of Error No. 2: The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Failing To Identify The Project's Incompatibility With The Objectives Of Local Land Use Planning Codes As Another Reason To Deny The Certificate Pursuant To R.C. 4906.10(A)(6).

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Assignment of Error No. 5: The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Failing To Find That The Project Does Not Minimize The Project's Adverse Environmental Impact Under R.C. 4906.10(A)(3) Nor Serve The Public Interest, Convenience, Or Necessity Under R.C. 4906.10(A)(6) Due To Its Short Setbacks.

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- A. Kingwood Did Not Accurately Describe The Project's Adverse Visual Impacts Pursuant To R.C. 4906.10(A)(2) And OAC 4906-4-08(D)(4)(e), But Instead Submitted Non-Representative Simulations Designed To Conceal The Project's Actual Visibility From The Board And The Public.
- B. OPSB Erred By Finding That The Project's Adverse Visual Impacts Do Not Preclude The Issuance Of A Certificate Under R.C. 4906.10(A)(3) and R.C. 4906.10(A)(6).
- C. Kingwood Did Not Provide Measures To Minimize The Project's Adverse Visual Impacts Pursuant To OAC 4906-4-08(D)(4)(e), R.C. 4906.10(A)(3), And R.C. 4906.10(A)(6).

Assignment of Error No. 7: The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Finding That Kingwood Has Provided The Information About The Project's Potential Impacts On Wildlife And Plants Required By OAC 4906-4-08(B) And R.C. 4906.10(A)(2), (3), And (6).

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Assignment of Error No. 10: The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Failing To Identify The Project's Damage To The Community's Historic And Cultural Resources As Another Reason Why The Project Does Not Comply With R.C. 4906.10(A)(3) and (6).

Assignment of Error No. 11: The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Failing To Identify The Project's Risk To The Community During Tornadoes As Another Reason Why The Project Does Not Comply With R.C. 4906.10(A)(6).

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Assignment of Error No. 15: The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Failing To Identify The Applicant's Inexperience As Another Reason Why The Project Does Not Comply With R.C. 4906.10(A)(6).

The bases for this Application for Rehearing and more detailed descriptions of the Board's errors are set forth in the Memorandum in Support below, which is incorporated in its entirety as part of

this Application for Rehearing.

Respectfully submitted,

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## **MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING**

### **I. Standards for Certification Of Major Utility Facilities**

No person may construct a major utility facility without first obtaining a certificate for the facility. R.C. 4906.04. The proposed Project would be a “major utility facility” as defined by R.C. 4906.01(B)(1)(a), because it is designed to generate in excess of 50 megawatts of electricity. In order for the Board to issue a certificate for a major utility facility, OPSB must hold a hearing on the application. R.C. 4906.07. The Board must render a decision on the record either granting or denying the certificate based on the application as filed, or granting it



on such terms, conditions, or modifications as the Board considers appropriate. R.C. 4906.10(A).

The Board may not grant a certificate unless it finds and determines, *inter alia*, the following:

- (a) “The nature of the probable environmental impact.” R.C. 4906.10(A)(2).
- (b) “That 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).
- (c) “That the facility will comply with Chapters 3704., 3734., and 6111. of the Revised Code and all rules and standards adopted under those chapters...” R.C. 4906.10(A)(5).
- (d) “That the facility will serve the public interest, convenience, and necessity.” R.C. 4906.10(A)(6).
- (e) “That the facility incorporates maximum feasible water conservation practices as determined by the board, considering available technology and the nature and economics of the various alternatives.” R.C. 4906.10(A)(8).

R.C. 4906.10(A)(3) prohibits OPSB from issuing a certificate unless “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.” Emphasis added. The dictionary meaning of “minimum” is “the least quantity assignable, admissible, or possible.” The Merriam-Webster Dictionary, “Minimum,” <https://www.merriam-webster.com/dictionary/minimum> (accessed April 8, 2022). Whether R.C. 4906.10(A)(3) requires zero impact or allows some adverse impact depends on how much community damage is the least quantity assignable, admissible, or possible adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations. That is, R.C. 4906.10(A)(3) prohibits OPSB from issuing a certificate unless the facility poses the least quantity assignable, admissible, or possible adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other

pertinent considerations. As explained below, Kingwood has not demonstrated that its Project achieves the standard in R.C. 4906.10(A)(3) with respect to the many harms that the Project will cause.

Kingwood also has not provided the information required by the Board's rules and R.C. 4906.10(A)(2) that is necessary for the Board to determine the nature of the Project's probable environmental impact. Similarly, Kingwood has not provided the information required by OPSB's rules that is necessary for the Board to determine compliance with R.C. 4906.10(A)(5), (6), and (8).

## **II. An Administrative Agency Such As The Ohio Power Siting Board Is Required To Comply With Its Own Rules.**

Administrative regulations issued pursuant to statutory authority have the force and effect of law, so an administrative agency such as OPSB is required to follow its own rules. *State ex rel. Cuyahoga Cty. Hosp. v. Ohio Bureau of Workers' Comp.*, 27 Ohio St.3d 25, 27–28, 500 N.E.2d 1370, 1372–73 (1986); *Parfitt v. Columbus Corr. Facility*, 62 Ohio St.2d 434, 436, 437, 406 N.E.2d 528, 530 (1980); *Clark v. Ohio Dep't of Mental Retardation and Developmental Disabilities*, 55 Ohio App.3d 40, 42 (6th Dist. 1988). A litigant is entitled to enforce such an agency's rule against the agency if the litigant is a member of the class which the rule was intended to benefit. *Parfitt*, 62 Ohio St.2d at 436.

R.C. 4906.03(C) requires OPSB to “[a]dopt rules establishing criteria for evaluating the effects on environmental values of proposed and alternative sites.” R.C. 4906.06(A)(6) provides:

(A) An applicant for a certificate shall file with the office of the chairperson of the power siting board an application, in such form as the board prescribes, containing the following information: ... (6) Such other information ... as the board by rule or order may require.

This statutory mandate requires an applicant to submit the information required by OPSB's rules. OPSB has no discretion to allow an applicant to get away with not complying with the rules. OPSB has promulgated OAC Chapter 4906-4 to implement R.C. 4906.03(C) and R.C. 4906.06. Consistent with R.C. 4906.06(A)(6), OAC 4906-2-04(B) requires an application to include the information required by OAC Chapter 4906-4. Notably, OAC 4906-4-01(B) provides that "[t]he board may, upon an application or motion filed by a party, waive any requirement of this chapter other than a requirement mandated by statute." This rule allows OPSB to waive a requirement in that chapter only if a party has filed an application or motion justifying such a waiver.

OAC 4906-3-06(A) requires OPSB's chairman to determine whether an application is complete and complies with the content requirements of the Board's rules, including OAC Chapter 4906-4, before the application can be processed. Kingwood has not obtained waivers of the rule requirements at issue in this case pursuant to OAC 4906-4-01(B). OPSB cannot ignore its own rule-required procedure for granting waivers, nor did it grant any such waivers of the requirements at issue.

Neither R.C. 4906.10(A) nor OAC Chapter 4906-4 allows OPSB to pick and choose which rule requirements it will consider in deciding whether the criteria in R.C. 4906.10(A) are met. Just because an application contains thousands of pages of information on some potential Project impacts does not mean that the applicant or OPSB is allowed to ignore or gloss over other harms. For example, OPSB cannot find that a facility complies with R.C. 4906.10(A)(2) or (3) if an applicant has neglected to demonstrate pursuant to OAC 4906-4-08(A)(3) that the project will not cause a noise nuisance, even if the applicant has shown that no other types of harm are of concern. In this case, the gaps in rule-required information are myriad and substantial.

OAC Chapter 4906-4 is an integral component of the process set up by R.C. 4906.06 and R.C. 4906.07 to provide members of the public with the information they need to provide the Board with informed input on a project that could impact them. The applicant is required to publish public notices notifying the public about the application and where to find a copy of the application for review. R.C. 4906.06(C); OAC 4906-3-06(C)(4) & (5), 4906-3-07, & 4906-3-09. R.C. 4906.07(A) instructs OPSB to schedule the hearing only after receiving a complete application “complying with section 4906.06 of the Revised Code.” Thereafter, the Board must conduct a hearing to obtain evidence from the parties and the public, including intervenors. R.C. 4906.07(A). The fairness and accuracy of this process depend on the applicant’s provision of rule-compliant information.

An intervenor’s right to conduct discovery cannot compensate for an applicant’s failure to comply with OAC Chapter 4906-4. Many of the studies required by these rules do not exist until an applicant generates them, so intervenors are unable to obtain this information through discovery. For example, the field surveys for plants and wildlife in the Project Area required by OAC 4906-4-08(B) ordinarily do not exist unless the applicant conducts them. The Intervenor has no access to the participating landowners’ land to conduct these surveys themselves. That is why the rules require the applicants, not the Staff or intervenors, to produce the necessary information. Moreover, it is only fair to require applicants to produce the information necessary to prove that the developments from which they will benefit financially will not harm the public.

In this case, the evidentiary record lacks much of the information required by OAC Chapter 4906-4. The Board may not issue a certificate without this information. The missing information is necessary for the Intervenor to participate meaningfully in the hearing process. This information is also needed for the Board to make sound decisions under the R.C.

4906.10(A) criteria, namely, whether to approve the Project, and if so, how it should be designed to minimize the Project's impacts on the Intervenor. The Intervenor is prejudiced by OPSB's failure to comply with these rules, and they have standing to seek OPSB's compliance with its rules.

Many of Kingwood's rule violations stem from its failure to provide definitive designs and mitigation plans for the various types of damage its Project can cause. Kingwood's widespread lack of commitments stem from its failure to include final design plans in the Application for the public to review and test and for the Board to act on. This strategy, if allowed by the Board, would eviscerate the public's right to meaningful input into the Board's decision-making on this Application.

No final plan for the Project has been prepared. Stickney, Tr. I 126:2-25. The Project layout showing component locations in the Application is just preliminary. *Id.*; Kingwood Application ("Applic."), Figure 03-3. During the hearing, Kingwood's project manager testified as to Kingwood's position that its preliminary plans could be changed in the final design. Stickney, Tr. I 62:12 to 64:8, 126:2-25, 131:24 to 134:8, 135:4-21; Stickney, Tr. IX:2145:2 to 2146:17. Kingwood's lawyers largely repudiated that position in their reply brief, and OPSB has correctly ruled (at ¶ 111) that Kingwood is bound by the preliminary plans. However, this ruling does not correct the serious problem that the preliminary plans are incomplete.

Few, if any, other government entities approve building projects without first reviewing final design plans. This procedure is all the more egregious given that the OPSB process supplants local zoning that most certainly would have required final design plans so that the approving authority, with public input, could tell what it is approving. In this case, Kingwood's disregard for the Board's rule requirements has produced a Project design that is not approvable.

**III. Kingwood Cannot Excuse Its Violations Of OPSB's Rules By Arguing That The Rules Do Not Apply To The Board's Decisions To Issue Or Deny Certificates.**

Kingwood has contended that its noncompliance with the Board's rules is irrelevant to whether the R.C. 4906.10(A) criteria have been met, claiming that the rules' only purpose is to kick off the investigation stage of the proceeding. Kingwood's position, if accepted, would eviscerate the rules' purpose. R.C. 4906.03(C) describes the rules' purpose as "establishing criteria for evaluating the effects on environmental values of proposed and alternative sites." Thus, an applicant's compliance with these rules is designed to provide the information necessary to demonstrate whether a project complies with the criteria in R.C. 4906.10(A). The rules' detailed requirements are necessary to define the information necessary to comply with the general language of the R.C. 4906.10(A) criteria. Like R.C. 4906.03(C), R.C. 4906.10(A)(7) indicates that compliance with the R.C. 4906.10(A) criteria and the rules is a prerequisite to an award of a certificate. That section states that OPSB must examine a proposed project's impact on agricultural districts "[i]n addition to the provisions contained in divisions (A)(1) to (6) of this section and rules adopted under those divisions." Emphasis added. Thus, the rules do not have the trivial role portrayed by Kingwood. Their role is not just to initiate a Staff investigation of a project in which the Staff has the burden to collect all of the information that Kingwood should have voluntarily provided in its Application. In this case, the entire record, not just the Application, lacks the rule-required information necessary to determine compliance with the criteria in R.C. 4906.10(A).

Kingwood has sought to evade responsibility for its violations of the Board's rules by arguing that a motion should have been filed earlier to contest the Staff's letter of June 15, 2021 to Kingwood. This letter stated:

This letter is to inform you that the above referenced application, filed with the

Ohio Power Siting Board (Board) on April 16, 2021, has been found to comply with Chapters 4906-01, et seq., of the Ohio Administrative Code (Ohio Adm.Code). This means the Board's Staff (Staff) has received sufficient information to begin its review of this application. During the course of its investigation, the Staff may request additional information to ensure a full and fair assessment of this project.

Emphasis added. The Staff did not actually determine that the Application was complete, since the underlined sentence indicated the Staff was only starting to review the Application. The staff letter does not state that the application is complete, but only that it is complete enough to review. In fact, the Staff served Kingwood with a number of data requests in attempts to fill some of the numerous gaps in rule-required information.

Nevertheless, Kingwood has argued that the right to argue that the Application is incomplete has been waived, because this issue should have been raised before the Application was admitted into evidence. Kingwood's argument is a red herring, because the Intervenors' focus is on the lack of rule-required evidence in the entire evidentiary record, not just the Application. The Citizens provided Kingwood with fair notice of these deficiencies in their Petition for Leave to Intervene filed on June 25, 2021, only 10 days after the Staff letter of June 15, 2021. See Paragraphs 1, 3, 4, 5, 6, 7, 8, 9, 11, 15, 16, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 39, and 40 of CGA's petition to intervene, which describe the information missing from the Application. The Citizens again described these deficiencies in their List of Issues filed on November 22, 2021. After the Citizens first identified these deficiencies in their petition to intervene, Kingwood had eight months prior to the evidentiary hearing and eight days of hearing in which to add the missing information to the record but obstinately refused to do so. Thus, the Citizens notified Kingwood of the Application's deficiencies at the beginning of the case and provided Kingwood with ample opportunity to cure those deficiencies. Once Kingwood's opportunity to supplement the record passed upon conclusion of the hearing, the Citizens

reiterated their objections to Kingwood's shortcomings in their initial post-hearing brief. In their post-hearing briefs, the Citizens have not complained about the incompleteness of the Application; they are pointing out that the entire evidentiary record is deficient, a position that ripens only once the evidentiary hearing has closed.

Kingwood also has claimed that an objection should have been filed contesting a statement in the administrative law judge's entry of August 26, 2021 referring to the Application as completed. The Intervenors do not interpret the judge's statement as a ruling that the Application was complete. Moreover, even if the Intervenors had any reason to object to this statement, OAC 4906-2-29(F) provides that such an objection is timely if raised in the parties' post-hearing briefs:

Any party that is adversely affected by a ruling issued under rule 4906-2-28 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference and that (1) elects not to take an interlocutory appeal from the ruling or (2) files an interlocutory appeal that is not certified by the administrative law judge may still raise the propriety of that ruling as an issue for the board's consideration by discussing the matter as a distinct issue in its initial brief or in any other appropriate filing prior to the issuance of the board's order in the case.

As allowed by this rule, the Citizens timely identified Kingwood's failures to provide the rule-required information in the Citizens' post-hearing briefs.

Kingwood also has asserted that the Citizens did not object to the Application's admission into evidence. But the problem was not that the offered information was inadmissible; the problem was that more evidence was needed to comply with the rules. After all, admitting the Application into the record was necessary to show that it (along with the rest of the record) lacked the rule-required information. Kingwood failed to add the required information to the record, even though the Citizens had already identified the record's shortcomings. OPSB should not let Kingwood get away with thumbing its nose at the Board's requirements.



The contents of Sections I, II, and III above are incorporated by reference into the Assignments of Error in Section IV below.

#### **IV. ASSIGNMENTS OF ERROR**

##### **Assignment of Error No. 1:**

##### **The Ohio Power Siting Board Has Acted Unlawfully And Unreasonably By Failing To Identify The Facts And Reasoning Supporting Many Of Its Conclusions.**

R.C. 4906.11 provides that “[i]n rendering a decision on an application for a certificate, the power siting board shall issue an opinion stating its reasons for the action taken.” R.C. 4903.09, which is applied to OPSB decisions via R.C. 4906.12, states that “the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.” Although the Supreme Court of Ohio has advised that strict compliance with R.C. 4903.09 is not mandated, the Board’s decisions must show, “in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed ... in reaching its conclusion.” *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶30. A “legion of cases” establishes that the Board “abuses its discretion if it renders an opinion on an issue without record support.” *Id.* As outlined in the discussions below, OPSB’s Opinion does not satisfy these requirements with regard to some of the issues it has decided. The Intervenors incorporate those discussions by reference into this Assignment of Error No. 1.

**Assignment of Error No. 2:**

**The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Failing To Identify The Project's Incompatibility With The Objectives Of Local Land Use Planning Codes As Another Reason To Deny The Certificate Pursuant To R.C. 4906.10(A)(6).**

Smothering the Project Area with industrial solar equipment is contrary to the land use objectives of Greene County and the three townships in which the Project area is situated. The Project Area is zoned in an agricultural district, not an industrial district. Miami Exh. 1, Sauer Direct Testimony, p. 16, lines 16-18. Residents who purchased farms or rural homes expected to live in a rural or agricultural setting. *Id.*, p. 17, lines 4-5. An industrial use such as a utility-scale solar facility is not compatible with local land use plans. *Id.*, p. 17, lines 3-9.

On August 26, 2021, the Greene County Board of County Commissioners passed a resolution declaring the county's intent to balance development and farmland preservation. Greene County Exh. 1, Huddleson Direct Testimony, p. 4, lines 76-83. Attached to that resolution was "Perspectives 2020: Amendment 2021-01." *Id.*, p. 4, lines 68-70. Perspectives 2020 is the county's comprehensive land use plan, which guides regional, county, and township officials when considering any new development or land use application. *Id.*, lines 71-75. Two important goals of Perspectives 2020 are the protection of agriculture and recreational resources. *Id.*, p. 4, lines 76-83 & p. 5, lines 87-98. Kingwood's Project is contrary to those objectives.

This Project also is incompatible with Greene County's Farmland Preservation Plan, which is designed to protect existing farmland from encroachment by other uses. Miami Township Exh. 1, Sauer Direct Testimony, p. 14, lines 4-20. Kingwood has contended that its Project promotes farmland preservation, because the land might be farmed again after the Project's expiration. However, destroying the land's agricultural use for 35 years is hardly consistent with the preservation of agriculture.

