

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Application of Hardin Solar )  
Energy III LLC for a Certificate of )  
Environmental Compatibility and Public Need ) Case No. 20-1678-EL-BGN  
to Construct a Solar-Powered Electric )  
Generation Facility in Hardin County, Ohio. )

**RESPONSE TO  
SEPTEMBER 15, 2023 LIGHTNER LETTER**

**I. BACKGROUND**

Hardin Solar Energy III LLC (“Hardin Solar” or “Company”) is certified to construct a solar-powered electric generation facility (“Project”) in Hardin County, Ohio, in accordance with the 33 conditions set forth in the Joint Stipulation and Recommendation (“Stipulation”), as approved by the Ohio Power Siting Board (“Board”) in its September 16, 2021 Order in Case No. 20-1678-EL-BGN (“Certificate”).

On September 15, 2023, Jimmie and Susan Lightner (the “Lightners”) filed a letter in this docket alleging Hardin Solar violated several conditions of its Certificate. Specifically, the Lightners allege Hardin Solar: graded the Project Area next to the Lightners’ property in a manner that caused uncontrolled stormwater runoff; and did not minimize the amount of dust resulting from construction.

On October 12, 2023, the Administrative Law Judge issued an entry directing Hardin Solar to file a response to the Lightners’ September 15, 2023 letter. Now comes Hardin Solar providing the following response.

**II. LAW**

Ohio Revised Code (“R.C.”) 4906. 98 provides that “[n]o person shall construct, operate, or maintain a major utility facility, other than in compliance with the certificate the person has obtained.” R.C. 4906.97 provides that the Board must find that there are reasonable grounds to believe that there is a violation of R.C. 4906.98 before it can initiate a proceeding to investigate an alleged violation. Ohio Administrative Code (“O.A.C.”) 4906-7-02 sets forth the process for enforcement investigations by the Board.

### III. RESPONSES

As detailed below, the Lightners have not identified any reasonable grounds for the Board to initiate an investigatory proceeding under R.C. 4906.97. Through this answer, Hardin Solar is not waiving its right to argue jurisdictional authority over the concerns raised by the Lightners and hereby reserves its right to argue jurisdictional authority in the future, and denies all claims set forth by the Lightners in their letter.

Hardin Solar is in compliance with its Certificate conditions and is fully committed to continuing to comply in all respects with the conditions in its Certificate. Further, Hardin Solar takes seriously any concerns or complaints that arise regarding the Project and endeavors to resolve all legitimate complaints.

With regard to the Lightners' concerns, the Company and the RES Group ("RES"), the Company's contractor for the Project, have met with the Lightners numerous times to discuss and resolve concerns they may have. The concerns raised by the Lightners do not result in a violation by Hardin Solar of its Certificate conditions as contemplated in R.C. 4906.98. However, the Company is committed to continuing in good faith to work with the Lightners, investigate the situation, and address their concerns.

The Ohio Environmental Protection Agency ("Ohio EPA") is the agency with the authority to issue and enforce National Pollutant Discharge Elimination System ("NPDES") Construction Stormwater Permit Number OHC000006 ("General Permit") for the discharge of pollutants into Ohio waters.<sup>1</sup> Hardin Solar has obtained its General Permit from the Ohio EPA and has been in

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<sup>1</sup> States may apply for delegated authority to implement NPDES permitting in their state and, if the United States Environmental Protection Agency ("U.S. EPA") approves, the state has delegated authority over the program. In Ohio, the Ohio EPA has been delegated the authority to issue NPDES permits for the discharge of pollutants into Ohio waters. *See* 33 U.S.C. 1251 et seq. The NPDES permit program arises from Section 402 of the Federal Water Pollution Control Act. 33 U.S.C. 1342 (a.k.a., the Clean Water Act ["CWA"], 33 U.S.C. 1251–1387). The CWA uses two approaches to control water pollution: (1) technology-based regulations; and (2) water quality standards. *Arcadia v. U.S. EPA*, 265 F.Supp.2d 1142, 1143 (2003). "Technology-based regulations seek to reduce pollution by requiring a discharger to effectuate equipment or process changes, without reference to the effect on the receiving water; water quality standards fix the permissible level of pollution in a specific body of water regardless of the source of pollution." *Id.* at 1143–44. The NPDES permit program is a means of implementing both approaches. *Id.* at 1144. The objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The effluent (or discharge) limits set forth in NPDES permits are established via regulatory controls. Pursuant to O.A.C. 2745–33–05, the director of the Ohio EPA shall determine and specify in the permit the maximum levels of pollutants that may be discharged to ensure compliance with, *inter alia*, applicable water quality standards and applicable effluent limitations. Water quality-based limits are

