

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of	)	
Hecate Energy Highland 4, LLC for	)	Case No. 20-1288-EL-BGN
A Certificate of Environmental Compatibility	)	
And Public Need.	)	

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**EVS, INC'S INITIAL POST-HEARING BRIEF**

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## **I. INTRODUCTION**

The instant Project relates to the permitting, design and construction of what is commonly referred to as the New Market Solar Project. The Project is a 100 MW facility consisting of a 35 MW phase called New Market Solar I and a 65 MW phase called New Market Solar II. The project is located in Highland County, Ohio.

### **A. The Parties**

The Owner of the Project is commonly referred to as New Market Solar. McCarthy Construction serves as the construction, who in turned contracted with EVS, Inc. (“EVS”) to serve as the project engineer and designer.

### **B. Alleged Non-Compliance**

New Market Solar, received a non-compliance notice and report in which it was alleged that 36 areas of as built conditions violated an alleged 100’ setback requirement. Phase I has been completed and is in service, Phase II was nearing completion when this issue was self-reported by New Market Solar. EVS contends that OPSB approved and/or accepted 45’ setback minimums and even if strict compliance with a 100’ setback is required, the economic waste by enforcing said 100’ setback would be wasteful and of no benefit to adjacent landowners. Significantly, the “36 areas” involved minor corner intrusions into the alleged 100’ setback area. The average setback accounting for all boundary areas is 177.2 feet, well in excess of the alleged 100’ requirement

## **II. FACTUAL BACKGROUND**

### **A. The Solar Project**

The Project in question is a 100 MW solar power facility consisting of a 35 MW phase called New Market Solar I and a 65 MW phase called New Market Solar II. *See* Yuri Otarov written testimony at pp.3-4 (NMS Exhibit 18). The Project is located in Clay and Whiteoak

Townships, Highland County, Ohio. The applicants for the Certificate were Hecate Energy Highland 2, LLC and Hecate Energy (collectively referred to as “Hecate”). The current Owner is of the Project is New Market Solar. *Id.*

B. The Application

On or about September 2, 2020, Hecate submitted its application, which contained only one reference to property setbacks:

- Property Lines: Setbacks are only to property lines at the exterior of the property. When two contiguous parcels are included in the Projects, there are no setbacks between the parcels even if under separate ownership. Property lines are based on GIS data. Setback locations will be adjusted following detailed site surveys. In consultation with Highland County, the established setbacks from property boundaries is 100 feet.

*See* EVS Exhibit 1, Attachment DB-10 (Application) at p.22. The Board does not have any established setback requirement for solar farms, but Highland County does have setbacks for commercial and industrial buildings. *See* Transcript at p.17, Lines 7-11.<sup>1</sup> The following table from Highland County Conveyance Standards identifies the applicable setback:

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<sup>1</sup> Mr. Holderbaum is a utility specialist, which covers all types of utilities including solar farms. *See* Transcript at p.22. He became involved with the Project “[p]retty much in the start of them filing with the State”. *Id.* at p.21. With regard to this Project, he was “responsible for all of it” and “basically organized the entire review for the project”. *Id.* at pp.26-27. Mr. Holderbaum also coordinated the Staff. *Id.*

Article 4, Table 1: Minimum Lot Areas and Width Requirements								
Development Type	Public Water Available	Central Sewage Treatment Available	Minimum Lot Width (feet)	Minimum Lot Area (per family or business)	Minimum Front Setback Requirements (feet)			
					Arterial Street	Collector Street	Local and Cul-de Sac	Side and Rear Yard
Single, Two, or Three Families	Yes	No	90	1 Acre	40	40	40	10
	No	Yes	80	20,000 sf	40	40	40	10
	Yes	Yes	70	10,000 sf	40	40	40	10
	No	No	100	1 Acre	40	40	40	10
Multi-Family Four or More	Yes	No	Prohibited					
	No	Yes	90	2,700 sf	40	40	40	10
	Yes	Yes	90	2,500 sf	40	40	40	10
	No	No	Prohibited					
Commercial	Yes	No	150	1 Acre	50	45	40	10
	No	Yes	90	4,500 sf	50	45	40	10
	Yes	Yes	90	4,500 sf	50	45	40	10
	No	No	150	1 Acre	50	45	40	10
Industrial	Yes	No	Prohibited					
	No	Yes	100		50	45	40	10
	Yes	Yes	100		50	45	40	10
	No	No	Prohibited					

See Highland County Conveyance Standards (EVS Exhibit 1, Attachment DB-3). Clearly, no reference is made in the Highland County Conveyance Standards as to any setback of 100', and the Board has no proscribed setback requirement. At best, the reference in the Application stating that "[i]n consultation with Highland County the established setbacks from property boundaries is 100 feet", is puzzling. At worst, and the most likely explanation, is the Application language must have been a mistake, when similarly situated solar projects in the area have 50' setbacks. See Transcript at pp.17-18, lines 25 and 1.