Section 400.1 of the Xenia Township Zoning Resolution explains that the township areas zoned as Agricultural District are intended to maintain and protect areas with an existing agricultural character and prime agricultural soils, which provide a substantial economic base for the township. Citizens Exh. 12, Rand Direct Testimony, Exh. D, p. 36 (pdf p. 82). It further advises that “[u]nnecessary encroachment by nonagricultural land uses which limits agricultural effectiveness either through encroachment of land resources or through incompatibility of land uses will be discouraged.” *Id.* The Project is contrary to these objectives. Xenia Township Exh. 1, Combs Direct Testimony, p. 2, lines 16-24.

The Project also conflicts with Miami Township’s zoning and land use plans, which are designed to protect open areas, recreational treasures, and agricultural land. Miami Township Exh. 3, Hollister Direct Testimony, p. 4, line 20 to p. 6, line 3.

The Project is also inconsistent with Cedarville Township’s zoning and land use regulations. Cedarville Exh. 1, Ewry Direct Testimony, p. 2, lines 19-36. The Project’s industrial use is contrary to the township’s objective to preserve farmland. *Id.*

Although local land use regulations are not legally binding on OPSB, a project’s incompatibility with local land use plans is an important consideration in determining whether the project serves the public interest, convenience, and necessity under R.C. 4906.10(A)(6). After all, the local land use plans also are designed to serve the public interest, convenience, and necessity, so these plans mirror what the local community considers to be in the public interest, convenience, and necessity.

The Intervenors request that OPSB identify the Project’s incompatibility with local land use plans as additional grounds for denying the certificate under R.C. 4906.10(A)(6).

**Assignment of Error No. 3:**

**The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Failing To Identify The Project's Incapacitation Of 1,025 Acres Of Good Farmland For Food Production For 35 Years As Another Reason To Deny The Certificate Pursuant To R.C. 4906.10(A)(6).**

The farm fields in the Project Area are currently growing grain crops. Citizens Exh. 8, Krajicek Direct Testimony, p. 9, lines 2-3. The solar project will remove 1,025 acres of agricultural land from food production. Applic., pp. 99-100, table 08-7.<sup>1</sup> Of this acreage, about 316 acres are in an agricultural district as designated by Greene County. Applic., p. 119. This land will be lost to agricultural production for approximately 35 years, and the Project could last longer than that. Applic., pp. 120-121; Stickney, Tr. I 147:4-7.

The testimony of James Joseph Krajicek is informative about the good quality of the farmland in the Project Area. Mr. Krajicek is an experienced farmer who started farming at the age of 15 and who has farmed for 40 years. Citizens Exh. 8, Krajicek Direct Testimony, p. 2, lines 1-4. His farming activities, such as no till farming practices, vegetative buffer strips along streams, and constructing surface waterways that reduce soil erosion, are a study in good conservation practices. *Id.*, p. 2, lines 5-10, 14-23. Consequently, he was named by the Greene County Soil and Water Conservation District as the Conservationist of the Year on two occasions and has been named by the Greene County Cattlemen's Association as the Cattleman of the Year. *Id.*, lines 5-10. As an experienced farmer, Mr. Krajicek can recognize the quality of crop land by observing the characteristics of its soils and crops. *Id.*, p. 10, lines 3-4. Soil with higher fertility is blacker than less fertile soil, which has less organic material mixed into the soil particles. *Id.*, lines 4-5. Rainfall washes organic material off higher land onto lower land, making the lower land more fertile and the higher land less fertile. *Id.*, lines 5-7. The crops on

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<sup>1</sup> The Opinion (at ¶ 154) has a typographical error where it states that the Project will displace 205 agricultural acres.

less fertile soil have fewer soybean pods, smaller corn ears, and shorter stalks. *Id.*, lines 7-8. Crops on less fertile soil wither and become yellow more quickly in dry weather and their green colors are not as dark in all weather conditions. *Id.*, lines 8-10. Based on Mr. Krajicek's observations from the public roads in and around the Project Area, he can see that most of the land in the crop fields in the Project Area is of average or above average quality for growing crops with the exception of some land owned by John Kyle, whose farm contains hillier land with below average quality for growing crops along with other land that is of average quality. *Id.*, lines 10-14. According to the U.S. Department of Agriculture, Greene County had the sixth highest average corn yield per acre in Ohio in 2020. *Id.*, lines 14-16.

Mr. Krajicek's observations about the quality of the farmland in the Project Area were echoed by Citizen P. Chance Baldwin. The land he farms has included a 106-acre field rented from his cousin, a participating landowner, for nine years. Citizens Exh. 2, Baldwin Direct Testimony, p. 2, line 15 to p. 3, line 10. The soil in this field is black and fertile. *Id.*, p. 3, line 18. Based on crop yields, this field is the best farmland that Mr. Baldwin farms. *Id.*, lines 18-19.

Susan Jennings, the Executive Director of The Agraria Center for Regenerative Practice in Yellow Springs, also testified about the importance of farming in the Project Area. Ms. Jennings has extensive occupational experience in land conservation as related to food production. Citizens Exh. 7, Jennings Direct Testimony, p. 1, line 26 to p. 2, line 16. Ms. Jennings echoed what the farmers in the area, such as Mr. Krajicek and Mr. Baldwin, have observed firsthand about the good quality of the farmland in the Project Area. Based on soil type data from the U.S. Department of Agriculture, soil maps, and communications with agricultural experts, about 98% of the Project Area contains prime or locally important soils. *Id.*, p. 5, lines 1-7.

Michele Burns of the Tecumseh Land Preservation Association confirmed that the crop fields in the Project Area are prime farmland, with about 98% of the Project Area containing prime or locally important soils. Tecumseh Land Exh. 1, Burns Direct Testimony, p. 2, lines 37-38. The U.S. Department of Agriculture defines prime farmland as land that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops. *Id.*, p. 2, lines 30-32. Ms. Burns calculated that the Project Area produces approximately \$1,0000,000 annually in agricultural commodities, a figure that Ms. Jennings independently calculated and verified using agricultural statistics for Greene County. *Id.*, p. 3, lines 55-58; Citizens Exh. 7, Jennings Direct Testimony, p. 5, line 22 to p. 6, line 1; Jennings, Tr. VI 1345:18 to 1346:14, 1387:1-10.

Ms. Jennings and Ms. Burns both testified about the need to keep farming the agricultural land in the Project Area rather than taking it out of production for 35 years. Prime farmland is hugely important to global food production. Tecumseh Land Exh. 1, Burns Direct Testimony, p. 2, lines 29-30. Only about 3% of the earth's surface, all of which is located in Ukraine, China, Brazil/Argentina, and the United States Corn Belt, contains prime farmland such as that found in the Project Area. *Id.*, lines 32-38. According to a United Nations report, the earth will need to grow 70% more food by 2050 to feed the population demand. *Id.*, lines 40-41. Ohio is blessed with some of the best farmland in the country, as well as abundant water to grow the crops. Citizens Exh. 7, Jennings Direct Testimony, p. 3, lines 16-17. These resources have led to agriculture and related industries being Ohio's number one economic driver with one in seven of its jobs related to agriculture. *Id.*, lines 17-18.

At the same time, farmland is under threat nationally and internationally, from a variety of sources including development, desertification and drought, and conflict. *Id.*, lines 8-9. Two

recent examples are the Ukraine conflict which had an immediate impact on commodity availability internationally, and the drought in California, which is driving up food prices. *Id.*, lines 9-11. Other recent price and supply challenges include a steep rise in the price of fertilizer and other inputs, and transportation and processing issues. *Id.*, lines 11-13. The empty store shelves that began in the shutdowns two years ago alerted all of us of the need to be growing food closer to home and thus protecting farmland in our communities. *Id.*, lines 13-15.

Ms. Jennings, based on her experience with soil health, expressed doubts about whether the soils in a solar field can be restored to their pre-project vitality for growing crops. Citizens Exh. 7, Jennings Direct Testimony, p. 6, lines 6-11. As Ms. Jennings recommended, it would be prudent not to replace crop fields with solar arrays until meaningful academic studies are conducted to answer this question. Citizens Exh. 7, Jennings Direct Testimony, p. 7, lines 18-22.

Kingwood contends that the Project will remove only 1% of Greene County's total farmland from farming. But that statistic is misleading. Every solar project removes just a small percentage of the total acreage from farming, but the cumulative effect of a multitude of projects is substantial, whether those projects are inside or outside of Greene County. Jennings, Tr. VI 1369:10-21; Tecumseh Land Exh. 1, Burns Direct Testimony, p. 2, lines 41-47. The same argument can be made about every non-solar development project, which in isolation may be small but which in the aggregate has added up to huge losses of farmland. The cumulative effects of solar project development, combined with other types of developments, are having a devastating effect on farmland. *Id.*, 43-44. Kingwood does not seek to protect farmland; it is just joining the stampede of developments looking to exploit agricultural land.

Losses of prime farmland in Ohio are especially detrimental, since this land is an integral part of the 3% of prime soil existing worldwide. *Id.*, lines 41-43. Ohio has lost over seven

million acres, or one third, of its farmland since 1950. Citizens Exh. 7, Jennings Direct Testimony, p. 3, lines 19-20. The importance of Ohio's farmland, and the alarming prospects of losing it, led Governor Voinovich to issue an Executive Order in 1998 (98-11V) entitled "Ohio Farmland and Protection Policy." Citizens Exh. 5, Fife Direct Testimony, p. 25, lines 7-9. The order directed a number of state agencies, including the OPSB, "to examine policies, guidelines, and procedures to assure that land acquisition, direct state development projects, state-assisted public and private development including infrastructure, and development requiring state permits will not eliminate or significantly interfere with or jeopardize the continuation of agriculture on productive agricultural lands or reduce the agricultural potential on prime agricultural soils unless there is no feasible and prudent alternative and the facility or service has been planned to minimize its effect on such lands." *Id.*, lines 9-17. Whether or not this Executive Order is still in effect today, its message is still equally important.

Further demonstrating the importance of preserving prime farmland, Ms. Jennings is opposed to converting farmland into solar arrays even though she is an advocate for solar energy production. In fact, Agraria is looking into installing solar panels at its own property. Jennings, Tr. VI 1380:24 to 1381:2. However, she also firmly believes that solar panels should be placed on roofs and non-agricultural land, not on prime farm soils. *Id.*, 1381:3-13.

Kingwood tries to soften the impression of its intent to damage food production by arguing, unconvincingly, that removing good farmland from food production for 35 years is actually good for agriculture. Kingwood reasons that tying the land up in solar arrays will prevent its development for non-agricultural uses in the meantime. Applic., p. 121. However, Kingwood presents no evidence that anyone, other than Kingwood, plans to convert this farmland to other uses. In fact, even without a solar facility there, local zoning would prohibit



the Project Area from being used for a housing development or other non-agriculture developments. Fife, Tr. VI 1244:12-25. As noted in Assignment of Error No. 2, the Project Area is zoned for agricultural use only. Moreover, although the Application postulates (at 121) that restoration to agricultural use is “possible,” the descendants of the participating landowners may never farm it again once it has been industrialized for 35 years. They could just as easily renew its use for energy production or convert it into residential communities. There are many reasons to disapprove this Project, and the preservation of farmland is an important one.

Taking prime farmland out of production for 35 years does not serve agricultural objectives in a time where food shortages are becoming a reality. The Intervenor request that OPSB identify the Project’s planned removal of 1,025 acres of good farmland from food production as additional grounds for denying the certificate under R.C 4906.10(A)(6).

**Assignment of Error No. 4:**

**The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Failing To Find That The Project’s Proven Negative Economic Impacts Are An Additional Reason Why The Project Does Not Serve The Public Interest, Convenience, And Necessity Under R.C. 4906.10(A)(6), And By Failing To Find That Kingwood’s Failure To Evaluate The Project’s Other Potential Negative Economic Impacts As Required By OAC 4906-4-06(E)(4) And R.C. 4906.10(A)(6) Are Additional Reasons For Denying The Certificate.**

OAC 4906-4-06(E)(4) requires applicants to “provide an estimate of the economic impact of the proposed facility on local commercial and industrial activities.” The purpose of this analysis is to assist the Board in its determination of whether “the facility will serve the public interest, convenience, and necessity” under R.C. 4906.10(A)(6). In this case, Kingwood has focused primarily on what it regards as the Project’s positive economic results. What little negative information Kingwood provided, and only in its rebuttal case, demonstrates that the Project will not produce economic benefits that warrant the widespread damage that the Project

will cause to the community's economic and non-economic interests. In fact, the Project will cause a net loss of "direct" jobs.

Kingwood's economic impact study in the Application is a "rose-colored glasses" exercise that considers the Project's economic benefits, but not its adverse economic impacts. Kingwood's Application did not evaluate the economic losses to local businesses and individuals that will result from its Project.

In fact, Kingwood's initial economic impact report specifically disclaims any intent to evaluate the losses of the economic benefits from the current agricultural use of the Project Area that will be displaced by solar facilities, stating:

This analysis estimates the economic impact of the Kingwood Solar Project. Comparisons to the economic impacts of alternative uses of the Project site, including its current agricultural use, are outside the scope of this report.

Applic., Exh. D, p. 1. A review of the report reveals the truth of this disclaimer.

The farm fields in the Project Area are currently growing grain crops. Citizens Exh. 8, Krajicek Direct Testimony, p. 9, lines 2-3. As explained in Assignment of Error No. 3, the farmland in the Project Area is of good quality for growing crops. The solar project will remove 1.025 acres of agricultural land from food production. Applic., pp. 99-100, table 08-7. This land includes a 106-acre field that Citizen P. Chance Baldwin has rented from his cousin, a participating landowner, for nine years. Citizens Exh. 2, Baldwin Direct Testimony, p. 2, line 15 to p. 3, line 10. This field has soil that is black and fertile. *Id.*, p. 3, line 18. Based on crop yields, this field is the best farmland that Mr. Baldwin farms. *Id.*, lines 18-19. Mr. Baldwin's situation illustrates the dilemma posed by the Project for the area's farmers who rent and farm crop land in the Project Area. Without this 106-acre field, Mr. Baldwin's remaining downsized farm may no longer be large enough to be viable and he may be forced to downsize his farming

equipment and hire other farmers to care for his crops. *Id.*, p. 3, lines 4-8. Finding replacement land to farm in this area is difficult. *Id.*, lines 8-10.

Replacing productive farm ground with Project solar panels will also hurt other area farmers. Citizen James Joseph Krajicek knows other farmers who rent crop land in the Project Area. Citizens Exh. 8, Krajicek Direct Testimony, p. 9, lines 8-11. Mr. Stickney knew about four or five participating landowners who rent their crop land to farmers. Stickney, Tr. I 118:2-15. He did not know how many acres in the Project Area are rented to non-owner farmers. Stickney, Tr. I 122:2-4. This lack of knowledge is not surprising, since Kingwood's study does not evaluate their revenue losses. Applic., Exh. D. Mr. Stickney tried to soften the harshness of Kingwood's damage to those renting farmers by stating that Kingwood would try to contract with some of them to perform services for the Project, but he could only come up with only one such arrangement that has been made so far, with just one farmer for two to three weeks. Stickney, Tr. I 119:9 to 121:8. Although Kingwood will undoubtedly argue that it may contract for services by other persons victimized by its Project, Kingwood can take no credit for any such vague, unrealized plans without providing a study to evaluate and quantify those benefits and compare them to these persons' economic losses, just as OAC 4906-4-06(E)(4) intended.

Removing the Project Area's prime farmland from crop production at this time would be particularly ill-timed. As explained above, agricultural production needs to increase to avoid world starvation, not decrease. Moreover, tenant farmers are already faced with historically high rents, and as land is taken out of production, fewer are able to find the acres they need to be profitable. Citizens Exh. 7, Jennings Direct Testimony, p. 5, lines 21-22. As land is taken out of farming, this also creates stresses on all the support industries that rely on agriculture, including equipment dealers, processors, transport firms, and the food industry. *Id.*, p. 6, lines 1-5.

The economic losses from converting crop land to an industrial solar facility are not limited to the renters' losses of revenue from growing crops. As any farmer knows, the reduction of crop land decreases the amount of grain seed that would otherwise be purchased and decreases the amount of harvested grain that would be supplied to businesses that purchase the grain grown in these fields. Citizens Exh. 8, Krajicek Direct Testimony, p. 9, lines 3-5. Mr. Krajicek, who farms land near the Project Area, knows persons who contract with the farmers in the Project Area to apply fertilizers and herbicides on the crop fields in the Project Area, and who will lose that business if the crops in the Project Area are replaced with solar panels. *Id.*, lines 5-8. He also knows of farmers that do custom work in the Project Area, who will lose the income from that work if the land is used for this Project. *Id.*, lines 11-13.

Kingwood's economic study did not account for the reductions in crop production revenue resulting from the solar panels' displacement of farm crops. Stickney, Tr. I 114:14-18. Mr. Stickney did not contest the premise that other persons will lose income from selling seed and fertilizer to the farmers growing crops in the Project Area. Stickney, Tr. I 115:16-22. But Kingwood's economic study does not evaluate those losses. Applic., Exh. D. Mr. Stickney did not know that farmers currently farming in the Project Area hire custom applicators to apply herbicides or fertilizer on the crops (Stickney, Tr. I 117:4-10), notwithstanding Mr. Krajicek's testimony that they do. Had Kingwood looked at the Project's negative economic impacts, he would have known this information.

Although Mr. Stickney claims to have met with surprisingly few people involved in the area's recreational activities, the Application provides no analysis at all about the Project's economic impacts on the area's recreational assets. Stickney, Tr. I 122:5 to 124:22; Applic., Exh. D. Mr. Stickney had no knowledge of any Kingwood outreach to the proprietor of the

Camp Clifton 4-H Camp to find out how the Project may affect the camp. Stickney, Tr. I 95:24 to 96:24. Nor has Kingwood conducted an economic study to find out. Stickney, Tr. I 96:25 to 97:5.