communication with the Ohio EPA to ensure compliance with its General Permit. In fact, recommendations made by the Ohio EPA were recently implemented by Hardin Solar. Thus, while General Permit compliance is a condition to Hardin Solar's Certificate issued by the Board, the Ohio EPA is the agency with primary jurisdiction over stormwater compliance and is the only agency with the statutory authority to determine compliance in the first instance, and no adjudication of the Lightners' concerns may be decided before Ohio EPA has had a chance to investigate.<sup>2</sup> The Ohio EPA's findings and conclusions on Hardin Solar's compliance with the General Permit will ultimately be binding on the Board.

Further, as detailed below, Hardin Solar has a pending civil complaint regarding its lease agreement with a participating property owner<sup>3</sup> in the Hardin County Court of Common Pleas. The civil complaint requests injunctive relief to allow Hardin Solar to construct a temporary sediment basin in accordance with the Ohio EPA General Permit in the Project Area, adjacent to the Lightners' property.

#### **A. Stormwater**

##### **1. Response to Allegations 1, 10, 11, 12: Hardin Solar is Compliant with its Certificate Commitments Regarding the General Permit, Stormwater Pollution Prevention Plan, and Best Management Practices**

In accordance with the requirements of its Certificate, Hardin Solar obtained a General Permit from the Ohio EPA prior to the start of construction.<sup>4</sup> Hardin Solar further developed and implemented the Stormwater Pollution Prevention Plan ("SWPPP") and best management practices

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included in NPDES permits if technology-based limits are not sufficient to achieve or maintain compliance with water quality standards. O.A.C. 3745-33-05(A). *See* R.C. 6111.05.

<sup>2</sup> *See, e.g., Dental Care Plus, Inc. v. Sunderland*, (Ohio Ct. of Appeals Nov. 5, 1999) 135 Ohio App.3d 574, 735 N. E.2d 19, which states, "[t]he **doctrine of primary jurisdiction** will be utilized when the circumstances and their underlying legal issues would be better ascertained and interpreted by the agency specializing in that area. [*United States v. W. Pacific [RR. Co. (1956)]*, 352 U.S. [59] at 65, 77 S.Ct. [161] at 165-166, 1 L.Ed.2d [126] at 132-133. The criteria used in making this determination are the 'character of the controverted question and the nature of the inquiry necessary for its solution.' *Great N. Ry. Co. v. Merchants' Elevator Co.* (1922), 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943. The agency should make the determination on technical matters to maintain some uniformity in agency policy and to take advantage of the agency's expertise." Here, primary jurisdiction lies with the Ohio EPA possessing the expertise and the duty to implement and oversee such matters. This overriding interest is manifested in Ohio EPA's implementation of the vigorous and complex implementation of the NPDES program codified in 33 U.S.C. § 1342.

<sup>3</sup> Hardin Solar leases and has easement rights over the field west of the Lightners from Sugar Shack, Ltd. and the field north of the Lightners from Pohlman Farms Performance Hybrids, Ltd. The west and north fields are owned by the Pohlman family (jointly, the west and north fields are referred to herein as the "Pohlman properties").

<sup>4</sup> *See Hardin Solar*, Case No. 20-1678-EL-BGN, Stipulation (July 21, 2021), Conditions 8, 29.