**B. EVS Initial Design Work.**

In November 2020, EVS was provided a background from McCarthy (which came from the Owner), identifying a 50' setback. See EVS Exhibit 1 at p.3, line 33. On December 21, 2020, EVS prepared its Basis of Design to McCarthy, identifying setbacks of 45':

### 2.3 Setbacks

Property line setbacks are shown in the table below. The source of data for these setbacks is Highland County Conveyance Standards.

LOCATION		EQUIPMENT SETBACK	COMMENTS
<b>SIDE &amp; REAR</b>	Various locations throughout site	10'	
<b>Arterial Street</b>	None around project site	50'	
<b>Collector Street</b>	Various locations throughout site	45'	
<b>Local Street</b>	None around project site	40'	

*See* EVS Exhibit 1, Attachment-2 (Basis of Design). As Mr. Bowar testified, “EVS prepares a Basis of Design to outline the key design elements of the project. Based on research of available information, engineering judgment, and an understanding of solar construction EVS prepares the ‘rules’ which EVS uses to proceed with project design.” *Id.* at p.4, Lines 10-13. The purpose of the design is so that EVS’ “client and ultimately the Owner know that these are the design parameters we are using”. *Id.* at Lines 17-18.

C. January 4, 2021 Staff Report.

EVS proceeded with its design, and on January 12, 2021, received the Board’s Staff Report dated January 4, 2021. *See* EVS Exhibit 1, Attachment DB-11 (January 12, 2021, email). EVS was advised to pay specific attention to the conditions listed in the report. *Id.* The conditions do not identify a specific setback, but in a brief note in the Project Description states:

## PROJECT DESCRIPTION

The Applicant intends to construct the New Market Solar Project, a 100 MW solar-powered generating facility in Clay and Whiteoak Townships in Highland County. The project would consist of large arrays of photovoltaic (PV) modules, commonly referred to as solar panels, ground-mounted on a tracking rack system. The project would occupy approximately 824 acres within a 1,114-acre project area comprised of private land secured by the Applicant through agreements with the landowners. The project would include associated facilities such as access roads, meteorological stations, underground and/or overhead electric collection lines, inverters and transformers, a substation, a 345 kV gen-tie line, and a POI switchyard. The project would be secured by perimeter fencing, not to exceed seven feet in height, and accessed through gated entrances. The Applicant would ensure that solar modules are setback a minimum of 100 feet from adjacent residences and public road centerlines.

*Id* at p.6. EVS continued their design work, consistently utilizing a 45' setback as required by Highland County. EVS Exhibit 1 at p.8, Lines 19 and 36.

### D. Joint Stipulation.

On January 22, 2021, a Joint Stipulation was entered with the Board that provides, *inter alia*, the following:

- (1) The Applicant shall install the facility, utilize equipment and construction practices, and implement mitigation measures as described in the application and as modified and/or clarified in supplemental filings, replies to data requests, and recommendations in the *Staff Report of Investigation*, as modified by this *Joint Stipulation and Recommendation*.

See EVS Exhibit 1, Attachment DB-14 (Joint Stipulation). Mr. Holderbaum was very clear in his responses on cross examination as to what would modify a project, namely post certificate filings:

Q. ...Mr. Douglass mentioned filing his testimony. The filing in this particular case, that comes through the OPSB website for the exchange of data, does it not?

A. That's just our docket system so the Application would just file that with our docketing system.

Q. And I think that's my point is there's nothing ---if someone is filing something, it has to be through the filing system as a general matter of course, right?

A. I believe that's correct, yes.

Q. ... If the Applicant is submitting supplements to its Application, that's considering filing, right?

A. That would be considered filing, correct.

Q. If the Applicant is providing and submitting through the website the condition—the compliance condition letters, those are filings, right?

A. Correct.

*See* Transcript at pp. 23-24. Mr. Holderbaum also agreed that consistent with Condition 1, the Project could indeed be modified:

Q. ...As a general sense, you and I can agree that there are opportunities for ... project modification that are through supplemental filings, data requests, or other stipulations, fair enough?

A. Yeah, that's pretty broad, but yes."

*Id* at p.59.