Ignoring the Project's negative economic impacts, the Application's economic report sets forth the direct, indirect, and induced jobs that the Project supposedly will create. Direct jobs represent people employed to perform the Project's functions. Applic., pp. 2, 10. Indirect jobs are increased employment in suppliers, service providers, and other people who provide goods and services to the Project. *Id.* Induced jobs are increased employment resulting from increased spending by persons in direct and indirect employment. *Id.*

The Project will offer only four full-time equivalent jobs for operating the facility. Stickney, Tr. I 99:16-20; Applic., Exh. D, p. 4. Mr. Stickney could not say how many of these operational employees will live in Greene County instead of working remotely. Stickney, Tr. I 99:16 to 100:13. Facility employees are expected to visit the Project fewer than 10 times per year. Stickney, Tr. I 107:10-21. The Project also would offer construction jobs, but construction is expected to take 16 months, so the economic benefits from construction are just a "one-time economic activity during the 16-month construction period." Applic., Exh. D, p. 1.

Kingwood's economic impact report represents that Project operation will support four direct jobs, 13 indirect jobs, and six induced jobs altogether, including four direct jobs, nine indirect jobs, and two induced jobs performed in Greene County. Applic., Exh. D, pp. 7, 9. Each of the jobs will not produce enough income to support a household, as shown by permanent operating impact detail tables on Pages 7 and 9 of the economic report. For example, in Greene County, the four direct jobs will support only three households, the nine indirect jobs will

support only six households, and the two induced jobs will support only one household. Applic., Exh. D, p. 9. These figures are underwhelming, to be sure.

During rebuttal testimony, these figures were discovered to be even more unimpressive. During that testimony, Mr. Stickney sponsored an updated economic analysis with an updated table for “State of Ohio Updated Permanent Operating Impact Detail” revealing that the Project will cause a net loss of two direct jobs in Ohio during operation. Kingwood Exh. 107, Stickney Rebuttal Testimony, Exh. A, p. 3. The Project will cause a net loss of one direct job in Greene County during operation. *Id.*, p. 5. This indicates that six people in Ohio, including five people in Greene County, will lose their agriculture-related jobs. *Id.*, pp. 3, 5; Stickney, Tr. IX 2160:8 to 2162:5. The updated analysis reduced the total increase of direct, indirect, and induced jobs in Ohio from 23 to 15 and in Greene County from 15 to eight. *Id.*, 2161:8 to 2162:5.

The updated economic report does not explain what inputs were used to quantify the jobs that would be lost due to the displacement of farming. It does not state whether the updated jobs figures consider the losses of revenue for farmers who rent land in the Project Area, custom applicators of fertilizer and herbicides, seed and fertilizer vendors, or manufacturing employees who process food products from the lost crops. Kingwood undoubtedly would argue in the affirmative, but all Mr. Stickney could say was that the lost agricultural acreage and the type of farming were fed into the economic model. *Id.*, 2160:15-24. Kingwood did not present a written report or a qualified expert witness to provide a clear picture of the economic losses related to agriculture. The sparse information that was provided does not provide OPSB with adequate data about the Project’s negative economic impacts to satisfy OAC 4906-4-06(E)(4). In fact, Kingwood’s choice to largely ignore the Project’s negative economic impacts prevents OPSB from even figuring out whether the Project has a net economic benefit.

Although Kingwood has attempted to paint a rosy economic picture for the Project, the Project actually will cost a net loss of direct jobs, not increase direct jobs. Kingwood contends that the Project will provide a small increase in indirect and induced jobs, but neither the record nor Kingwood's initial brief explains how that could happen if the Project is killing the direct jobs. That scenario seems improbable, and Kingwood has failed to sustain its burden to prove how that could occur.

Nor does the updated economic report provide the necessary information necessary to determine whether recreational businesses and other non-agricultural interests would lose revenue due to the Project. Mr. Stickney admitted that Kingwood has not looked for negative economic impacts from the Project on local businesses, stating that he just assumes there will not be many. This "head-in-the-sand" approach is not what OAC 4906-4-06(E)(4) contemplates. If Kingwood had complied with the rule, Mr. Stickney would have been able to answer questions about the Project's negative economic effects. Since Kingwood neglected to comply with the rule, the Board has also been deprived of the data necessary to answer these questions, which it must do in order to evaluate the Project's compliance with R.C. 4906.10(A)(6).

A one-sided economic analysis does not comply with the mandate in OAC 4906-4-06(E)(4) to "provide an estimate of the economic impact of the proposed facility on local commercial and industrial activities," nor does it enable OPSB to fully evaluate the Project's consistency or inconsistency with the public interest, convenience, and necessity under R.C. 4906.10(A)(6). The record contains no analysis of the Project's potential negative impacts on trades and businesses other than the loss of agricultural jobs. The Opinion does not address this issue notwithstanding the Ohio Supreme Court's admonition in *Indus. Energy Users*. The Intervenor request that OPSB rule that this failure by Kingwood to perform a complete

economic analysis as required by OAC 4906-4-06(E)(4) and R.C. 4906.10(A)(6) is an additional reason for denying the certificate.

In addition, testimony from Kingwood and Citizen witnesses during the hearing, including the responses of Kingwood's project manager to questions from the Bench during rebuttal testimony, revealed that the Project will have negative impacts on custom applicators, farm employees, and tenant farmers who will lose income and/or their jobs if the Project proceeds. The Opinion does not address this issue notwithstanding the Ohio Supreme Court's instruction in *Indus. Energy Users*. The Intervenor request that OPSB identify the Project's negative economic impacts as additional grounds for denying the certificate under R.C. 4906.10(A)(6).

**Assignment of Error No. 5:**

**The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Failing To Find That The Project Does Not Minimize The Project's Adverse Environmental Impact Under R.C. 4906.10(A)(3) Nor Serve The Public Interest, Convenience, Or Necessity Under R.C. 4906.10(A)(6) Due To Its Short Setbacks.**

R.C. 4906.13(B) preempts the application of local zoning to utilities subject to OPSB authority. As a substitute for local zoning, R.C. 4906.10 entrusts the OPSB with the authority and responsibility to require regulated utilities to responsibly site and design their facilities.

To implement this mandate, the Board should not accept the unreasonably narrow setbacks between Kingwood's industrial facility and its neighbors' land and homes requested by Kingwood. The Application proposes a series of setbacks between the Project and the community that are so minimal as to offer no meaningful isolation from the Project's harmful impacts:

1. The setback between the solar facility and nonparticipants' houses is a mere 250 feet.

Jt. Exh. 1, Joint Stipulation and Recommendation as to Certificate Conditions



- (“Stipulation”), p. 4, proposed Condition 4. Even if the 20 feet between the solar fences and the solar panels is added to this setback, the distance between solar panels and neighboring houses is only 270 feet. This is less than the length of a football field, which makes the solar panels and fences intrusively visible from a neighbor’s home.
2. The setback between a central inverter and a nonparticipant’s house is 500 feet. Stipulation, p. 4, proposed Condition 4.
  3. The setback between solar fences and public roads is only 50 feet, other than a 200- to 300-foot setback for limited parts of State Road 72 and Clifton Road. Stipulation, p. 11, ¶ 37.<sup>2</sup>
  4. Where no other setback applies, the Application would allow the solar facility to be constructed as near as 25 feet to neighbors’ yards/land. Applic., p. 9. A 25-foot setback is approximately equivalent to two car lengths or the standard length of a homeowner’s garage. Kingwood has attempted to disguise this setback’s impact by pointing out that the solar panels are 20 feet behind the fences, but a proximity of 45 feet is just as harmful. Kingwood has also tried to hide this setback’s harmful effects by stating that the setback between solar fences and houses is 250 feet. But the county’s residents have a right to enjoy their yards, too, not just their houses.

At those short distances, many neighbors will be constantly exposed to unwanted and unpleasant views from their yards and houses for 35 years. The Application notes that 50 nonparticipating residences are within 250 feet of the Project Area. Gresock, Tr. II 255:21 to 256:1; Applic., Exh. Q, p. 2. Dr. George Landon’s simulations visually demonstrate the actual

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<sup>2</sup> Kingwood’s post-trial reply brief represented (at 51) that these setbacks “were a direct result of extensive negotiations between Kingwood and the intervenors.” This statement is false.

appearance of a solar facility with a setback 250 feet from the solar fence and 270 feet from solar panels, in contrast to the deceptive simulations provided in Kingwood's Application. Dr. Landon's simulations reveal that this setback from houses fails to protect either yards or houses from the overwhelming, lifestyle-destructive impacts of this industrial equipment. Similarly, a view only 50 feet away from public roads and a view only 25 feet away from nonparticipants' yards and land would be truly awful. As explained below, Kingwood's miserly plans for vegetative screening between its industrial facility and neighbors' homes will do little to conceal these views.

Kingwood has the burden to prove compliance with R.C. 4906.10(A)(3) by demonstrating that the Project represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, under R.C. 4906.10(A)(3). That is, under the common meaning of "minimum," Kingwood must prove that the Project's impacts are "the least quantity assignable, admissible, or possible" under the dictionary meaning of that word. Kingwood has not satisfied that mandate, so OPSB should have identified the Project's short setbacks as additional grounds for denying the certificate under R.C. 4906.10(A)(3) and (6).

**Assignment of Error No. 6:**

**The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Finding That Kingwood Provided The Information Required By R.C. 4906.10(A)(2) And OAC 4906-4-08(D)(4)(e) & (f) To Describe And Mitigate The Project's Adverse Visual Impacts And By Finding That The Project's Adverse Visual Impacts Do Not Preclude The Issuance Of A Certificate Under R.C. 4906.10(A)(3) and R.C. 4906.10(A)(6).**

- A. **Kingwood Did Not Accurately Describe The Project's Adverse Visual Impacts Pursuant To R.C. 4906.10(A)(2) And OAC 4906-4-08(D)(4)(e), But Instead Submitted Non-Representative Simulations Designed To Conceal The Project's Actual Visibility From The Board And The Public.**

To evaluate a project's visual impacts, OAC 4906-4-08(D)(4) requires an applicant to do the following:

(4) Visual impact of facility. The applicant shall evaluate the visual impact of the proposed facility within at least a ten-mile radius from the project area....The applicant shall:

(a) Describe the visibility of the project, including a viewshed analysis and area of visual effect, shown on a corresponding map of the study area. The viewshed analysis shall not incorporate deciduous vegetation, agricultural crops, or other seasonal land cover as viewing obstacles.

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(e) Provide photographic simulations or artist's pictorial sketches of the proposed facility from public vantage points that cover the range of landscapes, viewer groups, and types of scenic resources found within the study area. The applicant should explain its selection of vantage points, including any coordination with local residents, public officials, and historic preservation groups in selecting these vantage points.

This rule is intended to provide the Board and the public with a clear understanding of the Project's visual impacts by enabling them to visualize the Project's appearance from locations frequented by members of the public. Kingwood chose to provide photographic simulations for this purpose. However, Kingwood's simulations do not comply with OAC 4906-4-08(D)(4)(e). Instead, they are distorted to disguise how awful the Project would actually look to the most severely affected members of the public -- the nonparticipating neighbors whose residential yards would be next to the solar fields.

Kingwood wants to site the solar facility as close as 250 feet to neighbors' houses, 50 feet from public roads, and 25 feet from neighbors' yards/land. Stipulation, p. 4, proposed Condition 4 and p. 11, proposed Condition 37; Applic., p. 9. Yet the simulations do not depict even a single view from any of these distances. Instead, Kingwood's seven simulations depict views from 250-750, 2,000, 1,000-1,300, 400-500, 550, 500, and 500 feet away from the viewers. Applic., Exh. Q, pp. 25-31. This deception violates OAC 4906-4-08(D)(4)(e), which requires

simulations “from public vantage points that cover the range of landscapes, viewer groups, and types of scenic resources found within the study area.” (Emphasis added.) The term “range” means “the amount, number, or type of something between an upper and a lower limit.” The Cambridge Dictionary, “Range,” <https://dictionary.cambridge.org/us/dictionary/english/range> (accessed April 8, 2022). Thus, Kingwood must cover the entire range of landscapes, viewer groups, and scenic resources. At the very least, Kingwood must simulate the worst-case view in that range --and that was the view that Kingwood omitted from the Application and the record. The rule does not allow Kingwood to skip the landscapes, viewer groups, and scenic resources that will suffer the greatest visual impacts from the Project.

The Application provides no simulations of views of the substation. Gresock, Tr. II 270:2-4. This failure violates the mandate in OAC 4906-4-08(D)(4)(e) to “cover the range of landscapes.” Emphasis added.

The Application contains no simulations of any views from neighbors’ yards or houses, which further violates the mandate in OAC 4906-4-08(D)(4)(e) to “cover the range of landscapes, [and] viewer groups.” Emphasis added. All photographs used in simulations were taken from the public roads. Gresock, Tr. II 263:17 to 264:4. Thus, the simulations omit the most impacted “viewer group” (residents living nearby) and the most impaired “landscapes” and “types of scenic resources” (adjacent residents’ views from their houses and yards). Some nearby residents will be exposed to panels and fences on two, three, or four sides of their residences, which is another scenario not simulated. To allow Kingwood to simulate only the least impacted views defeats the rule’s purpose of enabling the Board and the public to evaluate the extent of the Project’s impacts.

Ms. Gresock attempted to excuse Kingwood's failure to base any simulations on photographic views from neighbors' yards adjacent to the Project Area by claiming that Kingwood was not allowed to trespass in neighbors' properties to take the photographs. Gresock, Tr. II 263:20-22. However, Ms. Gresock did not even check on whether any participating landowners had residences adjacent to the Project Area from which photographs could be taken. Gresock, Tr. II 264:24 to 265:3. Consequently, it is apparent that Kingwood made no effort to search for locations in yards or houses at which photographs could be taken for use in simulations. Ms. Gresock admitted that nothing prevented Kingwood from asking participating landowners living adjacent to the Project Area for permission to take photographs from their properties for that purpose but could only say that Kingwood did not design its study to do so. Gresock, Tr. II 274:1-7.

Ms. Gresock attempted to justify Kingwood's failure to simulate the neighbors' views of the Project from their houses and yards by stating that simulations should only show the views in public areas. Gresock, Tr. II 265:4 to 266:23. This argument is not only illogical, but it defies OAC 4906-4-08(D)(4)(e), which requires simulations "from public vantage points that cover the range of landscapes, viewer groups, and types of scenic resources found within the study area." Emphasis added. Since Kingwood wants to site solar facilities within 25 feet of neighbors' yards and land, it was obligated to provide at least one simulation to warn the Board and the public about the appearance of such a view.

Since Kingwood provided simulations that mislead the Board and the public about the Project's appearance, OPSB erred by finding (at ¶ 110) that Kingwood's viewshed studies are reasonable. For this reason, the Board should identify Kingwood's noncompliance with the

requirements of OAC 4906-4-08(D)(4)(e) and R.C. 4906.10(A)(3) as additional grounds for denying the certificate.

**B. OPSB Erred By Finding That The Project's Adverse Visual Impacts Do Not Preclude The Issuance Of A Certificate Under R.C. 4906.10(A)(3) and R.C. 4906.10(A)(6).**

The Project has a poorly planned layout with an irregular and irrational shape. Rather than being organized as a square or rectangular shape, the Project Area sprawls for miles with irregular boundaries. The boundaries go “in and out.” English, Tr. III 655:13-16. The Project’s peculiar shape is displayed in Figure 03-3 in Exhibit 2. These irregular boundaries increase the footage of the Project boundaries coming into contact with adjacent nonparticipating properties. English, Tr. III 653:17 to 654:13. In fact, Kingwood has identified about 47,000 linear feet (8.9 miles) of boundaries that need screening from the public. English, Tr. III 674:11 to 676:7. Thus, the Project is designed to inflict the maximum amount of visual damage on the maximum number of people in the nearby community.

The result of this bad design is evidenced in the Application’s visual impact analysis. This report notes that 50 nonparticipating residences are within 250 feet of the Project Area. Gresock, Tr. II 255:21 to 256:1; Applic., Exh. Q, p. 2. According to Exhibit P of the Application, 107 nonparticipating residences are located within 1,000 feet of the Project Area. Kingwood’s Application admits that the solar equipment will be highly visible to these neighbors:

Near-Foreground Views: 0 to 0.5 mile. At this distance, a viewer is able to perceive details of an object with clarity. Surface textures, small features, and the full intensity and value of color can be seen on foreground objects.

Applic., Exh. Q, p. 4. Thus, all 107 of the nonparticipating residences within 1,000 feet of the Project Area are located far closer than the half mile (2,640 feet) near-foreground area that has

clear views of the Project Area. Also see Gresock, Tr. II 256:19 to 257:4 & 257:15-20 (acknowledging that the 50 nonparticipating residences within 250 feet are in the near-foreground area).<sup>3</sup> Even with the Project’s miniscule setback of 250 feet from nonparticipants’ houses (or 270 feet, if the 20 feet between solar fences and solar panels are included), these 107 residences would still be well inside of the near-foreground area. In fact, 88 of the 107 residences are closer than 700 feet from the Project Area and 77 of them are closer than 500 feet. Applic., Exh. P.

The Project’s visibility is increased by the Project Area’s variations in elevation. According to Kingwood’s topography survey, the Project Area has “gently rolling topography with elevations ranging between 920 and 1,080 feet above sea level.” Stickney, Tr. I 50:14-to 51:3. The land in the Project Area has a rolling topography with small pockets of hilly land that are higher than the surrounding land. Citizens Exh. 1, Adams Direct Testimony, p. 7, lines 4-10; Kingwood Exh. 8, Krajcek Direct Testimony, p. 9, lines 16-18. Many of the homes in and adjacent to the Project Area are built on elevated land overlooking the surrounding crop fields. *Id.*, lines 18-19. It has been common to build houses on elevated land in this area for a number of reasons, including that soils on hills are less productive for growing crops, the houses stay dry because precipitation flows off the hills, and elevated land offers better views of surrounding territory. *Id.*, lines 19-23. This means that the neighbors’ houses on elevated land have a clear, unobstructed view of the crop fields below, where the solar arrays are planned. CGA members who own houses on higher elevations include Jenifer and Steven Adams, Nicole and Scott

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<sup>3</sup> Kingwood’s post-hearing reply brief (at 8) represents that “most non-participating viewers surrounding the Project would be approximately this far [1,000 feet] from viewed arrays.” The reference to “most non-participating viewers” begs the question about what area this population occupies. Does Kingwood mean to state that most people in Greene County are at least 1,000 feet away? At any rate, even accounting for the fact that the solar panels and fences are set back slightly from the Project Area boundary, a substantial number of nonparticipating residents will have severe views of the Project due to Kingwood’s irresponsible siting decisions. An OPSB decision exposing even just one family to these views would be unlawful and unreasonable.

Marvin, Steve and Karyn Current, Doug and Paula Noble, Anne Rich, and James Joseph Krajicek. Citizens Exh. 1, Adams Direct Testimony, p. 7, lines 4-5, 8-10.