(“BMPs”) required under the General Permit to reduce pollutants in stormwater discharges during construction.<sup>5</sup>

As part of the Ohio EPA’s General Permit BMPs, in order to reduce stormwater runoff during construction, Hardin Solar installed a silt fence between the Project Area and the Lightners’ property and has judiciously pursued placement of a temporary sediment basin in the Project Area on the land adjacent to the Lightners’ property – the Pohlman properties. But, as the Lightners acknowledge, the owners of the Pohlman Properties have intentionally blocked construction of the basin, requiring Hardin Solar to file a civil suit to enjoin the blockade and enforce Hardin Solar’s right to install the basin under the Pohlman Properties’ lease. The case is pending at the Court of Common Pleas in Hardin County (Common Pleas Case No. CVH20231138). The Hardin County Court of Common Pleas denied Hardin Solar’s request for a Temporary Injunction on September 22, 2023, and scheduled a hearing on the Preliminary Injunction to commence on January 3, 2024.

Further, the Lightners believe that, since the sediment basin has not been built and the silt fence was not timely installed, Hardin Solar has not verified as provided in Hardin Solar’s Application that: all BMPs are implemented correctly and in the proper locations; that performance standards are being met; and that there is no offsite discharge of sediment or other pollutants. The Lightners note that Hardin Solar committed that “[i]f sediment is leaving the Project Area, appropriate BMPs are not installed/implemented to SWPP standards or at the right locations, and/or practices are not being followed, [Hardin Solar] will document present conditions and take measures to resolve these situations in a timely manner.”<sup>6</sup>

Thus, the Lightners assert Hardin Solar is not in compliance with the Ohio EPA’s General Permit and Certificate Condition 8, which requires the Company to comply with all permits. On September 14, 2023, the Lightners also submitted a verified complaint with the Ohio EPA alleging violation of the General Permit and SWPPP.<sup>7</sup> The Lightners clearly acknowledge the Ohio EPA is

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<sup>5</sup> See *Hardin Solar*, Case No. 20-1678-EL-BGN, SWPPP (Mar. 18, 2022).

<sup>6</sup> Lightner Letter (Sept. 15, 2023) at 5.

<sup>7</sup> The verified complaint submitted to the Ohio EPA by the Lightners was against the following respondents: Hardin Solar, Sugar Shack, Ltd., Pohlman Farms Performance Hybrids, Ltd., Renewable Energy Systems Americas, Inc., and R.D. Jones Excavating, Inc. As acknowledged by the Lightners in the verified complaint, which includes both Hardin Solar and the Pohlman Properties, the Ohio EPA General Permit defines “operator” to include the property owner where the project operator requires additional authorization from the owner “for modifications to the SWPPP, construction plans, and/or site specifications to ensure compliance with the permit.” Thus, the owners of the Pohlman Properties are operators and co-permittees of the General Permit.

the agency with primary jurisdiction over compliance with the stormwater concerns raised by the Lightners.

Contrary to the Lightners' assertions, Hardin Solar has been and continues to comply with and implement the commitments in the SWPPP. For example, with regard to temporary stabilization of disturbed areas, in accordance with the SWPPP, at a minimum, Hardin Solar has, and will continue to, apply erosion controls for any disturbed areas where visible evidence of erosion exists: within 50 feet of a surface water of the state and not at final grade, within 2 days of the most recent disturbance if the area will remain idle for more than 14 days; that will be dormant for more than 14 days but less than one year that is not within 50 feet of a surface water of the state, within 7 days of the most recent disturbance in the area; and for disturbed areas that will be idle over winter, prior to the onset of winter weather. Further, for permanent stabilization, Hardin Solar will apply erosion controls in disturbed areas where visible evidence of erosion exists: that will lie dormant for 1 year or more, within 7 days of the most recent disturbance; within 50 feet of a surface water of the state at final grade, within 2 days of reaching final grade; and other areas at final grade, within 7 days of reaching final grade in that area.<sup>8</sup>

Hardin Solar has taken every possible action and implemented every BMP to reasonably protect against erosion. In compliance with the SWPPP and BMPs, Hardin Solar placed temporary seeding twice, silt fence, silt sock, and straw/hay bales to combat erosion across the site and is in the process of permanently seeding the Project Area to further combat erosion. Moreover, Hardin Solar is communicating with the Ohio EPA and has filed a civil complaint against the Pohlman Properties to enable the construction of the temporary sediment basin.