In addition, with regard to the final design of the Project, the Joint Stipulation mandated very clear and specific obligations on the Board to affirmatively review the final drawings "to confirm that the final design is in conformance with the certificate":

- (8) At least 30 days prior to the preconstruction conference, the Applicant shall submit to Staff, for review and acceptance, one set of detailed engineering drawings of the final project design and mapping in the form of PDF, which the Applicant shall also file on the docket of this case, and geographically referenced data (such as shapefiles or KMZ files) based on final engineering drawings to confirm that the final design is in conformance with the certificate. Mapping shall include the limits of disturbance, permanent and temporary infrastructure locations, areas of vegetation removal and vegetative restoration as applicable, and specifically denote any adjustments made from the siting detailed in the application. The detailed engineering drawings of the final project design shall account for geological features (including, but not limited to Karst topography or earthwork considerations) and include the identity of the registered professional engineer(s), structural engineer(s), or engineering firm(s), licensed to practice engineering in the state of Ohio who reviewed and approved the designs. All final geotechnical study results shall be included in the submission of this final project design to Staff. If any changes to the project layout are made after the submission of final engineering drawings, the Applicant shall provide all such changes to Staff in hard copy and as geographically referenced electronic data. All changes are subject to Staff review to ensure compliance with all conditions of the Certificate prior to construction in those areas.

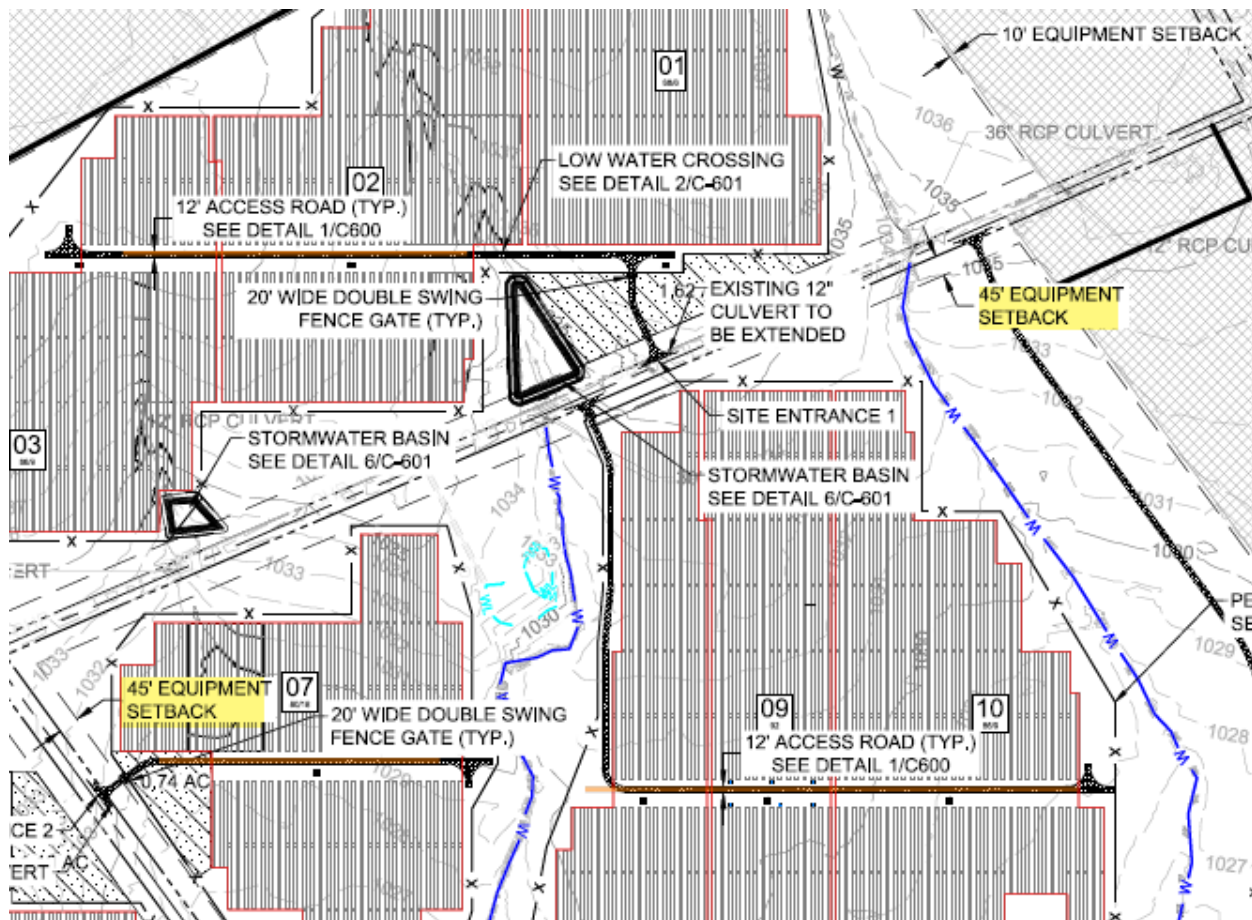
See EVS Exhibit 1, Attachment DB-14.