The widespread visibility of the Project, even if Kingwood plants trees along the Project Area, is illustrated by elevations at the Adams' residence. The Adams' two-story house is on a hill adjacent to and overlooking the Project Area to the north and west. *Id.*, p. 5, line 7 to p. 6, line 14. At the house, the land is at an elevation of 1056 feet above sea level, from which the terrain to the north goes down to 1043 feet at the edge of their land and then gradually descends to 1020 feet at the northern edge of that portion of the Project Area. *Id.*, p. 5, lines 15-18 & Exhs. H & I. That is, the base of the house is 36 feet higher than the other end of the Project Area, and they can see almost a mile from the house in that direction. *Id.*, p. 5, lines 20-22. The Adams can see the Project Area to the north through 15 windows in the three levels of their house (two stories and a walk-out basement). *Id.*, p. 5, line 22 to p. 6, line 2. The Adams will also have elevated views of the Project Area to the west from the house when the deciduous trees are without foliage. *Id.*, p. 6, lines 3-14. During that time of the year, they can see the Project Area to the north and west through 28 windows, two patio windows/doors, and three external doors in their house. *Id.*, lines 4-8. See Adams Exh. K, which maps the areas visible from the Adams property, and Adams Exh. L, providing photographic simulations of views of the Project Area from the Adams property.

The Citizens and other residents of the three affected townships are among those whose residences and yards will be exposed to near-foreground views of the adjacent Project Area. Citizens for Greene Acres has 48 members who own and/or live on properties adjacent to the Project Area. Citizens Exh. 1, Adams Direct Testimony, p. 2, line 5 & Exh. C. Exhibit D to Jenifer Adams' direct testimony portrays the locations of their land in red shading and their



houses as green stars. *Id.*, p. 4, lines 9-15 & Exh. E. Other members live nearby. *Id.*, p. 4, lines 15-18 & Exhs. E & F. The paragraphs below provide some examples of CGA members whose properties would be severely impacted by the views of adjacent solar arrays in the Project Area.

Natalie and Nicholas Pitstick own and live on a five-acre parcel that is adjacent to the Project Area on the entire north side (their backyard) and the entire east side of their yard. Citizens Exh. 11, Pitstick Direct Testimony, p. 2, lines 9-11. The Project Area is only about 140 feet in a perpendicular direction from the back wall of their house. *Id.*, lines 17-19. They can see the Project Area from most of the backyard and side yards and from the kitchen and living room windows of the house. *Id.*, p. 3, lines 4-6. Their views of the Project Area from their house and yard, where they have a picnic shelter, grill, and swing set to socialize and relax, are largely unobstructed by vegetation as shown in their photographs attached as Exhibits A through H of Mr. Pitstick's written direct testimony. *Id.*, p. 2, line 21 to p. 3, line 17.

George and Karen Landon own and, with their three children, live on a three-acre parcel adjacent to the Project Area on the entire north and east sides. Citizens Exh. 9, Landon Direct Testimony, p. 1, lines 19-20 & p. 2, lines 20-24. Their family uses their yard for such recreational activities as flying kites, throwing frisbees, playing soccer, playing basketball, playing outdoor games, exercising, and relaxing and eating meals on the front porch and the backyard porch. *Id.*, p. 4, lines 3-6. The Project Area is 220 feet from the west wall of their house and 125 feet from the northern wall of their house, with no trees or bushes between the house and the Project Area. *Id.*, p. 3, lines 8-15. Thus, they have unobstructed views of the Project Area from the yard west and north of their house, from the back porch on the north side of their house, and from the windows on the north and west sides on the first and second floors of their house. *Id.*, lines 17-19. Exhibit B to Dr. Landon's written direct testimony is a frame

from a drone's video showing an aerial view of their yard and house to show how close and intrusive the Project Area will be. *Id.*, lines 20-21. A blue line drawn on that frame shows the border between their yard and the Project Area. *Id.*, lines 21-22.

Angie and Jed Hanna live with two of their children on a five-acre parcel adjacent to the Project Area on two sides. Citizens Exh. 6, Hanna Direct Testimony, p. 1, lines 19-20 & p. 2, lines 9-16. They enjoy sitting and relaxing on their front porch and the deck. *Id.*, p. 4, line 16. They have some meals on the deck. *Id.*, lines 16-17. They entertain friends and family for outdoor parties in the fall and host many swimming parties in the summer. *Id.*, lines 17-18. They have recreational activities in their yard, including flying kites and riding four-wheelers, a golf cart, and a go-cart. *Id.*, lines 18-19. Their children play in the yard, including in the playground set and sandbox. *Id.*, lines 19-20. The Project Area is 70 feet from the western wall of their house and 41 feet from the northern wall of their house. *Id.*, p. 3, lines 12-13. The Project Area is 20 feet from their barn, 37 feet from their pool, and 30 feet from their well. *Id.*, lines 13-14. They have clear and close views of the Project Area from the yard west and north of their house, from the porch in front of the house, from the deck on the west side of their house, and from the windows on the north and west sides on the first and second floors of the house. *Id.*, lines 1-4. The close views of the Project Area from their house and yard are portrayed in photographs attached to Ms. Hanna's written direct testimony as Exhibits B through I. *Id.*, lines 4-13.

P. Chance and Michelle Baldwin own and, with their two children, live on a three-acre parcel that is adjacent to the Project Area across the road. Citizens Exh. 2, Baldwin Direct Testimony, p. 1, lines 19-20 & p. 2, lines 9-12. They also own 68 acres of crop land that is adjacent to the Project Area. *Id.*, lines 12-13. Their yard is only 200 feet from the Project Area,

and they can see the Project Area from their yard and house. *Id.*, p. 2, lines 17-18 & p. 5, lines 3-4.

Verity and Matthew Digel own and, with their three children, live on an eight-acre parcel adjacent to the Project Area on three sides. Citizens Exh. 4, Digel Direct Testimony, p. 1, lines 19-20 & p. 2, lines 9-11. The house was built around 1880. *Id.*, p. 2, line 13. They can see the Project Area on three sides of their property from their land. *Id.*, p. 3, line 1. They spend considerable time on recreational activities in their yard, especially the children. *Id.*, lines 10-11. Ms. Digel has a hobby of growing flowers to produce cut flowers. *Id.*, line 11. Their children's activities include riding all-terrain vehicles, climbing trees, soccer, and volleyball. *Id.*, lines 11-12. These recreational activities occur in areas from which the Project Area can be easily seen. *Id.*, lines 13-14. They can see the Project Area to the north, west, and east of their property from the first and second floor windows on those sides of their house. *Id.*, lines 1-7. The views are especially prominent from the second-floor windows. *Id.*, line 7. The distance between their house and the Project Area to the north is only about 120 to 150 feet. *Id.*, lines 7-8.

Karen and Chad Mossing own and, with their four children, live on a five-acre parcel adjacent to the Project Area on four sides. Citizens Exh. 10, Mossing Direct Testimony, p. 1, lines 19-20 & p. 2, lines 12-17. They enjoy sitting and relaxing on the front porch and spend considerable time on recreational activities in their yard, including football, soccer, golf, volleyball, baseball, swimming in the pool, and playing on the sandbox and playground set. *Id.*, p. 3, lines 10-12. They can see the Project Area on all four sides of their property. *Id.*, p. 2, line 23. The view between the front porch of their house and the Project Area across the road northwest of our property is almost entirely unobstructed. *Id.*, p. 2, line 23 to p. 3, line 1. The distance at that location between their porch and the road in front of the Project Area is about

180 feet. *Id.*, p. 3, lines 1-2. A row of trees and bushes only partially obstructs the view of the Project Area on the northeast side of their property, which is only 90 feet from their house. *Id.*, lines 2-4. Large expanses of the Project Area can be seen without obstruction from their land and house on the southwest and southeast sides, especially when viewed from second floor windows of their house. *Id.*, lines 4-6. The house is about 240 feet from the Project Area on the southwest side and about 100 feet from the Project Area on the southeast side. *Id.*, lines 6-8.

Because Kingwood's simulations conceal the Project's actual appearance to the public, the Citizens created their own simulations to reveal the Project's actual appearance to the neighbors who will be the most victimized by the Project. These simulations were created by Citizen expert witness George Landon and are attached to his written direct testimony. Citizens Exh. 9, Landon Direct Testimony, p. 4, line 10 to p. 6, line 17 & Exhibits D, E, G, H, J, K, M, and N.

Dr. Landon is thoroughly qualified to create visual simulation through his education and experience. With regard to education, he possesses a Bachelor's degree in Computer Science from the University of Kentucky and a doctorate in Computer Science from the University of Kentucky. *Id.*, p. 2, lines 1-2. With respect to his experience, he was a Professor in Computer Science at Eastern Kentucky University from 2007 to 2019. *Id.*, lines 8-9. He has been a professor in Computer Science at Cedarville University since 2019. *Id.*, line 9. He has been a Research Fellow in Computer Science at the Air Force Institute of Technology since summer of 2020. *Id.*, lines 9-11. He has nearly 20 years of experience in 3D scanning and visual simulations. His doctoral training included developing new methods for acquiring 3D surface information for cultural heritage projects involving museums and libraries. *Id.*, p. 6, line 20. He has developed a custom 3D scanning system that acquired shape and color information for

cultural artifacts in Puerto Rico and the United Kingdom. *Id.*, p. 6, line 22 to p. 7, line 1. He also possesses a US patent for a 3D scanning device. *Id.*, p.7, lines 1-2.

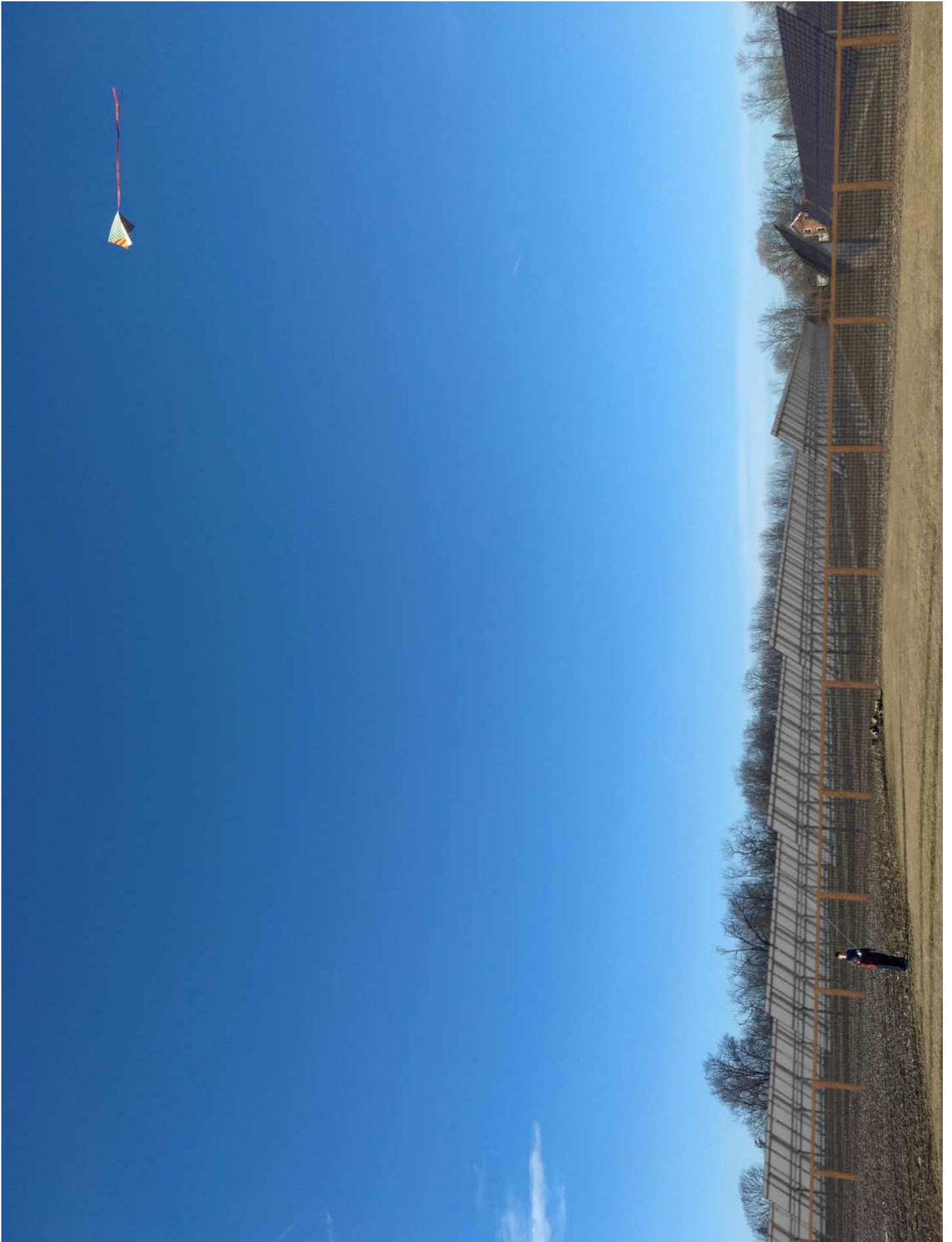
Dr. Landon created simulations to depict the appearance of the Project's solar facility at distances of 25 feet from the edges of his yard and 250 feet from his house, just as proposed in the Application and the Stipulation. *Id.*, p. 4, lines 15-22 & p. 5, lines 6-13, 20-23 & p. 6, lines 1-4, 10-17. Since the Application predicts a 20-foot space between solar arrays and the outer fences, Dr. Landon portrayed the solar panels at a distance of 20 feet behind the solar fences. *Id.*, p. 4, lines 15-22 & p. 5, lines 6-13, 20-23 & p. 6, lines 1-4, 10-17; Stickney, Tr. I 75:20 to 76:14. The simulations show how the solar facilities look from both ground level (Landon Exhibits D, E, J, K) and the second-floor windows of the Landon home (Landon Exhibits G, H, M, N). *Id.*, p. 4, line 11 to p. 6, line 17.

These simulations vividly demonstrate the intrusiveness of solar facilities located next to neighbors' residences and yard. For example, Landon Exhibits H and K illustrate the views the neighbors will be forced to endure in locations where the solar fence is 250 feet from their houses and the solar panels are 270 feet away. *Id.*, p. 5, lines 10-13, and p. 6, lines 1-4. Exhibits H and K are reproduced on the next two pages of this brief. Landon Exhibits J and M simulate the appearance at ground level of the solar facility in locations that are 25 feet from the boundary line. *Id.*, p. 5, lines 14-23. Neighboring residents whose houses and yards are at these minimum setbacks will look at these depressing scenes during virtually every day for decades. Dr. Landon's simulations reveal the utter falsity of Kingwood's position that the Project will not be visually offensive to the community.

Kingwood has contended that Dr. Landon's simulations are not consistent with the preliminary solar panel layout drawing provided by Kingwood Exhibit 25 for the panels near the







Landons' property. Dr. Landon based his simulations on Kingwood's proposed setback distances instead of the preliminary drawing, because the drawing designates the panel areas as "potential" solar arrays. Landon, Tr. IV 757:6-23. However, Dr. Landon's simulations are still entirely relevant notwithstanding the Board's ruling that the preliminary drawing is binding on Kingwood. The purpose of Dr. Landon's simulations is not just to illustrate the views from the Landons' home, but also to illustrate the views of other neighbors whose houses and yards would be located 270 feet and 45 feet from the solar panels (which distances include the 20 feet between the solar fences and solar panels). Moreover, Exhibit K shows the northern view of the solar fence and solar panels from the Landons' house at distances from the house of 250 feet and 270 feet, respectively, while the preliminary drawing provides an approximate distance of 200 feet to the north of the house. Landon, Tr. IV 741:1-19, 749:15 to 750:7. However, the stipulation's provision for a minimum setback of 250 feet from the solar fence trumps the shorter distance in the preliminary drawing, and Exhibit K utilizes the stipulation's distance. Thus, Dr. Landon's simulation in Exhibit K accurately illustrates the view of the solar facility to the north of the Landons' house notwithstanding the design in the preliminary drawing.

These nasty views will not be limited to the 50 nonparticipating residences that are within 250 feet of the Project Area. Since Kingwood seeks to site its solar facilities within 50 feet of the public roads, everyone in the community will be exposed constantly to close-up claustrophobic views of solar arrays whenever they venture from their homes. For example, the property of Citizen Terry Fife is not adjacent to the Project Area, but she would not be able to leave or return to her house without seeing the solar facility. Fife, Tr. VI 1224:8-15.

Not surprisingly, Kingwood has tried to focus the Board's attention on the Project's views for people far from the Project Area instead of admitting the Project's severe impacts on



those living nearby. Kingwood has stated that the solar panels will have a relatively low visual profile at 14 feet of height at maximum tilt, but this is more than double a typical human's height. However, while a 14-foot high panel may have little or no visual impact from a mile away, it will have a huge, looming impact at the close quarters that many neighbors will experience if this Project proceeds. Dr. Landon's simulations visually demonstrate these views. If any persons harbor any doubt about how imposing a 14-foot industrial structure next to a person's yard would be, they should look at Dr. Landon's simulation of 14-foot solar panels behind his sons flying the kite in Exhibits J and K of his testimony. Citizens' Exh. 9. Kingwood proposes to install solar arrays of up to 14 feet in height right next to people's yards. No reasonable person would find 35 years of life in such a setting to be tolerable. Jenifer Adam's photographic simulations also show how far and wide the neighbors will be able to see the solar panels, especially from homes and yards on elevated land overlooking the solar fields. The Board should not be fooled by Kingwood's diversionary tactic of focusing on far views instead of near views. Nor should the Board be misled by Kingwood's deceptive simulations that omit those near views.

Besides imposing harmful views on nonparticipating residents, the Project also will impair activities at local recreational areas. Kingwood's own visual impact expert Lynn Gresock and the Application admitted that the Project also is potentially visible from the public natural areas at Clifton Gorge, John Bryan State Park, the Little Miami Jacoby Road state route access, the Upper Great Scott Trail, and Glen Helen. Gresock, Tr. II 315:23 to 316:13; Applic., Exh. Q, p. 6, Table 1. Despite these admissions, the Opinion states (at ¶ 110) that the Project is not expected to visually impact local recreation areas as confirmed by "Kingwood's primary consultant and architectural historian" and "CGA's visual impact witness, Susan Jennings." This

finding is erroneous in all respects. First, its reference to Kingwood’s “primary consultant” presumably refers to Lynn Gresock, but she admitted that the Project is potentially visible from local recreational areas while professing not to know how visible it will be. Gresock, Tr. II 315:23 to 316:13. Second, Susan Jennings stated that she did not think that the Project would be visible from Glen Helen, John Bryan State Park, or Clifton Gorge, but she admitted she is not an expert in visual impact analysis. Jennings, Tr. VI 1373:12-15 & 1379:19-21. Contrary to the Opinion’s statement, she is an expert on farmland preservation for food production, not a visual impact expert. Citizens Exh. 7, Jennings Direct Testimony, p. 1, line 26 to p. 2, line 16. She did not assess the Project Area for its visual impacts.