Until the sediment basin is in place, Hardin Solar has implemented additional SWPPP measures to mitigate potential runoff from the Project Area. Inspections conducted by Hardin Solar's consultant RES have reflected that at no time during or after any rain event has sediment or erosion left the Project Area. The designed BMP measures on the Project site stop any sediment and erosion from leaving the Project site. Until the sediment basin is in place, Hardin Solar will continue to employ maintenance above and beyond the standard erosion control repair to ensure that any potential

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<sup>8</sup> See *Hardin Solar*, Case No. 20-1678-EL-BGN, SWPPP (Mar. 18, 2022) at Tables 1, 2.

sediment or erosion stays on the Project site and does not go onto adjacent properties. The bottom line is: all BMPs have been implemented correctly and are in the proper locations; all performance standards are being met; and there is no offsite discharge of sediment or other pollutants.

**2. Response to Allegation 2: Hardin Solar is Compliant with its Certificate Commitments Regarding SWPPP BMPS and Flow Patterns**

As stated in the Application “[c]hanges in flow patterns and erosions are not anticipated....” Hardin Solar designed the site so that it will be managed with “adequate drainage to maintain and improve existing flow patterns.”<sup>9</sup>

Pursuant to the Certificate and the SWPPP, Hardin Solar’s consultant RES conducts inspections and maintains records of inspections as required by the General Permit. If the inspections find that “sediment is leaving the Project Area, appropriate BMPs are not installed/implemented to SWPPP standards or at the right locations, and/or practices are not being followed, [Hardin Solar documents] present conditions and take[s] measures to resolve these situations in a timely manner.”<sup>10</sup> These inspections during and after rain events have verified that the BMPs are working and that no sediment or erosion have left the Project Area or gone onto adjacent properties.

Since the time Hardin Solar became aware of the Lightners’ concerns, it has been working diligently and in good faith to resolve any legitimate concerns in accordance with the SWPPP BMPs. However, it is important to state at the outset that it is physically and scientifically impossible to change the flow patterns in the manner alleged by the Lightners.

Pointing to the Application that provides during clearing and grading “[c]hanges to the flow patterns and erosion are not anticipated and the site will be designed and managed with adequate drainage to maintain or improve existing flow patterns,” the Lightners allege Hardin Solar’s clearing and grading on the adjacent Pohlman Properties have destroyed the drainage system, resulting in a change in the flow patterns of Dunlap Creek and increased erosion.<sup>11</sup> They claim that now “the north field’s primary stormwater runoff flows south over land instead of east through the tile system, travels across a 100-foot wide soybean patch in the setback, and then enter the Lightners’ woods.” According

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<sup>9</sup> *Hardin Solar*, Case No. 20-1678-EL-BGN, Narrative (Feb. 11, 2021) at 49.

<sup>10</sup> *Id.* at 88.

<sup>11</sup> *Id.* at 48-49.

to the Lightners, the stormwater flows have resulted in pooling among the trees and contamination into Dunlap Creek, stating that runoff from the north field had never flooded the woods prior to the grading activities. They also assert that grading of the west field has resulted in broken drain tile and has forced stormwater to flow over land to the headwaters of Dunlap Creek on the Lightners' property, eroding the field.

Hardin Solar notes that, while the drain tile system was impacted, as anticipated in the Application, such impact did not result in a change in flow patterns to Dunlap Creek as argued by the Lightners. Based on the topography of the area, the water would need to run uphill to result in the impact in the north field and the woods as alleged by the Lightners. At its lowest point, the Project Area adjacent to the Lightners sits at approximately 1,020 feet - which then continues through the Pohlman Properties' soybean field that is located between the Project Area and the Lightners' property – then, as you proceed toward the Lightners' property, the elevation climbs to 1,026 feet. Further, based on a comparison, the pre-grading runoff areas and the post-grading runoff areas are exactly the same, which means the exact same area of drainage goes to where it has always gone. Moreover, the drain tile main that could have impacted the Lightners' property has been completely replaced with new 24-inch drain tile and is located along the access road and parallel to old drain tile main to ensure that the flow pattern from the drain tile remains the same and does not change. The water flow through the new drain tile main goes in the exact same direction and flows into Dunlap Creek in the exact same location as it did in the old drain tile main.