E. The Board Staff's Acceptance of Drawings

1. February 2021 Engineering Drawings.

In February of 2021, EVS prepared drawings for Staff's review, and were in fact referred to as "Ohio Power Sitting Board Review" drawings. Mr. Holderbaum testified he received those drawings in February of 2021. See Transcript at pp.144-45 Lines 20-3; See EVS Exhibit 1, Attachment DB-6. The drawings clearly showed a 45' setback in multiple areas:





*Id.* On two pages of drawings, six 45' equipment setbacks are found, all conspicuously displayed.

2. March 23, 2021 Engineering Drawing.

The drawings from the Owners continued throughout 2021. For example, on March 23, 2021, New Market Solar submitted a large filing containing digital and hard copies of the engineering drawings. *See* Transcript at pp.147-149. *See* NMS Exhibit 15 (Thumb Drive). This drawing also contained 45' setbacks and was accepted by Staff as final engineering drawings.

3. Pre Construction Meeting.

Condition 8 very clearly identifies the Staff's obligations:

"At least 30 days prior to the preconstruction conference, the Applicant shall submit to Staff, for review and acceptance, one set of detailed engineering drawings of the final project design and mapping in the form of PDF, which the Applicant shall also file on the docket of this case, and geographically referenced data (such as

shapefiles or KMZ files) based on final engineering drawings to confirm that the final design is in conformance with the certificate”

*See* EVS Exhibit 1, Attachment-14. The significance of this provision cannot be understated, as Staff’s obligation to review the drawings “to confirm that the final design is in conformance with the certificate” 30 days in advance of construction was a critical step in this Project. Yuri Otarov of New Market Solar recalled the meeting and prepared notes of the preconstruction meeting with Mr. Holderbaum. Specifically, Mr. Otarov testified that “OPSB Staff Ashton had no concerns/objections to the start of construction, this being the final preconstruction conference, provided that we would comply with the Stipulation and Conditions prior to the applicable construction activity.” *See* Transcript at p.241; NMS Exhibits 28 and 29. To that point, Mr. Otarov testified that “[w]e received verbal approval from Mr. Holderbaum to proceed with construction”. *See* Transcript at pp.240-241, Lines 23-1.

3. May 26, 2021 Engineering Drawings.

New Market Solar submitted additional drawings to Staff on or about May 26, 2021 (EVS Exhibit 1, Attachment DB-9). These drawings were also accepted by Staff, as Mr. Holderbaum testified: “I would say we did as we are required to do which is review and accept this”. *See* Transcript at p.91, Lines 7-8. These drawings also contained a 45’ setback and six 45’ setbacks clearly labeled on these two drawings.

4. June 25, 2021 New Market Solar Submission.

On June 25, 2021, New Market Solar resubmitted all of its prior drawings. *See* EVS Exhibit 1, Attachment DB-10. Again, each relevant drawing identified a 45’ setback.

5. May 20, 2022 Drawings.

Once again, the May 20, 2022 Submission (EVS Exhibit 11), identifies setbacks of 45'. Mr. Holderbaum was very clear on these drawings, as each drawing submitted to Staff showed a 45' setback and "[w]e accepted the drawings". *See* Transcript at p.106, Line 5.

Following over a year of compliance condition drawings, we know the following has been established: (1) each drawing New Market Solar submitted contained a 45' setback; and (2) each drawing was accepted.

F. Staff's Failure to Review New Market Solar Condition Compliance Drawings.

Turning back to the key obligations under Joint Stipulation Condition 8, there is no dispute that Staff had the affirmative obligation "to confirm that the final design is in conformance with the certificate", 30 days in advance of construction was a critical step in this Project. Mr. Holderbaum's testimony on cross-examination was shocking in this regard, as he specifically testified neither he nor any Staff member did anything to comply with Condition 8 in any respect:

Q. You didn't confirm whether the design of the project or the work that was going to be happening was either going to be in conformance with the Certificate or not going to be in conformance with the Certificate.

A. I would say we never confirmed that, correct.

*See* Transcript at p.114, Lines 17-23. Stated differently, the Staff utterly failed in its obligations to adhere to the language of the Joint Stipulation. Mr. Holderbaum also agreed that that New Market Solar could not review and accept their own work:

Q. All right. So we also can agree that the review and acceptance couldn't be done by the Applicant. It had to be done by some other party because you are submitting it for review and acceptance; would that be fair?

A. Yes. As I have stated before, our – the way we view reviewing and acceptance is a couple of things that I don't think the

Applicant would do and that's to keep it in our public docket and have it forward facing for the public to have access to.

Q. Is there anything in Condition 8 that says, hey, the Staff isn't going to do one bit of substantive review of this?

A. I don't think so.

*Id* at p.109, Lines 9-22. In short, no one on the Staff made a single effort to confirm “that the final design is in conformance with the certificate” prior to construction beginning. *Id* at p.119, Lines 15-18.