OPSB’s reliance in Paragraph 110 on testimony from Kingwood’s “architectural historian” refers to Amy Kramb, a historian who assessed the Project’s visibility for 258 properties of potential historic significance. Kramb, Tr. IX 2197:1-25. However, she was tasked with the chore of evaluating Project views from historic sites, not recreational facilities. More importantly, she is not a visual impact expert. Consequently, the testimonies of Gresock, Jennings, and Kramb provide no basis for OPSB’s finding that Project views will visually impact local recreational areas.

At any rate, OPSB’s Opinion accurately acknowledges (at ¶ 110) that the Project will “impact the viewsheds of nonparticipating residents.” Kingwood’s siting of the Project immediately next to yards and in close proximity to neighboring residences on two, three, or four sides is an abject exercise of irresponsible utility siting. This misconduct, if allowed by the Board, would have irreparably damaged the neighbors’ views and quality of life. For this reason, the Project does not comply with R.C. 4906.10(A)(3) or R.C. 4906.10(A)(6). The Board should cite these flaws in its Opinion as additional grounds for denying the certificate.

C. **Kingwood Did Not Provide Measures To Minimize The Project's Adverse Visual Impacts Pursuant To OAC 4906-4-08(D)(4)(e), R.C. 4906.10(A)(3), And R.C. 4906.10(A)(6).**

OAC 4906-4-08(D)(4)(f) requires an applicant to evaluate the visual impact of the proposed facility as follows:

Describe measures that will be taken to minimize any adverse visual impacts created by the facility, including, but not limited to, project area location, lighting, turbine layout, visual screening, and facility coloration. In no event shall these measures conflict with relevant safety requirements.

Emphasis added. In response to this mandate, Kingwood proposed to plant screening with some trees, bushes, and perennials along the solar fences. Because Kingwood's proposal comes nowhere close to mitigating the visual damage it wants to inflict on the Project's neighbors, OPSB's finding (at ¶ 110) that Kingwood proposed "reasonable mitigation measures as to nonparticipating residents" is erroneous. Similarly, the fact that OPSB has acquiesced to vegetative screening as mitigation in other solar projects is not probative of whether vegetative screening in this Project is adequate. The solar projects submitted to OPSB vary as to how effectively the proposed vegetation will screen the neighbors' views. In Kingwood's case, the design of the Project and the proposed screening are uniquely unsuited to provide the public with relief from unacceptable views of solar panels looming over nearby yards.

Kingwood's vegetative screening proposal suffers from four incurable deficiencies:

First, the neighbors will be exposed to objectionable views of solar arrays for 35 years, because Kingwood does not intend to plant complete screens of trees and bushes to block its industrial facility from the neighbors' view. Applic., Exh. Q, Pt. 2, Attachment C, Landscape Plan, pdf p. 70. Instead, Kingwood wants to "soften" the industrial views by planting trees and bushes sporadically along the fences. *Id.* Kingwood asserts that complete screening with evergreens or other trees would look unnatural and the community would prefer partial

screening. *Id.* It does not take a landscape architect degree to realize that this position is nonsense, and that no neighbor would prefer to see solar panels between the trees next to their yards. After all, a rural woodland offers complete screening without looking unnatural. Kingwood has created simulations of its planting options in the Landscape Plan that make the vegetative screening look much denser than it actually will be by depicting the views from an angle instead from a perpendicular angle. *Id.*, pdf pp. 76, 78, 80; English, Tr. III 670:22 to 671:19, 673:7 to 674:4. As Kingwood witness Andrew English noted, “the massing appears denser when not looking directly at the Project.” Kingwood Exh. 17, English Direct Testimony, p. 4, lines 15-16. The gaps between the trees will actually be much wider, and the solar arrays will be much more visible, in real life. Mr. English admitted that the trees’ canopies will not even start to touch each for eight to 10 years, and even that prediction is based on “conjecture.” English, Tr. III 665:19 to 666:12.

Second, the trees will be small at planting time and will take many years to reach the solar panels’ height. The Application’s Landscape Plan does not specify the trees’ size at planting time, but the plan states that “younger plant material” will be used. Applic., Exh. Q, Pt. 2, Attachment C, Landscape Plan, pdf p. 72. At planting time, the height of the trees could range anywhere between three feet and 12 feet, depending on the species, but the landscape plan does not commit to any specific height at planting time. English, Tr. III 660:17 to 661:6, 662:8 to 663:10. Mr. English stated that some of the trees may be 20 to 25 feet tall in eight to 10 years, and the Landscape Plan has a simulation for the Tall Screening module that appears to show trees of that height in eight to 10 years. English, Tr. III 665:8-18; Applic., Exh. Q, Pt. 2, Attachment C, Landscape Plan, pdf pp. 72, 80. However, as explained above, Tall Screening will be used sparingly. The Landscape Plan provides simulations of trees along solar arrays in

the other screening modules showing them to be as tall as or taller than the solar panels in eight to 10 years. Applic., Exh. Q, Pt. 2, Attachment C, Landscape Plan, pdf pp. 72, 76, 78. But these simulations are deceptive, because they depict the solar panels as being shorter than the seven-foot fences even though the panels will be as high as 14 feet. At a maximum height of 14 feet, the solar panels will loom above the trees until the trees are at least 14 feet tall. Where solar arrays are located near two-story neighboring residences, the trees will need to be taller than 14 feet to provide meaningful screening. For example, Dr. Landon's views of the Project Area through his second story windows were at elevations of 17 feet above ground level. Citizens Exh. 9, Landon Direct Testimony, p. 5, lines 1-5 & p. 6, lines 5-9. Since the trees will grow only one to two feet per year (English, Tr. III 649:13-14), the trees will take a considerable number of years to reach 17 feet in height. The neighbors should not be forced to see these views for any length of time, not to mention decades.

Third, tall trees in the "Tall Screening" module will be planted only on the northern side of the Project, because they would shade some solar panels on other sides. English, Tr. III 663:17-22. Thus, for example, tall trees will be absent from the vegetative screening along the solar arrays to the north and west of the Landons' house. In fact, tall screening is projected by Kingwood's updated screening map for very little of the Project's northern borders. *Id.*, Attachment A. The absence of tall trees along most of the Project boundaries is especially troublesome given that many neighbors will have views of solar arrays from their second-floor windows. For example, "light" screening is provided for the solar field north of the Landons' home, and that screening consists of "lower growing evergreen species." Landon, Tr. IV 768:8-12; Applic. Exh. Q, Pt. 2, Attachment C, pdf p. 72. So squeezing every dollar out of the Project from electricity production is more important to Kingwood than preserving the neighbors'

quality of life on the other sides of the Project. While OPSB states in its Opinion (at ¶ 110) that it is satisfied with Kingwood's mitigation of the Project's appearance, it does not explain how a three-foot tree at planting time will relieve the unsightly views from neighbors' second floor windows at much higher elevations such as the 17-foot windows (measured at the bottom of the window) in the Landons' case. See Landon, Tr. IV 762:21 to 763:13.

Fourth, the rolling topography in and near the Project Area makes it impossible for vegetation to screen the Project effectively. As explained above, many of the houses in and near the Project Area are situated on higher elevations looking down into the fields targeted for solar arrays. Mr. English noted that vegetative screening along a project's perimeter can be effective in areas with relatively flat topography, because the potential views are generally constrained to areas near the project perimeter. Kingwood Exh. 17, English Direct Testimony, p. 5, lines 17-21. But, for this Project, the Citizens and other neighbors will be looking up at solar arrays on higher ground or looking downward at solar arrays at lower elevations (e.g., Jenifer and Steven Adams). Vegetative screening will do nothing to obstruct their views of the industrial facility from their houses and yards, or from the public roads.

Jenifer Adams' annotated photographs of the Project Area as seen from her house and yard are good illustrations of this problem. Citizens Exh. 1, Adams Direct Testimony, p. 6, line 15 to p. 7, line 2 & Exh. L. The yellow overlays on these photographs show where the portions of Project Area visible from her property are located. Adams, Tr. IV 839:17 to 840:2. For ease of reference, copies of one of these photographs with and without the yellow overlay of the Project Area are inserted on the next three pages of this brief. This photograph was taken from the back porch of the Adams house, showing the Project Area to the north highlighted in yellow. Just about all of the Project Area can be seen from the porch over the top of the four evergreen

## 3258 Harbison Viewshed Pictures

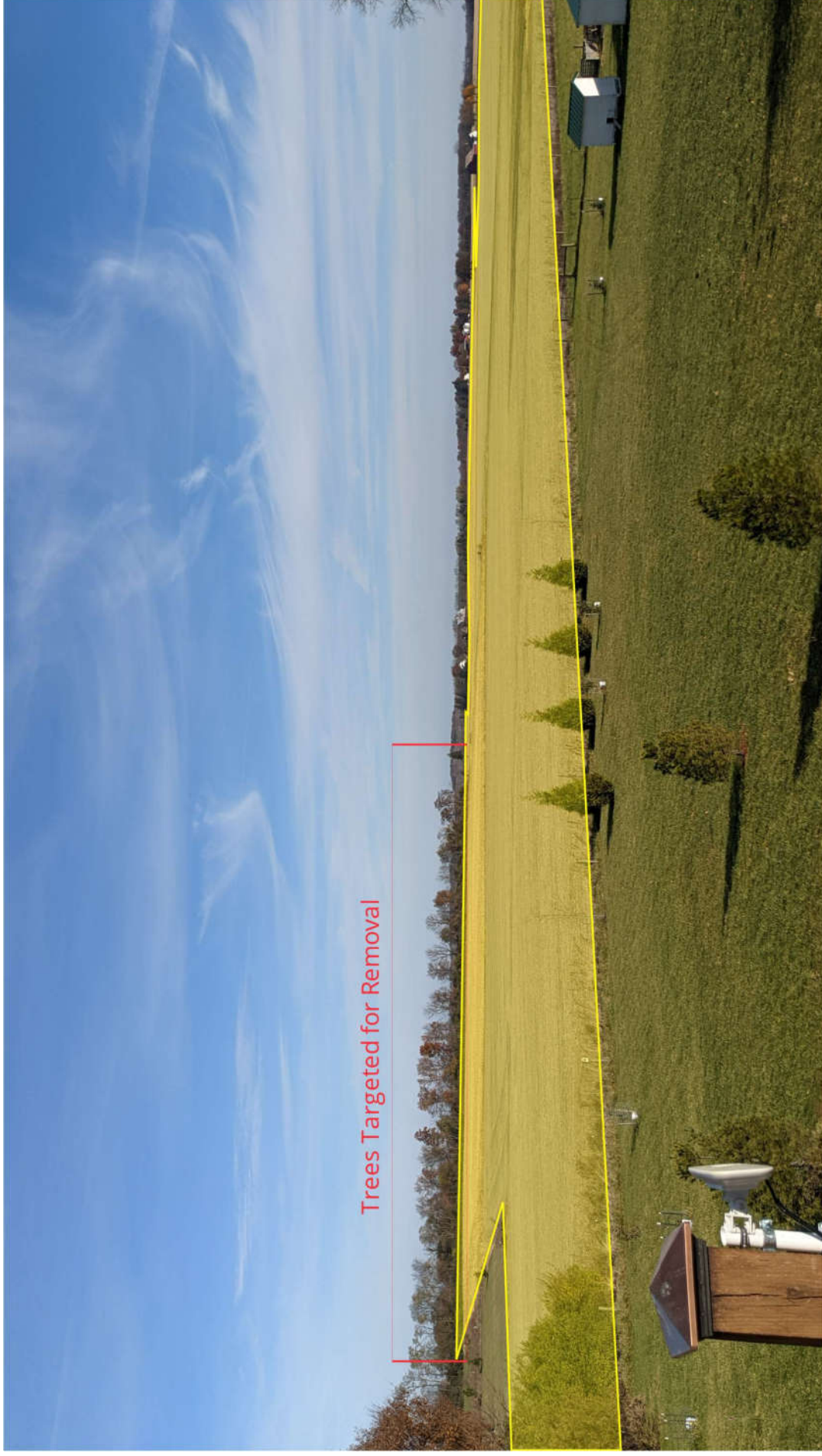
Back Porch – Picture 2





## 3258 Harbison Viewshed Pictures

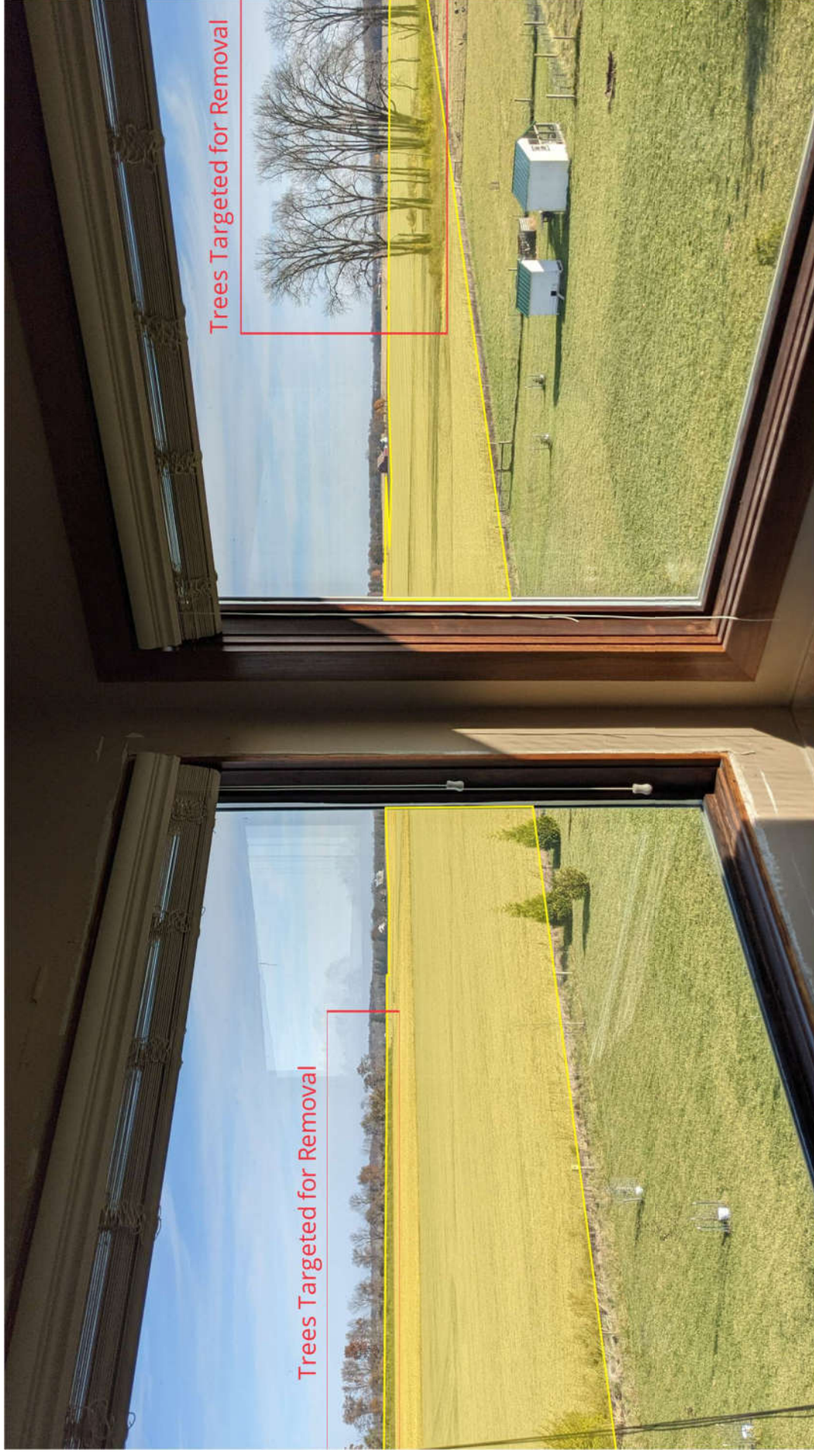
Back Porch – Picture 2 Annotated





## 3258 Harbison Viewshed Pictures

Second Floor – Picture 1 Annotated



trees along the edge of the yard, even though the trees are tall enough to tower over the fence behind them and even though they are just as high as the buildings to their right. The third photograph following this page of the brief shows the view from a second-floor window of the Adams house, with the yellow overlay of the Project Area even more visible. These annotated photographs vividly demonstrate that no amount of vegetative screening along the Project's fences will ameliorate the solar facility's harsh views from elevated neighboring yards and second-floor windows.

Exhibits G, H, M and N of Dr. Landon's testimony further demonstrate this point. Even though his property is not elevated above the Project Area, the second-floor windows of his residence are higher than the Project Area. Any vegetative screening along the north and west edges of the Landons' yard would be ineffective. For that reason, Dr. Landon's simulations justifiably do not incorporate vegetation from Kingwood's proposed screening.

These issues, combined with a faulty Project design and terrible siting, mean that vegetative screening will never be effective to provide nearby residents with meaningful relief from oppressive facility views. The Board should not approve a facility with irregular boundaries of almost nine miles of damaging visual impacts in rolling terrain that defies effective vegetative screening. OPSB should not allow Kingwood to site solar arrays on the edges of neighboring residences and yards with unobstructed views of the Project, where newly planted trees will take many years to grow as high as the solar arrays or the second-floor windows looking down on the solar arrays and where neighbors will be able to see the solar panels through the ubiquitous gaps in Kingwood's single row of trees. Kingwood's pathetically designed screening does not comply with the mandate in OAC 4906-4-08(D)(4)(f) to "minimize" the Project's adverse visual impacts, nor does the Project comply with R.C. 4906.10(A)(3) or

R.C. 4906.10(A)(6). The Board should cite these flaws in its Opinion as additional grounds for denying the certificate.