### **3. Response to Allegation 3: Hardin Solar is Compliant with its Certificate Commitments Regarding Grading**

Hardin Solar's grading commitment is clearly and fully spelled out in the Application and reflects that:

- Because of the overall “relatively flat topography” in the Project Area, minimal grading will be required; however, “[s]ite grading will remove slopes of greater than 5% so that the land is as flat as possible before installing the racking.” (Emphasis added).
- “[g]rading may require excavation, soil redistribution, and soil compaction in order to achieve desired grades and elevations and to ensure proper soil compaction and site drainage....”
- “[g]rading will likely be most extensive in areas for the access roads and Project

substation yard, while grading and vegetation removal will be minimized to the extent practicable for the rest of the components.”

- “[t]he site cut and fill will be balanced across the entire site; however, temporary stockpiling and grading will require the use of backhoes, graders, and rollers/compactors.”<sup>12</sup>

As the Geotechnical Report found, the vast majority of the Project Area is flat and requires little grading.<sup>13</sup> However, as the commitment in the Application provided, there could be more grading in areas of the Project where the slope was above 5%.<sup>14</sup> For example:

- A review of the Project Area north of and adjacent to the Lightners’ property shows that the slope at the greatest point is 9.25%, which is greater than the 5% stated in the Application. However, the grading of the 9.25% slope was designed to head east away from the Lightners’ property.
- A review of the Project Area west of and adjacent to the Lightners’ property shows that the slope at the greatest point is 1.84% and the area flows away from the area the Lightners are claiming is impacted.

The Lightners allege that Hardin Solar’s extensive grading on the Pohlman’s Properties to the north and west sides of the Lightners’ property violates Hardin Solar’s Certificate. The Lightners point to Certificate Condition 1, which requires Hardin Solar to follow the commitments in the Application. They look to the Geotechnical Report claiming that Hardin Solar has not complied because the grading on the property adjacent to theirs was not “nominal” or “very little” as referenced in the report. The only thing the Lightners base their assumption on is their view that “[e]xcavation activities using six to eight machines in the north field lasted for weeks.”<sup>15</sup>

The Certificate commitments, which are set forth above, must be understood and implemented as a whole, not in piece parts as the Lightners attempt to do. The language they refer to in the Geotechnical Report for this allegation describes the consultants’ understanding of the Project that they used in their study and report. Thus, while it is part of the commitment made by Hardin Solar regarding grading, it is not the full commitment. As detail above, the full commitment includes the full Application, data responses, and the Stipulation – not just the report/exhibit to the Application.

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<sup>12</sup> *Id.* at 18, 25, 67.

<sup>13</sup> *Id.* at Ex. Q.

<sup>14</sup> *Id.* at 18.

<sup>15</sup> Lightner Letter (Sept. 15, 2023) at 2.



Hardin Solar has not violated its Certificate commitments. It just so happens that the view from the Lightners' property happens to be where more grading was required because of the greater than 5% slope.

**4. Response to Allegations 4, 5, 8: Hardin Solar is Compliant with its Certificate Commitments Regarding Drain Tile**

Hardin Solar has complied with the Certificate commitment to:

avoid, where possible, or minimize to the extent practicable, any damage to functioning field tile drainage systems and soils resulting from the construction...of the facility in agricultural areas. Damaged field tile systems shall be promptly repaired to at least original conditions or modern equivalent at the Applicant's expense. However, if the affected landowner agrees to not having the damaged field tile system repaired, they may do so only if the field tile systems of adjacent landowners remain unaffected by the non-repair of the landowner's field tile system.<sup>16</sup>

In addition, in accordance with the Application, Hardin Solar continues to "[work] with the landowners to minimize impact to the existing drainage system by avoiding tile mains and repairing damaged tiles wherever commercially feasible."<sup>17</sup>

The Lightners claim Hardin Solar did not, as promised in the Application: preserve the existing drainage tiles in the north and west fields nor install additional subsurface drainage measures; avoid the drainage tiles while grading the north and west fields nor repair the tiles since damaging them; or "avoid where possible, or minimize to the extent practicable, any damage to functioning drainage systems and soils."<sup>18</sup>

This allegation is false. As stated previously, the drain tile main that could have impacted the Lightners' property has been completely replaced with a 24-inche main that is approximately 900 feet in length. The new drain tile main is located parallel to the access road so that the drain tile is completely avoided during installation of the Project infrastructure in this area. Further, the new drain tile main is parallel to the old drain tile main along the Project's access road, and perpendicular to the Lightners' property and the Project's fenceline. Thus, the water flow through the new drain tile main goes in the exact same direction and flows into Dunlap Creek in the exact same location as it did in

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<sup>16</sup> *Hardin Solar*, Case No. 20-1678-EL-BGN, Stipulation (July 21, 2021) at Condition 22.