Indeed, not only did Staff not adhere to Condition 8, but Mr. Holderbaum also testified that Staff never substantively reviewed any drawing that was submitted, instead only checking to see if there is an engineer’s logo on the drawing and whether it was pdf format:

Q. So but -- but on a substantive level, if I asked you questions about every single drawing that you had in your possession or that you were provided, your answer is going to be the same, we looked to see that it's in PDF format, and we looked to see if there is an engineer logo on there, right?

A. Pretty much, yeah. We don't -- we don't review every aspect of these drawings to make sure they are building like they said they were.

Q. I am trying to cut your testimony a little shorter, so I appreciate you helping, but I just want to make sure we are on the same page. I could point to five more drawings that was in your possession, Mr. Holderbaum, and I don't want to, but I think if we just get an agreement between you and I that based upon your testimony today, nobody reviewed any drawing for any substance or anything other than is there a logo of an engineer on the drawing, and was it in PDF format?

A. That -- that's pretty broad in terms of any drawing. I mean, as I said, prior to a certificate being issued, we do.

Q. I am talking about after the certificate.

A. Nope. Correct.

Q. So that would be -- we have that agreement then, right?

A. We have that agreement.

*Id* at pp.93-94; Lines 1-20 and 1-2.<sup>2</sup> This mantra of simply ministerially checking for a logo and whether the format of the drawing was in pdf format was repeated throughout Mr. Holderbaum's testimony.

Instead of conducting any sort of substantive review, Mr. Holderbaum testified on cross-examination that he relied solely upon the Applicant to do the work-in this case New Market Solar:

Q. So you're basically relying on the Applicant to review their own work, right?

A. We are -- we are assuming that the Applicant will submit correct drawings to us.

Q. So you're assuming, your protocol is assume that the people doing the Application are doing it right. We don't have to review it other than for logo and formatting, PDF or not, and is it available to the site -- on the website; is that fair?

A. That's fair unless something comes up in the future.

*Id* at p.99-100, Lines 24-25, 1-9; p.152, Lines 8-18.<sup>3</sup>

When questioned about whether there was a written protocol to ignore the directives of the Joint Stipulation, Mr. Holderbaum's responses were equally inadequate, because he stated that

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<sup>2</sup> Mr. Holderbaum testified that Staff only reviewed drawings that were submitted prior to the Certificate. But we know this could not be true because the only drawing that was provided to Staff prior to the Certificate being issued was the February 2021 "Ohio Power Sitting Board Review" drawings that clearly identify a 45' setback in no less than 6 areas, and Staff never reviewed that drawing either, but did accept it. *See* EVS Exhibit 1, Attachment DB-5. If his testimony is true, and this filing was submitted prior to the Certificate and Board Staff reviewed the drawing, it clearly was an accepted modification under Condition 8 of the Joint Stipulation.

<sup>3</sup> Mr. Holderbaum also testified that his written testimony, page 4, line 7, which states that "Staff's treatment of this filing (verification of formatting consistent with filing on the case docket) is consistent with its treatment of the numerous other condition compliance filings that occurred in this case between March 19 and April 14, 2021". Yet under cross examination he was forced to acknowledge that the written testimony was not accurate and they did review for compliance at least the landscaping and transportation plans. *See* Transcript at p.160, Lines 6-16.

there was no written protocol or otherwise suggesting that Staff never substantively review drawings.

Q. There is no written understanding that you have that says we don't review drawings meaning your office and you and your staff and Staff you coordinate do not review drawings.

A. There's no written protocol that says don't do that. There's -- the way that the condition is we did as we were supposed to do.

*Id* at p.104, Lines 7-12. Knowing that it had not substantively reviewed a single drawing except to validate the existence of an engineer's logo and whether it was in PDF format and had utterly failed to adhere to Condition 8, Board Staff still gave the verbal go ahead to the Owner to begin construction in April of 2021. *See* Transcript at pp.240-241, Lines 25-1.

G. The Board's Compliance Inquiry Report and Alleged Violations

On or about September 8, 2022, New Market Solar self-reported noncompliance with Certificate. *See* Transcript at p.214, Lines 9-15. The reported noncompliance related to the equipment setbacks. Staff then issued a Compliance Inquiry Report ("the Report"). *See* Staff Exhibit 3. The Report stated "[t]hirty-eight of the 39 setbacks measured by Staff during the aforementioned field inspection were not in compliance with the Certificate. The range of setbacks found to be in violation of the required 100-foot setback distance was between 71 feet 2 inches and 97 feet 2 inches". *Id.* at p.2.