**Assignment of Error No. 7:**

**The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Finding That Kingwood Has Provided The Information About The Project's Potential Impacts On Wildlife And Plants Required By OAC 4906-4-08(B) And R.C. 4906.10(A)(2), (3), And (6).**

OAC 4906-4-08(B) requires an applicant to conduct literature and field surveys of the plant and animal species in the Project Area to assess and mitigate a project's potential ecosystem impacts:

(B) The applicant shall provide information on ecological resources.

(1) Ecological information. The applicant shall provide information regarding ecological resources in the project area.

\*\*\*\*\*

(c) Provide the results of a literature survey of the plant and animal life within at least one-fourth mile of the project area boundary. The literature survey shall include aquatic and terrestrial plant and animal species that are of commercial or recreational value, or species designated as endangered or threatened.

(d) Conduct and provide the results of field surveys of the plant and animal species identified in the literature survey.

(Emphasis added.) Without this information, OPSB can neither determine the nature of the probable environmental impact under R.C. 4906.10(A)(2) nor find that a project represents the minimum adverse environmental impact under R.C. 4906.10(A)(3).

In order to informedly identify and avoid Project harm to plants and wildlife, it is first necessary to find out what species of plants and wildlife exist in and near the Project Area. That is why OAC 4906-4-08(B)(1)(c) requires applicants to conduct literature searches to identify the species that are potentially present, and field surveys to look for them. Kingwood failed to complete this task.

The Application contains a section labeled “Species Literature Survey,” but that title mischaracterizes what Kingwood actually did. *Applic.*, p. 77. A review of that section reveals that, with respect to plants, Kingwood only received a list of state-listed threatened and potentially threatened plant species with occurrence records within a mile of the Project Area. *Applic.*, p. 81. This list was provided in a letter of June 8, 2020 from the Ohio Department of Natural Resources (“ODNR”). *Applic.*, Exh. N. The correspondence between Kingwood and the U.S. Fish and Wildlife Service and the ODNR contains no other literature listing plant species that may be in and near the Project area. *Applic.*, Exh. N. Accordingly, Kingwood witness Lynn Gresock admitted that Kingwood did a literature search only for rare species of plants. *Gresock*, Tr. II 293:11 to 294:5. Kingwood contends that the Citizens have identified no other literature that may be available, but it is Kingwood’s duty, not the Citizens’, to look for and produce that literature. Kingwood did not even look for it.

Kingwood also failed to do a complete search for animal life in and near the Project Area as required by OAC 4906-4-08(B)(1)(c). The letter of June 8, 2020 from ODNR lists some rare and endangered species of animals. *Applic.*, Exh. N. Otherwise, the Application contains no literature data on animals. *Applic.*, pp. 77-82 & Exh. N. Ms. Gresock admitted that Kingwood did no other literature search for birds or bats. *Gresock*, Tr. II 294:6 to 295:10.

Thus, Kingwood did not provide a literature survey for all plant and animal life in and near the Project Area as required by the first sentence of OAC 4906-4-08(B)(1)(c). Kingwood obtained literature only for rare plant and animal species as required by the second sentence of OAC 4906-4-08(B)(1)(c). Although Kingwood may contend that the second sentence of the rule limits the scope of the first sentence, such an interpretation is contrary to established rules of statutory construction. The word “include” in the second sentence of subsection (B)(1)(c) is a

term of enlargement, not limitation. 2A Singer, *Sutherland Statutes and Statutory Construction*, Section 47:7 (7<sup>th</sup> Ed.). In other words, “the verb *to include* introduces examples, not an exhaustive list.” Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at Section 15, p. 116 (Thomson/West 2012, Kindle Ed.). See also *Kish v. Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, ¶ 20 (the word “includes” is an indication of expansion rather than constriction, restriction, or limitation); *Diller v. Diller*, 2021-Ohio-4252, 182 N.E.3d 370, ¶ 38 (3<sup>rd</sup> Dist. 2021). Limiting Kingwood’s literature search to just those species in the second sentence of the rule provision would render the first sentence superfluous. The failure to catalogue and evaluate all other species in the area left a huge gap in the record’s “information regarding ecological resources in the project area” contrary to OAC 4906-4-08(B)(1). Kingwood’s failure to perform a complete literature survey fails to comply with this rule.

Moreover, Kingwood’s literature on plants and animals did not even fulfill the first sentence of OAC 4906-4-08(B)(1)(c). That sentence also requires a list from literature of species of commercial and recreational value, and Kingwood provided no such list.

OAC 4906-4-08(B)(1)(d) requires an applicant to conduct field surveys for the plant and animal species noted as potentially present by the literature searches. By knowing what species may be in the area, an applicant can design field surveys to search the types of habitat and locations where those species are most likely to be found and to search at times of the year when the species are likely to be there. Kingwood’s failure to obtain this literature information resulted in substandard field surveys.

Kingwood’s failure to conduct the required literature surveys resulted in and was compounded by its lackluster methodology for the field surveys. Kingwood did not follow any government protocols for conducting bird surveys. *Gresock*, Tr. II 302:3-19. Kingwood has

complained that field surveys would be burdensome, but OPSB routinely requires field surveys for birds in wind power projects in project areas far larger than Kingwood's.

The field surveys for plants and wildlife may not have extended more than 100 feet outside of the Project Area (Gresock, Tr. II 297:7-21), even though OAC 4906-4-08(B)(1) requires surveys inside and within a quarter mile around the Project Area. This apparent restriction on the search area is particularly damaging to the accuracy of the bird survey, since birds likely fly between the Project Area and several natural areas located near the Project Area, including John Bryan State Park and the Little Miami River. Gresock, Tr. II 299:17 to 300:23.

The field surveys were conducted exclusively in October and November of 2020. Gresock, Tr. II 297:22 to 298:10. Different wildlife species are present in different seasons of the year, so Kingwood did not find the species present only during seasons other than fall. Gresock, Tr. II 298:11-23. This means that Kingwood missed any and all bird species that are present only during spring migration. Gresock, Tr. II 299:3-13.

The Application contains a list of plant species and a list of animal species whose presence was noted in and near the Project Area by two people during two days of surveying wetlands and streams. Gresock, Tr. II 278:2 to 279:3 & 282:12-23; Kingwood Exh. 8, Gresock Direct Testimony, p. 7, line 23 to p. 8, line 7; Applic., pp. 83-84, Table 08-4; Applic., pp. 88-89, Table 08-5. All of their observations of wildlife are contained in the Application's narrative and in Appendix N. Gresock, Tr. II 281:14 to 281:1. Table 08-5 of the Application's narrative lists the bird species seen during these visits. Gresock, Tr. II 283:18 to 284:2.

Without literature searches and proper field protocols to guide its field surveys, Kingwood performed demonstrably substandard field surveys. This is particularly evident in the results of its field surveys for birds. Table 08-5 of the Application lists only 23 species of birds

found by the surveys. Applic., pp. 88-89. Had Kingwood fulfilled its responsibilities to survey the area's wildlife, it would have found the wildlife species known by the community to be present there. Residents living adjacent to the Project Area regularly see such bird species as hummingbirds, goldfinches, sandhill cranes, bald eagles, red-winged blackbirds, mockingbirds and great blue herons, all of which are missing from Kingwood's list. Citizens Exh. 1, Adams Direct Testimony, p. 7, line 17 to p. 8, line 2; Adams, Tr. IV 810:18-23; Citizens Exh. 6, Hanna Direct Testimony, p. 5, lines 1-4; Citizens Exh. 9, Landon Direct Testimony, p. 4, lines 7-9; Citizens Exh. 11, Pitstick Direct Testimony, p. 4, lines 1-2. Ms. Gresock's rebuttal testimony acknowledged that red-winged blackbirds, finches, and mockingbirds are expected in the Project Area, but Kingwood did not see them. Gresock, Tr. VIII 2000:16 to 2001:15. Jenifer Adams recounted that she sees great blue herons nearly every day in spring, summer and fall, sees them in her yard two or three times per month in the winter, sometimes sees them standing in the portion of the Project Area next to her property, and often sees them flying over the Project Area. Citizens Exh. 1, Adams Direct Testimony, p. 7, lines 17-20. Kingwood's failure to see and record even one of these extremely large, common birds illustrates Kingwood's failures to perform its surveying duties.

OPSB's Opinion does not address any of the issues described above in this assignment of error. Contrary to the Ohio Supreme Court's admonition in *Indus. Energy Users*, the Opinion identifies no facts or reasoning for its conclusion (at ¶ 108) that "[t]he Board is satisfied with the studies that Kingwood provided as to the Project's impacts to ... wildlife in the Project area." The Board must explain the basis and rationale for this finding.

Kingwood has failed to conduct the rule-mandated literature searches and field surveys for plants and wildlife. Without that data, neither Kingwood nor OPSB has a basis for

concluding that the Project will not harm wildlife; they do not know what wildlife is there.

Kingwood's failure to provide this information violates OAC 4906-4-07(C)(3)(e), OAC 4906-4-08(B)(1)(c), and R.C. 4906.10(A)(2), (3), and (6). OPSB erred by finding that Kingwood satisfied OAC 4906-4-07(C)(3)(e), OAC 4906-4-08(B)(1)(c), and R.C. 4906.10(A)(2) and (3). OPSB should have identified Kingwood's failure to provide this information as additional grounds for denying the certificate under R.C. 4906.10(A)(3) and (6).

**Assignment of Error No. 8:**

**The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Erroneously Finding That The Project Provides For Water Conservation Measures As Required By OAC 4906-4-07(C)(3)(e) And R.C. 4906.10(A)(2), (3), (6), and (8).**

ODNR has records for 473 water wells drilled within a mile of the Project Area. Applic., Exh. N, ODNR letter of June 8, 2020, pdf p. 35. The wells vary in depth from 20 feet to 240 feet. *Id.* Obviously, the protection of underground water supplies is important here.

To protect water supplies of this nature, R.C. 4906.10(A)(8) requires the Project to incorporate "maximum feasible water conservation practices as determined by the board, considering available technology and the nature and economics of the various alternatives."

Water conservation also is necessary to achieve the criteria in 4906.10(A)(2), (3), and (6). OAC 4906-4-07(C)(3)(e) implements these criteria by requiring an applicant to do the following:

Describe how the proposed facility incorporates maximum feasible water conservation practices considering available technology and the nature and economics of the various alternatives.

Kingwood has failed to do this. Despite this rule's mandate to describe the Project's water conservation practices, the Application identifies no such measures. Applic., p. 45. Instead, the Application just states that it will not use much water. *Id.*

Recognizing this deficiency, the Staff served data requests on Kingwood asking about its anticipated water usage in an attempt to obtain the information required by the rule. According



to its responses to data requests, Kingwood anticipates the need to wash its solar panels once or twice per year. Stickney, Tr. I 149:9-22; Kingwood Exh. 2, pdf p. 11, Answer 36. Kingwood also stated that it expects to use an annual average of 775 gallons per day for routine cleaning. *Id.*, Answer 37. That amounts to about 282,875 gallons of water per year, which is hardly an insignificant amount of water.

Mr. Stickney could not say where Kingwood will acquire the water used for cleaning solar panels, but assumed that Kingwood might use groundwater from a well inside the Project Area. Stickney, Tr. I 154:15-23. He did not know whether the Application includes a hydrogeologic study to find out whether such water withdrawal would draw down the neighbors' wells. Stickney, Tr. I 155:19 to 156:3. A review of the Application reveals that no such study was included.

Kingwood has represented that well waters will be protected by Stipulation Condition 25, which would require Kingwood to keep its solar panels at least 50 feet from active water wells inside the Project Area. This does little to protect water wells outside of the Project Area. More importantly, this condition does not prevent Kingwood from over-pumping the Project Area's water wells so as to dry up the neighbors' water wells. While Kingwood has argued that no permit for water consumption will be required, that is because Ohio law does not require water consumption permits for anyone.

Mr. Stickney said that Kingwood will not use much water, but he could not identify any actual water conservation measures actually included in the Application. Stickney, Tr. I 156:4-12. Nor did Kingwood supplement the Application by committing to any water conservation measures during the hearing. Surely, there must be methods available to reduce the amount of water needed to wash the solar panels, yet Kingwood offers none. Nor does OPSB's Opinion (at

¶¶ 109, 162) identify any such measures. Kingwood's failure to provide for the maximum water conservation measures considering available technology and the nature and economics of the various alternatives violates OAC 4906-4-07(C)(3)(e) and R.C. 4906.10(A)(2), (3), (6), and (8). OPSB erred by finding that Kingwood satisfied these legal requirements with respect to water conservation.

**Assignment of Error No. 9:**

**The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Failing To Identify The Project's Threat To The Neighbors' Property Values As Another Reason Why The Project Would Not Serve The Public Interest, Convenience, Or Necessity Under R.C. 4906.10(A)(6).**

One hardly needs an appraisal expert to know that the construction of an industrial complex that damages the aesthetic setting of a neighborhood will reduce the community's property values. A person need not be a property expert to realize that a residential property next to a visible industrial solar facility is worth less than a residential property with a pleasant view. People enjoy living in a scenic environment, but not in a sea of industrial metal and glass. Putting an unsightly facility within 250 feet of a neighbor's house, or within 25 feet of a neighbor's yard, as Kingwood proposes, is guaranteed to damage the pleasantness of the neighbor's surroundings and the value of the neighbor's residence.

Nevertheless, since Kingwood hired a property valuation contractor, CohnReznick, to opine about property values around solar facilities, the Citizens retained their own expert, Mary McClinton Clay, to expose the inaccuracy of CohnReznick's opinion that solar facilities do not impair property values. Ms. Clay's expert testimony about a solar facility's damaging impact on property values just confirms what everyone already knows: the presence of an industrial solar plant adjacent to a neighbor's residential property will reduce the value of that property.

Ms. Clay has been a real estate appraiser for 46 years. Citizens Exh. 3, Clay Direct Testimony, p. 2, line 5. She has the customary appraiser education and professional accreditations and was the President of the Kentucky chapter of the Appraisal Institute. *Id.*, p. 1, line 27 to p. 2, line 2 & p. 2, lines 23-24. She has considerable experience in studying and testifying about the adverse impacts of solar facilities on neighboring property values, including testimony in the Kentucky Siting Board for utilities. *Id.*, p. 3, line 5 to p. 5, line 3. Consequently, she is well versed on the impact of commercial-scale solar facilities on nearby property values. *Id.*, p. 5, lines 4-6.

Because solar companies are well-financed, it is not surprising that they are able to pay contractors to conduct studies concluding, contrary to everyone's common sense, that solar projects do not damage property values. CohnReznick's report in Kingwood's Application is a typical product of this solar company strategy. Ms. Clay has conscientiously examined CohnReznick's study in great detail, and, not surprisingly, has found the study to be biased, flawed, and skewed in order to produce the erroneous conclusion CohnReznick was paid to render. *Id.*, p. 5, line 7 to p. 23, line 17. The initial post-hearing brief for the Greene County Commissioners has further analysis of the flaws in Mr. Lines' conclusion that industrial solar facilities do not devalue adjoining properties. The Intervenors incorporate that discussion herein by reference.

Importantly, when evaluating the credibility of Mr. Lines' testimony, the Board should consider the fact that Mr. Lines has been paid by solar companies to testify more than 100 times that solar facilities do not damage adjoining property values. Lines, Tr. II 366:22 to 367:14. Andrew Lines arrived at his conclusion that this Project will not devalue neighboring properties simply because he was paid to come to that conclusion. Although Kingwood contends that

serving “green” energy companies is a small percentage of CohnReznick’s income, it is not a small part of Mr. Lines’ work. Unless he renders opinions favorable to solar companies, he would lose an enormous amount of the work for which he is paid by CohnReznick. Mr. Lines cannot afford to testify accurately about the financial effects of solar projects on adjoining property values, and that is why he did not do so here.

In contrast to Mr. Lines’ biased opinion, Ms. Clay found two soundly conducted case studies concluding that two solar facilities dropped improved (developed) neighboring property values by a range of 6.3 % to 16.9%. *Id.*, p. 23, line 21 to p. 24, line 6. She found two more case studies on solar projects that reduced the values of nearby vacant properties by 15.5% in one case and by 30% in another case. *Id.*, p. 24, lines 7-17.

Consistent with these case studies, Ms. Clay’s study of Kingwood’s Project has concluded that the Project will likely reduce the property values of the neighboring properties. *Id.*, p. 5, lines 13-16. Ms. Clay found that the 25-foot setbacks between Kingwood’s solar fences and neighboring properties, with the solar arrays right behind them, will likely have a negative effect on the neighboring property values. *Id.*, p. 24, lines 18-21. That conclusion should not come as a surprise to anyone who exercises common sense.

Of particular relevance to this case is Ms. Clay’s finding that solar facilities damage neighboring property values whether or not a vegetative buffer intervenes between the solar arrays and the nearby property. *Id.*, Exh. I. She cited case studies finding that single family lots and improved residential properties located within about 500 feet of a solar farm, and with dense mature woodland between them, lose 15% of their value. *Id.*, Exh. I, pp. 6-7. Other case studies have found that single family lots and agricultural tracts with a clear view of a solar facility within 450 feet, or with minimal natural vegetation between them, lose 30% of their value. *Id.*

These case studies have ominous ramifications for the 50 households located within 250 feet of the Kingwood Project Area. With or without trees to block the view of solar panels, those properties will lose substantial value if the Project is built. Even if Kingwood did a good job of vegetating its fence lines instead of skimping on the number and sizes of trees (which as explained above, it will not), Kingwood's objective to intercept the neighbors' views of solar arrays would be doomed by the differences in elevation between solar arrays and neighboring residences. OPSB should have identified the Project's damage to neighboring property values as additional grounds for denying the certificate under R.C 4906.10(A)(6).

**Assignment of Error No. 10:**

**The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Failing To Identify The Project's Damage To The Community's Historic And Cultural Resources As Another Reason Why The Project Does Not Comply With R.C. 4906.10(A)(3) and (6).**

Both Kingwood's architectural history expert Amy Kramb and the Citizens' expert historian Terry Fife testified about the historic and architectural significance of the Project Area and the surrounding territory.

Ms. Kramb performed an architectural survey for the Application that discovered widespread and extensive historical resources in the area. Kingwood Exh. 109, Kramb Rebuttal Testimony, Exh. A, Appendices A, C, D, E, F, G.

Ms. Kramb has identified 685 architectural sites of 50 years of age or older in the Ohio Historic Inventory database within five miles of the Project Area. *Id.*, Exh. A, p. 6. She has identified 258 architectural sites within two miles of the Project Area. *Id.*, Exh. A, Appx. G; Kramb, Tr. IX 2196:16 to 2197:10. Five sites within two miles of the Project Area are registered on the National Register of Historic Places, and an historic district with nine sites also is listed. Kramb, Tr. IX 2200:21 to 2201:5. Five historic bridges are in the area. *Id.*, 2201:5-6. Ms.