<sup>17</sup> *Hardin Solar*, Case No. 20-1678-EL-BGN, Narrative (Feb. 11, 2021) at 107.

<sup>18</sup> Lightner Letter (Sept. 15, 2023) at 5.

the old drain tile main.

To be clear, on the Project Area adjacent to the Lightners, Hardin Solar has only completed civil engineering construction, in the form of access road placement, grading activities, and the installation of collection line cables. Pile driving activities have not yet commenced in that area.

**5. Response to Allegations 6, 7: Hardin Solar is Compliant with its Certificate Commitments Regarding Water Quality, Streams, and Wetlands**

The Lightners believe that construction of the Project has had an impact on water quality and that Hardin Solar has not implemented mitigation measures to ensure that impacts from construction to groundwater, surface waters, and wetlands are avoided or minimized to the maximum extent practicable. Further, they allege Hardin Solar is not in compliance with Certificate Condition 23 because the erosion from the Pohlman properties is directly impacting Dunlap Creek. The Lightners contend “the uncontrolled runoff of stormwater from graded solar fields is polluting a creek and a woodland on Lightners’ land with excessive amounts of sediment and has damaged habitat on [the Lightners’] property [that hosts] a state endangered species [the blue-spotted salamander].”<sup>19</sup>

As stated in the Application, “construction of the [Project] is not anticipated to have any significant impact on water quality.” Hardin Solar has employed mitigation measures “to ensure that impacts to groundwater, surface waters, and wetlands are avoided or minimized to the maximum extent practicable...during...construction.”<sup>20</sup> In addition, Hardin Solar has employed “[e]quipment restrictions, herbicide use restrictions, and erosion control measures...to reduce adverse impacts to water quality, surface water hydrology, and aquatic organisms.”<sup>21</sup> Further, impacts to wetlands and streams from collections lines, access roads, and crossings are being avoided by installation via horizontal directional drilling. Any remaining “potential for wetland and/or delineated stream impacts will be limited to those impacts accounted for in the Ohio EPA approved SWPPP for retention ponds (to the extent such ponds require storm water outflow).”<sup>22</sup> Further, Hardin Solar committed that the Project will “not directly impact streams or wetlands.”<sup>23</sup>

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<sup>19</sup> *Id.* at 1.

<sup>20</sup> *Hardin Solar*, Case No. 20-1678-EL-BGN, Narrative (Feb. 11, 2021) at 47.

<sup>21</sup> *Id.* at 48.

<sup>22</sup> *Id.* at 83-84.

<sup>23</sup> *Hardin Solar*, Case No. 20-1678-EL-BGN, Stipulation (July 21, 2021) at Condition 23.

As stated previously, Hardin Solar has developed and implemented a SWPPP and BMPs as required under its Ohio EPA General Permit in order to reduce pollutants in stormwater discharges during construction. Hardin Solar is in communications with the Ohio EPA to ensure that it fully complies with the General Permit.

**6. Response to Allegation 9: Hardin Solar has an Environmental Specialist and Reporting Process in Compliance with the Certificate**

As part of its Certificate commitments, Hardin Solar has a program that trains all construction employees on all environmental resources and activity requirements. All employees have the authority to stop work and a requirement to act on said authority, in the event of unforeseen environmental impacts.<sup>24</sup> Importantly, Hardin Solar also has a third-party environmental compliance monitor to confirm compliance with environmental commitments and on-call environmental experts from the third-party consultants familiar with the Project, Certificate Conditions, and Ohio regulations.<sup>25</sup> Moreover, in compliance with Certificate Condition 25, during construction activities that may affect sensitive areas, Hardin Solar has an environmental specialist on site.