The following table illustrates these alleged setback violations, as sorted from the closest to the road versus furthers from the measurement points:

New Market Solar Measurement Table September 30, 2022

Measurement	Feet from Road Center Line		
Measurement 39	100'1"	100	0
Measurement 11	97'2"	97	3
Measurement 24	96'5"	96	4
Measurement 17	94'4"	94	6
Measurement 2	91'2"	91	9
Measurement 35	89'9"	90	10
Measurement 26	89'10"	89	11
Measurement 27	88'10"	89	11
Measurement 16	86'9"	87	13
Measurement 4	86'	86	14
Measurement 6	85'9"	86	14
Measurement 7	85'7"	86	14
Measurement 31	85'9"	86	14
Measurement 32	85'7"	86	14
Measurement 3	84'7"	85	15
Measurement 23	85'	85	15
Measurement 29	85'5"	85	15
Measurement 1	84'1"	84	16
Measurement 34	83'8"	84	16
Measurement 15	83'1"	83	17
Measurement 30	82'11"	83	17
Measurement 22	82'10"	82	18
Measurement 25	82'3"	82	18
Measurement 14	81'1"	81	19
Measurement 5	78'9"	79	21
Measurement 12	77'8"	78	22
Measurement 28	77'11"	77	23
Measurement 8	75'8"	76	24
Measurement 10	76'	76	24
Measurement 18	76'1"	76	24
Measurement 19	76'5"	76	24
Measurement 36	76'	76	24
Measurement 9	75'5"	75	25
Measurement 13	75'2"	75	25
Measurement 20	73'2"	73	27
Measurement 21	71'2"	71	29
Measurement 38	71'2"	71	29
Measurement 37	68'7"	69	31
Measurement 33	67'11"	68	32

See NMS Exhibit 26. Of these alleged setback violations, 5 are less than 10 feet; 23 less than 20 feet, and 33 less than 25 feet. See Transcript at p.175-176 (entirety).

EVS' Property Lines and Average Setbacks analysis is even more illuminating as to these alleged setback violations, as even assuming a required setback of 100' (which is not accurate), the weighted average of setbacks for this Project is 177.2:

**PROPERTY LINES & AVERAGE SETBACKS**

Line No.	Length (ft.)	Area (SF)	Avg. Setback	Req Equip Setback
L1	2,082	342,019	164	100
L2	455	121,368	267	100
L3	2,178	445,435	205	100
L4	1,255	220,792	176	100
L5	1,382	311,643	226	100
L6	772	121,287	157	100
L7	667	118,834	178	100
L8	682	337,814	495	100
L9	2,240	236,649	106	100
L10	1,015	157,408	155	100
L11	3,319	549,572	166	100
L12	957	252,234	264	100
L13	617	93,828	152	100
L14	373	46,347	124	100
L15	1,562	283,499	181	100
L16	2,041	241,381	118	100
L17	2,197	288,298	131	100
L18	1,027	229,135	223	100
	<b>Weighted Avg. Setback</b>		<b>177.2</b>	

See EVS Exhibit 1, Attachment DB-15.

H. The Practical Impact of the Alleged Setback Violations.

The only testimony presented to the Board on the issue of the impact of the alleged setback violations came from Dan Bowar of EVS. Mr. Bowar testified that he has designed and been involved with “many, many solar projects” similar to the instant one. See Transcript at p.225, Lines 5-7. In questioning about the chart referenced in NMS Exhibit 26, Mr. Bowar testified as follows:

Q. Looking at the chart, it showed the setbacks, would those setbacks as exist in your opinion as a civil engineer working on solar projects, is that going to change the experience for anybody driving by the project keeping in mind there is a fence and vegetation?

A. With the distances we are talking about, no. The aesthetics are going to be imperceivable to those on the roadway.



See Transcript at p.221, Lines 1-9. With Mr. Bowar being the only person to testify on the issue, the Board is presented with clear testimony that the alleged setback violations are “imperceivable” from that of 100’ setbacks. Stated differently, the current setbacks as built have no negative impact on any landowners or otherwise, and the Board must accept this testimony as undisputed.

I. McCarthy’s Proposed Plan

As part of its presentation, New Market Solar presented a proposed plan that would not invoke a complete dismantling of the Project. See NMS Exhibit 18 (Testimony and Exhibits of Yuri Otarov). Presumably, New Market Solar will further describe this proposed plan, but EVS does not believe that such a plan is needed, as the only testimony before the Board is that all the drawings and plans submitted to OPSB staff showed a 45’ setback and were accepted by the Board.<sup>4</sup>

J. Undisputed Facts

Given the foregoing, the testimony from all parties was abundantly clear, and the following represents the undisputed facts in this matter:

The Board does not have a rule regarding setbacks for all projects	See Transcript at p.17
the Board has approved at least two solar farm projects in close proximity in which a 50’ setback exists	See Transcript at pp.17-18
Application Filed on September 2, 2020 stating in “consultation with Highland County, the setbacks are 100’	EVS Exhibit 1, Attachment DB-10 p.22.
Highland County Conveyance Standards require a 45’ setback	EVS Exhibit 1, Attachment DB-3
EVS Basis of Design, communicated to all parties, was a 45’ equipment setback	Written Testimony of Daniel Bowar (EVS Exhibit 1)
The Joint Stipulation allows for project modifications “as modified and/or clarified in supplemental filings”, which are filings	See Transcript at p.59

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<sup>4</sup> EVS’ position will be further explored below.

through the the Board's website submitted after the date of the Joint Stipulation or the opinion"	
The Certificate and Order contemplates that supplemental filings and compliance letters could change features on the Project	See Transcript at p.59
EVS drawings that were submitted in February for Staff review identified a 45' Setback	Written Testimony of Daniel Bowar (EVS Exhibit 1)
New Market Solar filed final engineering drawings on March 23, 2021 identifying a 45' setback	See NMS Exhibit 15 (flash drive)
New Market Solar filed drawings on May 25, 2021 identifying a 45' setback	See EVS Exhibit 9
New Market Solar filed sealed engineering drawings on May 22, 2022 identifying a 45' setback	See EVS Exhibit 11
Staff accepted and approved every filing of New Market Solar identifying a 45' setback.	See Transcript at p.147-149; See January 22, 2021 Joint Stipulation Condition 8
Phase I was built and placed into service with a 45' setback. Phase II was nearing completion when this issue was self-reported.	See Otarov Written Testimony (NMS Exhibit 18)
Condition 1 of the Joint Stipulation allows for changes in the plans for the Project through "supplemental filings" to the Board.	See Transcript at p.59. See Joint Stipulation Condition 1.
Staff's review failed to comply with Condition 8 in that despite accepting all drawings, Staff failed to "confirm that the final design is in conformance with the certificate", and instead only checked the drawings to see if there was a logo from the engineering firm and that they were in PDF Format	See Transcript at pp. 129-133
Every drawing submitted by New Market Solar to Board Staff identified a 45' setback	See Exhibit Transcript at pp.246, Lines 2-8.
There were 36 areas on the Project that came within 100', with a range from 69'11" to 97'2"	See NMS Exhibit 26.
The average as built setback on this Project is 177'	See EVS Exhibit 15
The only testimony presented in the hearing was that for the 36 areas in questions, additional screening would be significantly better for all residents than moving back the solar panels to the 100' setback	See Transcript at p.250, Lines 10-21

### III. LAW AND ANALYSIS

- A. There is No Setback Violation Because the Language of the Opinion and Order Read in Conjunction with other Filings and Supplemental Filings Were Ambiguous as to the Final Setback Distance and Staff's Approval Confirmed the 45 foot Setback was in Conformance with the Certificate
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EVS asserts that the claimed purported setback of 100' was not what was ultimately approved by Staff and subsequently built. Indeed, it indisputable at this time from not only the testimony, but also the written documentation that the setback was portrayed and approved as set forth in the February 2021 drawings that Staff claimed to have reviewed and accepted; the March 2021 Drawings that Staff accepted but never reviewed; the April 2021 drawings and final preconstruction conference where Staff accepted but never reviewed; the May 2021 drawings that Staff accepted but never reviewed; and finally, the May 2022 drawings that Staff accepted but never reviewed. Each of these drawings identified 45' setbacks. Each of these drawings were submitted to the public and provided to Staff. As EVS will further show, each of these 36 points of de minimus setback violations were accepted and tacitly, if not explicitly, approved by Staff.

- i. The Application's 100' Setback Requirement of Highland County was not Accurate.
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The Application only discusses setbacks in one sentence in the Application, on p.22. Specifically, the language reads as follows:

- Property Lines: Setbacks are only to property lines at the exterior of the property. When two contiguous parcels are included in the Projects, there are no setbacks between the parcels even if under separate ownership. Property lines are based on GIS data. Setback locations will be adjusted following detailed site surveys. In consultation with Highland County, the established setbacks from property boundaries is 100 feet.