Kramb's visit to the area identified another 16 sites and two additional districts that may qualify for the list. *Id.*, 2201:7-19, 2202:4-12.

Although Ms. Kramb testified about potential views of the Project from vantage points at historic sites, she is not a visual impact expert nor did she obtain the physical access necessary to support her opinions. All 258 of the historic sites were on private property, which she did not access. Kramb, Tr. IX 2198:7-13. She stated that her opinions about the Project's visibility from each historic property were based on what she could see "from standing at that property at the edge of the public right-of-way." Kramb, Tr. IX 2197:20-22. Sometimes she did not even get out of her vehicle to look at the views from those properties. Kramb, Tr. IX 2198:14-18. She could not even see 14 architectural sites from which views of the Project Area are likely or possible. Kingwood Exh. 109, Kramb Rebuttal Testimony, Exh. A, p. ii.

Despite Ms. Kramb's incomplete survey, she found that eight of the historic sites potentially eligible for the National Register of Historic Places may have views of the Project Area. Kingwood Exh. 109, Kramb Rebuttal Testimony, Exh. A, p. ii. She also identified an additional seven architectural sites that she could not physically see during her visit to the study area as likely to have views of the Project Area, and another seven from which views are possible. *Id.*

In contrast to Ms. Kramb's limited experience with and knowledge of the history of this area of Greene County, Citizen Terry Fife is a seventh generation family member who has resided in the area, and she lives in a former one-room schoolhouse that her family has owned since the 1920s. Citizen Exh. 5, Fife Direct Testimony, p. 13, line 5 to p. 14, line 3. She is a practicing historian who has been actively engaged in the field of applied public history for 40 years. *Id.*, p. 2, lines 1-2. She began her career as a researcher and then a curator at the Chicago

Historical Society, which is now known as the Chicago History Museum. *Id.*, lines 5-6. In 1988, she founded a historical research firm called History Works, which is now recognized as the oldest public history consulting firm in the Midwest. *Id.*, lines 22-23. That firm's clients include museums, scholars, not-for-profits, individuals and families with noteworthy histories, corporations, and some of the nation's largest law firms. *Id.*, p. 2, line 22 to p. 3, line 4. For 20 years, she also taught at Loyola University of Chicago in courses for graduate students on oral history, public history media, and historical museums. *Id.*, p. 3, lines 14-23.

Ms. Fife acquired considerable knowledge of the area's history and architecture by living there. *Id.*, p. 13, line 5 to p. 14, line 3. In addition, Ms. Fife has examined a broad range of primary and secondary sources about the area's history. *Id.*, p. 7, line 4. For purposes of her testimony in this case, she studied a number of local histories and maps, including the earliest ones compiled and created for Greene County, as well as a range of local newspapers. *Id.*, lines 4-6. Other sources she reviewed included a substantial collection of family papers, memoirs, photographs, and records pertaining to the history of the Clark Run neighborhood. *Id.*, lines 6-8. She also inspected and studied some historic structures, including barns and houses farther afield from the Clark Run neighborhood but near Clifton and proximate to the eastern side of the Project Area. *Id.*, lines 8-10. She reviewed and studied primary source materials at the Greene County Historical Society, Xenia Township offices, the Greene County Archives, the Greene County Room at the Greene County Public Library, and the National Museum of Afro-American History in Wilberforce. *Id.*, lines 10-13.

While Ms. Kramb conducted a superficial review to compile a rote list of the area's architectural sites, Ms. Fife's in-depth research adds historical context to fully understand the area's historical resources. Without historical context it is impossible to fully understand an

area, a region, or people who have lived in those areas or communities at any time in the past. *Id.*, p. 5, lines 12-13. In the absence of context, one is merely engaging in the listing of random facts, figures, dates, and places. *Id.*, lines 13-15. Compiling a list of structures that may, or may not be, eligible for consideration for the National Register of Historical Places does not constitute a history of the region where the Kingwood Project is being proposed. *Id.*, lines 15-17. A list of structures tells us nothing about the backgrounds, the values, the culture, or the actual lives of the people who built, lived, and used these structures. *Id.*, lines 17-19. Context, in the case of understanding the history of the proposed project area, involves an awareness of the people who have lived and labored in this landscape over time. *Id.*, lines 19-21.

Based on this informed approach to history, Ms. Fife has written intensely detailed testimony describing the history of the rural community in and near the Project Area and explaining how this history has put its stamp on the area's appearance. The area's historic occupants and the surviving vestiges of their former presence can be summarized in abbreviated form in the following paragraphs:

Prehistoric peoples such as the Archaic People, Adena, Hopewell, and Fort Ancients lived there about 7000 years ago. *Id.*, p. 7, lines 18-22. Some Moundbuilders were active in the county about 2000 years ago. *Id.*, lines 22-23. These people were Moundbuilders, and a surviving Adena mound is located in a county park a short distance from the Project Area that attracts visitors from all over the state. *Id.*, p. 7, line 22 to p. 8, line 3.

Native Americans including the Miami, Shawnees, Wyandots, and Delawares also lived in the area and played an important role in its history. *Id.*, p. 8, lines 4-13. Ohio's newest state park, Tecumseh State Park, is in the planning stage and will be sited about two miles from the Project Area. *Id.*, p. 8, line 14 to p. 9, line 3. This park will shed more light on the currently



misunderstood and underappreciated role of the Shawnees in the history and culture of the local community and the state as a whole. *Id.*

Settlers of European descent such as Scots and Scots-Irish began to arrive soon after the Revolutionary War. *Id.*, p. 7, lines 18-19 & p. 9, line 4 to p. 10, line 16. The theological beliefs of many of them, including Presbyterians and Quakers, made them fiercely opposed to slavery. *Id.*, p. 9, line 15 to p. 10, line 16.

The area's anti-slavery philosophy and sparsely populated countryside made the area attractive to free people of color, who moved there from eastern cities and elsewhere. *Id.*, p. 10, lines 17-22. Few other rural counties in the Midwest can claim the presence of an established African American community in the years before 1865. *Id.*, p. 10, lines 20-21. The majority of the county's citizens of color lived in the three townships in which the Project Area is located. *Id.*, lines 21-22.

The architectural contributions of the European and African American settlers are pervasive and noticeable throughout and immediately around the Project Area. The sheer number of architectural sites found by Ms. Kramb attest to that fact. Ms. Fife has further described these historic assets in the context of the area's culture and history.

Many of the historic dwellings were solid but simple, sometimes made of local stones, like the 1809 structure at 1451 Bradfute Road. *Id.*, p. 11, lines 3-4. Other early houses in the area are exquisite examples of the plain and practical Federal farm style indigenous to the local landscape. *Id.*, lines 4-7. These structures, many of which were constructed with local clay and bricks fired on site, can be found throughout the Project Area. *Id.*, lines 7-8. Examples of then ordinary, now extraordinary, vernacular architecture of the early 1800s are located at 1360 and 1300 Bradfute Road, 1040 and 1430 Clifton Road, 1851 Stevenson Road, and 3010 Wilberforce-

Clifton Road. *Id.*, lines 8-11. At least twenty historic 19<sup>th</sup> century structures still stand in the little village of Clifton and many more are located just outside the village. *Id.*, lines 17-18.

Most of the houses more than 150 years old in the area feature plain but elegant interior carpentry fashioned from local hardwoods, especially oak, maple and walnut. *Id.*, lines 13-14. Many of the townships' early skilled craftsmen – carpenters, joiners, coopers, masons, wheelwrights, millers, and blacksmiths -- aspired to acquire farmland in the area. *Id.*, lines 15-16. When they were able to do so, they typically built their own houses. *Id.*, lines 16-17. Many of the oldest homes in the area are valued for the skilled craftsmanship still on display. *Id.*, lines 17-18.

Some of these local craftsmen had a hand in engineering and constructing the many water-powered mills that once operated in the Project Area. 19-20. Dozens of mills -- grist, woolen, and lumber -- were once located on the Little Miami River, on Clark Run, and on Massie's Creek. *Id.*, lines 20-22. The historic Clifton Mill and the Grinnell Mill have been preserved and stand as local touchstones to the area's early industrial and agricultural heritage. *Id.*, p. 11, line 22 to p. 12, line 1.

Each of the three townships operate cemeteries close to the Project Area that further document the area's historic heritage. *Id.*, p. 14, lines 5-6. Established in the early 1800s, these racially integrated cemeteries hold graves of early settlers including Revolutionary War veterans and a number of notable African Americans. *Id.*, lines 5-21.

This area also played an important role in the Underground Railroad, and it has the architectural sites to prove it. *Id.*, p. 15, line 1 to p. 16, line 14. About half of the 50 members of the Greene County Anti-Slavery Society lived within five miles of the Project Area with some of them residing in the Project Area, especially on elevated homesteads in the western part of the

Project Area. *Id.*, p. 15, lines 6-15 & p. 16, lines 1-6. About half of the county's 16 probable Underground Railroad sites are located within five miles of the Project Area. *Id.*, p. 15, lines 16-23.

The early presence of free African Americans in the area led to the establishment of the community of Wilberforce, located only a couple of miles from the Project Area. *Id.*, p. 16, lines 17-18. In that community, Wilberforce University was founded in 1856 and is America's oldest private African American institution of higher education. *Id.*, lines 20-21. Wilberforce is also the home of Payne Theological Seminary, the first such institution established by the African American Episcopal Church in the 1840s, and Central State University, which is one of only 19 "1890 Morrill Land Grant Universities" in the nation, established to ensure that students of color could access public institutions of higher education. *Id.*, p. 17, lines 6-19.

Oscar Bradfute, an early agricultural pioneer and farm leader, lived and worked near the Project Area. *Id.*, p. 19, lines 10-22. He was a founder of the Ohio Farm Bureau and the American Farm Bureau and served as president of both organizations in the early 1920s when the country was undergoing rapid industrialization and the population was migrating from farms to cities. *Id.*, lines 12-15. While not appearing on the National Register of Historic Places, the original farmhouse where he was born and lived, along with a bank barn and other structures used during his lifetime, survive in both Cedarville Township and Xenia Township. *Id.*, lines 15-18. The extant buildings and the surrounding pastures and tillable land have been well maintained by Bradfute descendants and more recently by non-family owners who appreciate both the historical and visual significance of these properties. *Id.*, lines 18-20. If the project is constructed, solar panels would be visible from this historic family farm situated in one of the most picturesque areas of the proposed project. *Id.*, lines 20-22.

Although the Project would impair individual historic sites throughout the area, the Project's impact on the historic value of this community is not limited to the repulsive views of solar arrays from an isolated historic site here and there. An industrial utility of 1,025 acres is completely out of character with the entire historical community. The entire area is full of historic architectural structures that add to the quality of life there. Massive arrays of solar panels will destroy the aesthetic character of this area, as residents, recreationists, and visitors attracted to the area's historic setting would be forced to drive or bike through and look at miles of solar panels as they move from one site to another. This adverse impact on the entire area cannot be prevented by a band-aid approach of planting some trees here and there to "soften" the Project's horizontal lines.

OPSB's Opinion is bereft of any reasoning on what effects the Project would have on historic and cultural resources other than to state (at ¶ 107) that the Staff's recommendation that the Project satisfies R.C. 4906.10(A)(2) and (3) is supported by Kingwood's evidence regarding the Project's limited impacts to cultural resources. This statement fails to satisfy the mandate in *Indus. Energy Users* that an OPSB order must show, "in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed ... in reaching its conclusion." 117 Ohio St.3d at ¶30. The Intervenor request that OPSB analyze this issue in detail and identify the Project's negative impact on the community's historic and cultural resources as additional grounds for denying the certificate under R.C 4906.10(A)(3) and (6).

**Assignment of Error No. 11:**

**The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Failing To Identify The Project's Risk To The Community During Tornadoes As Another Reason Why The Project Does Not Comply With R.C. 4906.10(A)(6).**

In 1974, a devastating Category 5 tornado struck Xenia, as well as the area in and near the Project Area. Citizens Exh. 5, Fife Direct Testimony, p. 27, line 18 to p. 28, line 6. The loss of life coupled with the loss of the landscape and the built environment was a traumatic experience for many who lived through the experience. *Id.*, p. 27, lines 21-23. The tornado's destruction of the area's buildings altered where people lived, worked, shopped, went to school, and attended church. *Id.*, p. 28, lines 1-6.

James Joseph Krajicek witnessed the destruction from the 1974 tornado in and near the Project Area as a young boy. Citizens Exh. Krajicek 8, Direct Testimony, p. 10, lines 18-19. This destruction included the leveling of his grandparents' barn and killing livestock. *Id.*, lines 19-20.

The area's experiences with tornadoes are not limited to 1974. In April 2018, a tornado ripped the garage off the Mossings' house and dropped the garage onto their above-ground swimming pool. Citizens Exh. 10, Mossing Direct Testimony, p. 3, lines 14-17. Mr. Krajicek also witnessed the destruction in the Project Area caused by the 2018 tornado, including the destruction of a number of buildings in the Project Area. Citizens Exh. Krajicek 8, Direct Testimony, p. 10, lines 20-21.

Knowing the area's propensity for severe weather, Kingwood produced Alex Roedel of Nextracker Inc. as a witness in an attempt to allay this concern. Mr. Roedel admitted that 17 tornadoes have occurred in Greene County since 1950. Roedel, Tr. III 631:13-15. He tried to defuse the natural concern about that statistic by saying that there have been higher numbers of

tornadoes in “Tornado Alley” in north Texas, Oklahoma, and Kansas, and in another Ohio county. *Id.*, 626:22 to 627:9, 631:13 to 632:16. Mr. Roedel made no statement about how Greene County’s tornado activity compares to the rest of the country, and he admitted that there are 17 recorded tornadoes in Greene County since 1950. Roedel, Tr. III 620:13-22. He also did not know how frequently tornadoes touch down in the Project Area, which has been struck at least twice -- in 1974 and 2018 -- according to eyewitness testimony at the hearing. Mr. Roedel also had no statistics to tell whether two tornadoes hitting an area of the size of the Project Area since 1974 is unusual. *Id.*, 632:20-23. But knowing that a few other places in the country have more tornadoes does not detract from the unusual numbers of tornadoes that have occurred in Greene County.

Mr. Roedel opined that the solar trackers that the Project will likely use to hold the solar panels to the racks will withstand wind speeds of 105 miles per hour. Kingwood Exh. 16, p. 7, lines 4-5. He stated that one solar project struck by a tornado did not suffer much damage. But there is a problem with that attempt at assurance, and it is big. As Mr. Roedel admitted on cross-examination, the wind speeds in tornadoes range from 65 miles per hour for a Category 0 tornado to over 200 miles per hour for a Category 5 tornado based on a three-second gust. Roedel, Tr. III 615:14 to 616:19; Citizens Exh. 19. The winds in the one tornado mentioned by Mr. Roedel were only 80 miles per hour, which the weakest category of tornado at Category 0. Roedel, Tr. III 615:19-21. A tornado with a wind speed of 105 miles per hour, for which the trackers are rated, is only a Category 1 tornado. Roedel, Tr. III 615:22 to 616:4.

In a further attempt to disguise the Project’s vulnerability to high winds, Kingwood has pointed to Mr. Roedel’s testimony that Nextracker trackers have been in several hurricanes with wind events exceeding 130 miles per hour. Kingwood Exh. 16, Roedel Direct Testimony, pp. 5-

6. The winds in hurricanes act differently than tornado winds, so the wind speeds in the two weather events are not comparable. Roedel, Tr. III 617:8-25. Most notably, Mr. Roedel offered no information about whether the solar panels survived those hurricanes.

The tornadoes hitting the area in 1974 and since that time have given the area's residents a heightened awareness and anxiety about the dangers associated with severe weather. Citizens Exh. 5, Fife Direct Testimony, p. 28, lines 7-19. One such danger is the threat of flying debris and infrastructure landing on nearby properties. *Id.*, lines 12-14. The massive areal extent of an industrial-sized solar project as a tornado target vastly increases that danger in an area that is already prone to tornado activity, which would increase the anxiety of residents who have experienced firsthand the effects of severe weather events. *Id.*, lines 14-19. Kingwood's ill-advised choice of this area for its sprawling industrial facility is another reason that OPSB should have cited for denying Project approval under R.C. 4906.10(A)(6).

**Assignment of Error No. 12:**

**The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Finding That The Project's Noise Impacts Do Not Preclude The Issuance Of A Certificate Under R.C. 4906.10(A)(3) and R.C. 4906.10(A)(6).**

Contrary to Kingwood's position, solar projects are noisy, not quiet. Noise measurements by Citizen expert witness Robert Rand at the Hardin Solar I project approved by OPSB prove that solar energy production is noisy.

Mr. Rand has been the owner and principal consultant of Rand Acoustics, LLC, an acoustical consulting company, since 1996. Citizens Exh. 12, Rand Direct Testimony, p. 1, lines 29-30. He has over forty years of experience in general acoustics, including industrial noise control, environmental impact assessment, and interior acoustics, with ten years in the Noise Control Group at Stone & Webster Engineering Corporation. *Id.*, lines 30-33. He has provided a

variety of acoustical consulting services over the years including evaluation of noise impacts, noise complaints, sleep disturbance, evaluation of sounds in interior spaces, speech intelligibility and sound quality, and effects of intrusive noise in mixed-use environments and quiet rural areas. *Id.*, p. 1, line 33 to p. 2, line 2. His experience includes sound level measurement and analysis of commercial and industrial equipment, infrasonic and barometric acoustic pressure pulsations, and community noise impact assessments for industrial wind turbines. *Id.*, p. 2, lines 2-5. He has worked for decades to prevent sleep disturbance and adverse impacts on community amenity, assist industrial and commercial clients to meet noise regulations and be good acoustic neighbors, and enhance the quality of life for citizens and communities. *Id.*, p. 2, lines 14-17. He has extensive professional experience with noise measurement, noise control design and cost management, and noise impact assessment for power generation transformers and tonal noise sources, all of which provide an experiential basis of noise impact assessment for Kingwood. *Id.*, p. 3, lines 10-13.<sup>4</sup>

During Mr. Rand's visit, a line of inverters at Hardin Solar I was producing continuous tonal noise which dominated the environment and sounded like "swarms of bees." *Id.*, p. 15, lines 5-6. At a distance of 790 feet away, the inverters' humming was heard and measured at levels of 42 to 45 A-weighted decibels ("dBA") with tonal sounds of 40 to 41 dBA. *Id.*, p. 14, lines 17-19 & p. 15, lines 6-19 & p.18, lines 1-5. This loud inverter noise from 790 feet away proves that Kingwood's proposed 500-foot setback between inverters and residences will not prevent noise nuisances at neighboring homes. *Id.*, p. 11, lines 12-13. Kingwood's inverters

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<sup>4</sup> Kingwood has contended that Mr. Rand had not measured noise at many solar facilities, but that argument is specious. Acoustical procedures for measuring noise are no different for solar facilities than for any other type of noise source. Kingwood also argued that Mr. Odom has more experience than Mr. Rand. In contrast to Mr. Rand's 40 years of acoustics experience, Mr. Odom's acoustics job experience consisted only of about four years at Acentech and about a year at Trinity Consultants, where he spent only five percent of his time working on noise projects. Odom, Tr. II 426:17 to 428:9. Mr. Odom had never previously testified as a noise expert before the hearing in this case. Odom, Tr. II 429:21-23.



would need to be 1800 feet away before their noise receded to reasonable levels. *Id.*, p. 11, lines 21-22.