The Lightners do not contest that the environmental specialist was on site during construction that may affect sensitive areas in accordance with Certificate Condition 25. But, they comment that the environmental specialist “either did not observe the grading activities...or else...missed the threat of this grading to Dunlap Creek and the salamander habitat.” The Lightners’ unsupported critical comment of the specialist does not equate to noncompliance with the Certificate. Hardin Solar has complied and continues to comply with the commitments in the Application and Certificate Condition 25 and ensures that the environmental specialist is on site during construction that may affect sensitive areas.

The Lightners also mention their belief that a state-endangered species, the blue-spotted salamander is present on their property that is outside of, but adjacent to, the Project Area. The Lightners are critical of the wildlife reports and consultations the Board considered in their review of the Application and Stipulation. It is important to note for context that the Company has been studying the resources in and around the Lightners’ property for over a decade and through that time has

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<sup>24</sup> *Hardin Solar*, Case No. 20-1678-EL-BGN, Response to Fifth Data Request from the Board’s Staff (June 10, 2021).

<sup>25</sup> *Id.*

repeatedly coordinated with the Ohio Department of Natural Resources (“ODNR”) and the U.S. Fish and Wildlife Service (“USFWS”).<sup>26</sup> However, the September 15, 2023 letter is the first time any mention of the blue-spotted salamander has come to the Company’s attention. Contrary to the Lightners’ allegations, the studies completed and reported by the ecological/wildlife experts, as well as the consultation opinions provided by the ODNR and the USFWS, correctly and primarily focused on the Project Area as the area of disturbance, but also considered the potential for resources beyond the Project Area. None of the reviews indicated that the blue-spotted salamander was a species with potential to occur in the Project Area or the vicinity of the area. Further, a review of ODNR’s published resources reflects that there is no evidence of the blue-spotted salamander’s existence in Hardin County.<sup>27</sup>

Finally, Certificate Condition 26 ensures that, if state or federal listed species are encountered during construction activities, Hardin Solar will: contact Staff, ODNR, and USFWS within 24 hours; and immediately halt construction in that area until an appropriate course of action has been agreed upon. Hardin Solar is in compliance with this condition as, to date, no state or federal listed species have been encountered in the Project Area.

## **B. Dust Control**

### **1. Hardin Solar is in compliance with the construction dust control requirements in its Certificate**

Hardin Solar committed that: construction activities will be in stages in order to minimize dust generation; water will be used for site preparation and grading activities; and, during earthmoving activities for the grading of roads and other components, the main use of water will be for compaction and dust control.<sup>28</sup> Hardin Solar committed that “[w]ater or dust suppressant such as calcium carbonate will be used to suppress dust on unpaved roads...as needed throughout the duration of construction activities.”<sup>29</sup>

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<sup>26</sup> Hardin Solar is an affiliate of Invenergy Solar Project Development LLC, which is an affiliate of Invenergy Renewables LLC, which in turn is an affiliate of Invenergy LLC (“Invenergy”). Invenergy’s affiliate, Hardin Wind Energy LLC, previously received a certificate from the Board to construct a wind-powered electric generation facility in this same area in Hardin County, Ohio (Case Nos. 09-479-EL-BGN, et al.) The certificate was subsequently relinquished.

<sup>27</sup> See [Amphibians of Ohio Field Guide pub348.pdf \(ohiodnr.gov\)](#) at 10.

<sup>28</sup> *Hardin Solar*, Case No. 20-1678-EL-BGN, Narrative (Feb. 11, 2021) at 13, 18.

<sup>29</sup> *Id.* at 43.