The clattering and bustling sounds of tracker motor shifts in the racking positions at Hardin Solar I also were loud, with measurements of 39 to 42 dBA at 90 feet away. *Id.*, p. 16, line 16 to p. 17, line 10 & p. 18, lines 10-13. Loud pile driving sounds at the Hardin Solar II construction site also were witnessed. *Id.*, p. 16, lines 3-15. However, the clanging pile driving and the inverter hums are distinctly different, enabling Mr. Rand to distinguish the inverter sounds from construction sounds and to measure their volumes separately. Rand, Tr. V 1032:2-11, 1037:6 to 1041:4.

With respect to the inverter noises at Hardin Solar I, Mr. Rand found that, “[w]ithout question, inverter noise with that sound character intruding onto adjacent residential property would be objectionable for neighbors who do not want such a facility installed.” *Id.*, p. 18, lines 1-3. Thus, the Board has already made a mistake at the Hardin Solar I facility, where the inverters’ tonal humming sounds like “swarms of bees” outside of the facility. Citizens Exh. 12, Rand Direct Testimony, p. 15, lines 5-6. Mr. Rand noted that the inverter noise at Kingwood is expected to occur at the same level based on the inverter units that may be selected. *Id.*, lines 5-9.

In its present state without solar arrays, the Project Area and environs are a quiet rural farming area. *Id.*, p. 20, line 9. Kingwood’s acoustic engineer skewed his background sound study to make the existing sound level look higher by selecting unrepresentative sound measurement locations for two of his three monitoring locations. *Id.*, p. 20, line 16 to p. 22, line 14. These two locations were placed next to public roads, at which traffic noise was substantially louder than sounds at and behind the community’s residences. *Id.*

Based on the unrepresentative sound measurements, Kingwood consultant Acentech proposed “Project-Only Sound Level Guideline (dBA)” for the three measurement locations on page 3 of Application Appendix K. These proposed noise limits range from 46 to 55 dBA in daytime, and 41 to 50 dBA at night. *Id.*, p. 24, lines 14-16. The highest guidelines are for the two measurement locations within 50 feet of roadways. *Id.*, lines 16-17.

Based on extensive experience in designing large facilities with noise controls, Mr. Rand has concluded that the Project’s proposed noise limit and predicted noise levels appear to be excessive for the quiet rural area and are likely to provoke widespread complaints. *Id.*, p. 24, lines 1-2 & p. 24, lines 6-7. Kingwood’s proposed noise limits are many decibels higher than five decibels above the background L90 sound level of 28 dBA, which is the level at which complaints are expected to occur. *Id.*, p. 12, line 16 & p. 25, lines 5-6. To address this inevitable problem, Kingwood should be required to install noise controls just like any normal industrial, noise-emitting facility instead of waiting from neighbors’ complaints to come in before acting. *Id.*, p. 26, lines 3-6. Both Mr. Rand and Kingwood’s acoustic expert agree that effective noise controls are available for inverters. *Id.*, p. 27, lines 7-12. Based on established industrial practice, with which Mr. Rand is familiar from his years of designing noise controls for industrial facilities at Stone and Webster Engineering Corporation, noise controls are deemed reasonable if their costs range between 5% and 20% of a facility’s construction costs. *Id.*, p. 10, line 12 to p. 11, line 11 & p. 26, lines 11-15. Inverter enclosures effective in reducing noise would cost about 15.2% of the cost of building a solar facility, and thus are affordable under standard industrial practice. *Id.*, lines 20-23.

As currently designed, the Project’s inverters and tracker motors would cause severe noise problems. OPSB’s Opinion states (at ¶ 109) that it agrees with Kingwood’s evidence that

it is economical to install noise controls after construction if noise proves to be a problem. OPSB has adopted Kingwood's approach to noise control, which is to install the inverters without noise controls and then mitigate the noise if it is a problem. That is, OPSB, like Kingwood, would prefer that the neighbors suffer for a while after the inverters start operation. As Mr. Rand testifies, the proper professional practice is to install noise control equipment at the time of facility construction rather than waiting for complaints. This is not only more responsible to one's new neighbors, but less expensive than retrofitting noise controls. The Board should have found that the Project is not approvable due to its failure to address this issue proactively with noise controls rather than waiting for damage to occur first.

Moreover, waiting for the problem to occur before acting violates OAC 4906-4-08(A)(3)(d), which requires Kingwood to "[d]escribe equipment and procedures to mitigate the effects of noise emissions from the proposed facility during ... operation." It also is unfair to residents who will be forced to endure the unpleasant noise of operation until controls are installed, if they are required at all. Effective noise controls must be incorporated into the Project's design to prevent these problems. OPSB erred by finding that the lack of noise controls does not violate R.C. 4906.10(A)(3) and R.C. 4906.10(A)(6).

**Assignment of Error No. 13:**

**The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Finding That Kingwood Provided The Information Required By OAC 4906-4-07(C) And R.C. 4906.10(A)(2), (3), (5), And (6) About The Project's Drainage Impacts And Associated Mitigation To Prevent Flooding.**

The Project Area is prone to flooding. Citizens Exh. 1, Adams Direct Testimony, p. 8, lines 3-4. The Project Area drains onto its neighbors' farmland and yards. For example, Citizen James Joseph Krajicek and his wife Deborah Krajicek, through their trust, own a 47-acre parcel of crop land adjacent to the Project Area that receives runoff through a surface waterway from

two fields totaling about 80 acres in the Project Area designated for solar panels. Citizens Exh. 8, Krajicek Direct Testimony, p. 3, lines 8-22. Although surface waterways in farm fields are ordinarily designed to be 30 feet wide, the amount of water flowing from the fields in the Project Area necessitates a 40-foot wide channel in order to convey the water without flooding the crops in the Krajiceks' field. *Id.*, p. 4, lines 5-7. During larger rainfalls, such as a two-inch rainfall that falls in a short period of time, the culvert under the public road at the end of their field cannot handle all of the water flowing through the waterway. *Id.*, lines 17-18. This causes water to rise and flow over the road. *Id.*, lines 18-19. It also causes the water level to rise in and back up in the waterway and to overflow the waterway's channel into the Krajiceks' field. *Id.*, lines 19-20. An increase in the volume or velocity of water from the Project Area would increase the frequency of the events in which water backs up behind the culvert, overflows the waterway's channel, floods the crops in their field, and flows over the road. *Id.*, lines 20-23. Water that the culvert cannot handle, which then flows over the road, floods the yards of two downstream households, the Reeds and the Fischers. *Id.*, p. 4, lines 8-12 & p. 5, lines 1-3.

The Krajiceks also rent 150 acres of farmland that are adjacent to and downstream from a field in the Project Area designated for solar panels. *Id.*, p. 5, lines 4-10. The amount of water flowing from the land in the Project Area necessitates a 40-foot wide surface waterway in order to convey the water without flooding the crops in the Krajiceks' rented field. *Id.*, lines 8-17.

Similarly, Citizen P. Chance Baldwin's yard receives surface runoff from the Project Area, which is flooded by runoff from that Project Area field during heavy rainfall. Citizens Exh. 2, p. 4, line 19 to p. 5, line 1. A crop field that he owns and farms is drained by a drainage tile that enters his field from the Project Area and then exits his field into another portion of the Project Area. *Id.*, p. 14-18.

The purpose of a drainage tile is to remove excess precipitation from a field before it damages the field's crops. Waterhouse, Tr. III 561:7-23. Flooding can kill crops or reduce their yields. *Id.*, 562:5-10. Excessive runoff through tiles and surface waterways from the Project Area could cause serious damage to downstream fields and yards. As demonstrated by the above discussion, the Project Area already has drainage problems and challenges, which would be exacerbated if the Project increases stormwater runoff. Consequently, it is critical that OPSB know how much runoff the Project will produce.

For that reason, 4906-4-07(C) requires the board to obtain data about a project's potential for surface water runoff from an applicant prior to approving a project, so that potential drainage problems can be diagnosed prior to construction. Rather than making uninformed guesses about whether the Project's design and construction will increase the runoff of stormwater from a site by altering the terrain, the Board has promulgated this rule to answer this question ahead of construction rather than finding out when flooding damages the community.

OAC 4906-4-07(C) provides:

(C) The applicant shall provide information on compliance with water quality regulations.

\*\*\*\*

(2) The applicant shall provide information regarding water quality during construction.

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(b) Provide an estimate of the quality and quantity of aquatic discharges from the site clearing and construction operations, including runoff and siltation from dredging, filling, and construction of shoreside facilities.

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(c) Describe any plans to mitigate the above effects in accordance with current federal and Ohio regulations.

(d) Describe any changes in flow patterns and erosion due to site clearing and grading operations.

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(3) The applicant shall provide information on water quality during operation of the facility.

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(d) Provide a quantitative flow diagram or description for water and water-borne wastes through the proposed facility, showing the following potential sources of pollution, including:

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(vii) Run-off from soil and other surfaces.

(Emphasis added.) The underlined language requires Kingwood to quantify the amount of water that will flow off the Project Area during construction and operation. For construction, OAC 4906-4-07(C)(2)(b) requires “an estimate of the ... quantity of aquatic discharges from the site clearing and construction operations.” Emphasis added. For construction, OAC 4906-4-07(C)(2)(d) requires descriptions of any “changes in flow patterns and erosion due to site clearing and grading operations.” Emphasis added. For operation, OAC 4906-4-07(C)(3)(d) requires “a quantitative flow diagram or description for water ... through the proposed facility.” Emphasis added. These water flow estimates and flow patterns are necessary to determine whether site clearing and the existence of impervious solar panels will increase stormwater runoff that could flood downstream properties during and after construction. Nevertheless, Kingwood’s expert witness admitted at hearing that Kingwood has not performed any calculations of the quantity of runoff prior to construction or after construction. Saunders, Tr. III 698:9 to 699:19, 700:19-25. He admitted that Kingwood provided no quantitative flow diagrams or descriptions of water flow patterns through the facility. *Id.*, 702:5-20. Accordingly, Kingwood admits that it has not provided the data required by OAC 4906-4-07(C)(2)(b) & (d) and OAC 4906-4-07(C)(3)(d) to determine whether the quantity of runoff caused by Project construction or operation will harm downstream landowners.

Kingwood has asserted that floodplains are not much of a problem in the Project Area, but citizen testimony proves that much of the Project Area is routinely covered with standing

water. These observations do not even account for modifications in drainage patterns that Project construction may make.

The Board's rule requires the numeric calculations necessary to define the differences in drainage volumes before and after construction. Kingwood has taken a shortcut through those requirements, choosing instead to hire a witness to just say drainage and flooding will not be problematic. The Board needs, and the Board's rule requires, volumetric calculations of stormwater so that OPSB can make an independent judgment as to whether the Project will cause flooding and to identify any mitigation measures necessary to prevent flooding. Kingwood does not deny the fact that the record contains no such volumetric calculations – a fact that its own expert admitted. Instead, Kingwood insists that no calculations are necessary, because the Project supposedly will not cause drainage problems. However, the very point of producing the rule-required stormwater calculations is to demonstrate whether the Project will create drainage problems. Presenting a hired gun to tell the Board it does not need these calculations does not satisfy these legal requirements.

The welfare of the Project's downstream neighbors depends on the development of water quantity data for the construction and operation of the Project. Without this data, the record does not and cannot identify any mitigation measures that may be necessary to protect neighbors from flooding and drainage problems caused by Kingwood's activities as required by OAC 4906-4-07(C)(2)(c). OPSB should have found that Kingwood's failure to provide this data violated OAC 4906-4-07(C) and R.C. 4906.10(A)(2), (3), (5), and (6). The Intervenors request that OPSB add this grounds as an additional reason for denying the certificate.

**Assignment of Error No. 14:**

**The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Finding That Kingwood Provided The Information Required By OAC 4906-4-07(C) And R.C. 4906.10(A)(2), (3), (5), And (6) About The Project's Pollution Impacts And Associated Mitigation.**

OAC 4906-4-07(C) requires the board to obtain data about a project's potential for water pollution from an applicant prior to approving a project, so that potential pollution problems can be diagnosed prior to construction. Rather than making uninformed guesses about whether the Project's disturbance of the soil will increase the runoff of soil-laden water into streams, the Board has promulgated this rule to answer this question ahead of construction rather than finding out after water pollution damages the streams and the community.

OAC 4906-4-07(C)(1)(d) and 4906-4-07(C)(2)(b), (c), (d), and (e) require Angelina to provide water quality data so the board can evaluate these discharges' impacts:

(C) The applicant shall provide information on compliance with water quality regulations.

(1) The applicant shall provide information regarding preconstruction water quality and permits.

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(d) Describe the existing water quality of the receiving stream based on at least one year of monitoring data, using appropriate Ohio environmental protection agency reporting requirements.

(2) The applicant shall provide information regarding water quality during construction.

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(b) Provide an estimate of the quality and quantity of aquatic discharges from the site clearing and construction operations, including runoff and siltation from dredging, filling, and construction of shoreside facilities.

(c) Describe any plans to mitigate the above effects in accordance with current federal and Ohio regulations.

(d) Describe any changes in flow patterns and erosion due to site clearing and grading operations.



(e) Describe the equipment proposed for control of effluents discharged into bodies of water and receiving streams.

(Emphasis added.) The emphasized language requires an applicant to submit information about the quality of surface water flows from the Project Area during construction and operation, such as sediment from erosion carried into the streams.

Kingwood's expert witness admitted that Kingwood has not submitted any of this water quality information. Saunders, Tr. III 700:7-18, 701:1-6, 701:24 to 702:4. Kingwood has not denied that fact. Instead, Kingwood states that it will provide this data later, when it obtains a stormwater discharge permit after certification that will require pre- and post-construction stormwater calculations. However, OPSB's rule requires these stormwater calculations before certification so that the Board can determine the Project's potential water quality impacts and the necessary mitigation measures.

Kingwood also has pointed out that the Project will not pollute the groundwater. However, this is a red herring aimed at diverting OPSB's attention from Kingwood's failure to provide data on surface water quality. The Intervenor has not argued that OAC 4906-4-07(C)(1)(d) and 4906-4-07(C)(2)(b), (c), (d), and (e) apply to groundwater.

Kingwood also argued that supplying the data required by this rule is unnecessary, because the Project will discharge only stormwater. However, stormwater carries eroded soil into streams, and soil is a harmful pollutant. That is why a stormwater discharge permit from Ohio EPA is required in the first place. OAC 4906-4-07(C)(1)(d) and 4906-4-07(C)(2)(b), (c), (d), and (e) provide no exception for stormwater pollution. Moreover, even if Kingwood wants to claim that the Project will not harm water quality, the rule requires Kingwood to prove that assertion by producing water quality data. The very point of producing the rule-required water quality calculations is to demonstrate whether or not the Project will create water quality

problems. Telling the Board it does not need these calculations fails to satisfy these legal requirements.

OPSB should have found that Kingwood's failure to provide this data violated OAC 4906-4-07(C) and R.C. 4906.10(A)(2), (3), (5), and (6). The Intervenor request that OPSB add this grounds as an additional reason for denying the certificate.

**Assignment of Error No. 15:**

**The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Failing To Identify The Applicant's Inexperience As Another Reason Why The Project Does Not Comply With R.C. 4906.10(A)(6).**

Kingwood Solar I LLC is a brand new company formed just for the purpose of filing this Application. Therefore, it has no experience in constructing or operating solar facilities. Kingwood is a wholly owned subsidiary of Vesper Energy. Stickney, Tr. I 47:22-25. Vesper has never operated a solar facility either. Stickney, Tr. I 44:1-20. To Mr. Stickney's knowledge, Vesper has never finished the construction of a solar facility. Stickney, Tr. I 44:21 to 45:10. In fact, although Vesper states that it has three gigawatts of renewable energy and energy storage projects in its "current development pipeline," these projects are not even in construction. *Id.*, 47:5-15. Kingwood and its parent company are new to their trade.

OPSB should not entrust the responsibility to construct and operate a facility, which could cause so much damage to the community, to a company that has absolutely no experience. Yet OPSB did not address this issue as required by *Indus. Energy Users*. OPSB should have identified Kingwood's inexperience as additional grounds for denying the certificate under R.C. 4906.10(A)(6).

## V. CONCLUSION

There are a multitude of important reasons to deny the certificate sought by Kingwood in addition to the grounds provided by OPSB's Opinion. The Board should add those reasons to its Opinion in support of its denial of Kingwood's application for certificate.

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## CERTIFICATE OF SERVICE

I hereby certify that, on January 13, 2023, a copy of the foregoing application was served by electronic mail on the following: Jodi Bair at [Jodi.Bair@ohioattorneygeneral.gov](mailto:Jodi.Bair@ohioattorneygeneral.gov); Daniel A. Brown at [dbrown@brownlawdayton.com](mailto:dbrown@brownlawdayton.com); Kevin Dunn at [kdd@planklaw.com](mailto:kdd@planklaw.com); John Hart at [jehartlaw@gmail.com](mailto:jehartlaw@gmail.com); Nathaniel B. Morse at [nbmorse@vorys.com](mailto:nbmorse@vorys.com); Werner.Margard@ohioattorneygeneral.gov; Michael Settineri at [mjsettineri@vorys.com](mailto:mjsettineri@vorys.com); Lee Slone at [ls lone@mdllp.net](mailto:ls lone@mdllp.net); Charles Swaney at [cswaney@woh.rr.com](mailto:cswaney@woh.rr.com); David Watkins at

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Township Trustees