The Lightners believe Hardin Solar has violated its commitment that BMPs will be utilized and implemented to minimize the amount of dust generated by construction. The Lightners note that the civil plans for the Project provides that “[t]he contractor shall be responsible for the control of dust and dirt...and shall provide water sprinkling or other suitable methods of control.”<sup>30</sup>

The Lightners’ allegations are unfounded and do not rise to the level of reasonable grounds for complaint. Hardin Solar does utilize BMPs to minimize the amount of dust generated by construction.<sup>31</sup> Specifically, there is always at least one water truck on site and another truck is available depending on the site conditions. During dry conditions, a water truck will pass through a given area up to 4 times a day as the truck rotates throughout the Project Area and stops to re-fill. In addition to the 4 times a day rotation, the construction operators can also request the water truck if additional passes are needed. In addition to these measures, it is continually stressed to the crews on site to drive slowly on the roads to avoid kicking up dust. Moreover, Hardin Solar planted a temporary seed mix prior to commencement of construction and recently planted additional temporary seeding in this area both of which have helped to mitigate dust exposure. Permanent seeding of the Project Area will begin in the next couple of months and will also help mitigate the dust exposure next year with better ground cover. Further, Hardin Solar enforces that if any unanticipated construction-related dust problems are identified they must be immediately reported to the construction manager and contractor.<sup>32</sup>

**2. The Lightners’ allegation that lime from construction entered their pond is a civil matter and not a question of Hardin Solar’s compliance with its Certificate**

The Lightners allege, “[l]ime from Hardin Solar’s poorly executed construction of an access road blew into the Lightners’ fish pond, polluting the pond and killing...fish valued at \$100,000.” The Lightners believe the contractor failed to wet the lime it spread on the roadbed during construction and the wind blew the lime dust into the Lightners’ pond. The Lightners further submit the pond was surface water that Hardin Solar failed to protect through implementation of mitigation measures in conformance with its commitment in the Application.

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<sup>30</sup> Referencing *Hardin Solar*, Case No. 20-1678-EL-BGN, Paving, Grading, and Drainage Notes, Sheet C-200 Civil Construction Plan (Mar. 7, 2023) at note 15.

<sup>31</sup> *Hardin Solar*, Case No. 20-1678-EL-BGN, Narrative (Feb. 11, 2021) at 43.

<sup>32</sup> *Id.* at 43-44.

It is essential to note at the outset that at no time during any construction of the Project has lime been in a dust-like state. The process used to stabilize the Project's access roads is a wet application due to the cement being used. For the road profile, the contractor uses a mixture of 94% soil and 6% cement. Of the 6% cement mix, only 0.3% constitutes lime. None of the mixture used for the road profile is airborne – it is all wet. However, even if the mixture was in a dust-like consistency, it is important to realize that there are trees and a barn between the area where the alleged lime dusted existed and the Lightners' pond and, as shown previously, Hardin Solar is in compliance with its Certificate and has properly employed its dust mitigation measures. Furthermore, there are other environmental factors involved in the pond that the Company understands could have contributed to the Lightners' situation, including that the pond is overgrown with dead vegetation and does not have an aeration system.

The Lightners' assertion that "lime dust" from the Project harmed their pond and fish is unfounded, as there was no "lime dust" associated with any Project construction. The Lightners' assertions of harm and request for damages in the amount of \$100,000 is a matter for the civil courts.

**C. Board's Implementation of the Rules Issuing the Certificate to Hardin Solar was Reasonable and Lawful**

The Lightners' attack on the Board's implementation of the Ohio Administrative Code Rules and claim that, the Board should have obtained more information prior to issuing the Certificate, is without merit. The Board's issuance of the Certificate was soundly based on scientific facts and information provided by experts. The concerns raised by the Lightners are an untimely attempt to overturn and litigate the Board's reasonable and lawful issuance of the Certificate to Hardin Solar.

**IV. CONCLUSION**

A review of the allegations raised by the Lightners as discussed above reveals that there is not reasonable grounds to believe that Hardin Solar has violated the terms of its Certificate as contemplated in R.C. 4906.98. Based on the above recitation of Hardin Solar's construction activities and implementation of the commitments it made, Hardin Solar denies that it is in noncompliance with

the Certificate conditions. Thus, there is no reasonable ground for the Board to initiate an investigatory proceeding under O.A.C. 4906-7-02.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to these cases. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below this 31<sup>st</sup> day of October, 2023.

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Summary: Response - RESPONSE TO SEPTEMBER 15, 2023 LIGHTNER  
LETTER electronically filed by Christine M.T. Pirik on behalf of HARDIN SOLAR  
ENERGY III LLC.