See EVS Exhibit 1, Attachment DB-10 at p.22. The language "in consultation with Highland County, the established setback from property boundaries is 100 feet" is not only awkwardly

phrased but could not possibly be accurate. First, the Board does not have any legally established setback requirement and had already approved other projects in the area with a 50’ setback. Second, Highland County’s requirements only call for 45’ setback in commercial or industrial settings:

Article 4, Table 1: Minimum Lot Areas and Width Requirements								
Development Type	Public Water Available	Central Sewage Treatment Available	Minimum Lot Width (feet)	Minimum Lot Area (per family or business)	Minimum Front Setback Requirements (feet)			
					Arterial Street	Collector Street	Local and Cul-de Sac	Side and Rear Yard
Single, Two, or Three Families	Yes	No	90	1 Acre	40	40	40	10
	No	Yes	80	20,000 sf	40	40	40	10
	Yes	Yes	70	10,000 sf	40	40	40	10
	No	No	100	1 Acre	40	40	40	10
Multi-Family Four or More	Yes	No	Prohibited					
	No	Yes	90	2,700 sf	40	40	40	10
	Yes	Yes	90	2,500 sf	40	40	40	10
	No	No	Prohibited					
Commercial	Yes	No	150	1 Acre	50	45	40	10
	No	Yes	90	4,500 sf	50	45	40	10
	Yes	Yes	90	4,500 sf	50	45	40	10
	No	No	150	1 Acre	50	45	40	10
Industrial	Yes	No	Prohibited					
	No	Yes	100		50	45	40	10
	Yes	Yes	100		50	45	40	10
	No	No	Prohibited					

See EVS Exhibit 1, Attachment DB-3. Surely, Highland County cannot violate its own regulations without running afoul of various legal challenges, so 100’ cannot be a requirement by Highland County.

There is no evidence in the record or otherwise that would suggest that the Board mandated a 100’ setback prior to the Application’s filing, otherwise the language in Application would have been a simple requirement that stated “the Board requires a 100’ setback”. But the Application does not say that. Rather, the Application (and its ultimate approval), was based upon a consultation with Highland County.

- ii. The Joint Stipulation Allows for Modifications to Certificate, Which is What *de facto* Happened on the Instant Project

The only testimony from Staff presented at the hearing relating to modifications to the Project was that of Mr. Holderbaum who clearly understood that the following language could permit modifications to the Project:

- (1) The Applicant shall install the facility, utilize equipment and construction practices, and implement mitigation measures as described in the application and as modified and/or clarified in supplemental filings, replies to data requests, and recommendations in the *Staff Report of Investigation*, as modified by this *Joint Stipulation and Recommendation*.

See EVS Exhibit 1, Attachment DB-14. Specifically, Mr. Holderbaum was clear that modifications could be made and approved through supplemental filings, data requests or other stipulations:

Q. ...As a general sense, you and I can agree that there are opportunities for ... project modification that are through supplemental filings, data requests, or other stipulations, fair enough?

A. Yeah, that's pretty broad, but yes."

See Transcript at p.59. This response only makes sense in light of the Joint Stipulation's permissive language regarding modifications and the fact that the Board does not have any established setback requirements. *Id* at p.17.

The Certificate was issued on March 19, 2021. Following the issuance of the Certificate, Staff received final construction drawings on March 23, 2021 showing a 45' setback. In April 2021, Staff received drawings showing a 45' setback. On May 26, 2021, Staff received drawings showing a 45' setback, and finally on May 22, 2022, Staff received drawings showing a 45' setback. **Over a year of drawings showing 45' setbacks and Staff did not perform one substantive review of any drawing yet approved the project to proceed with construction.**

Indeed, based upon the strictures of Condition 8 in the Joint Stipulation, construction could not begin unless and until Staff provided “confirm[ation] that the final drawing is in conformance with the certificate”. *See* EVS Exhibit 1, Attachment DB-15.

The Ohio Power Siting Board has exclusive authority to issue a certificate of environmental compatibility and public need for construction, operation, and maintenance of a major utility facility. R.C.4906.01(B)(1) specifically refers to a “Major utility facility” as being an “[e]lectric generating plant and associated facilities designed for, or capable of, operation at a capacity of fifty megawatts or more”. This includes a “large solar facility” such as the instant one. R.C.4906.01(G).<sup>5</sup>

Revised Code Chapter 4906, the Board's enabling statute,

expressly allows the board to delegate many responsibilities to subordinates. R.C. 4906.02(C) states, "The chairman of the public utilities commission may assign or transfer duties among the commission's staff." ...One responsibility, however, cannot be delegated: “the board’s authority to grant certificates under section 4906.10 of the Revised Code shall not be exercised by any office, employee, or body other than the board itself”.

*In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St. 3d 333; 928 N.E.2d 427 (2010).

As part of its obligations, the Board agreed to multiple stipulations, the first of which expressly permits modification to the “facility... as described in the application and as modified and/or clarified in supplemental filings, replies to data requests...”. *See* EVS Exhibit 1, Attachment DB-14 Condition 1. As noted, Mr. Holderbaum agreed that Condition 1 does indeed permit project modification. *See* Transcript at p.59.<sup>6</sup>

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<sup>5</sup> “Large solar facility” is defined as an “electric generating plant that consists of solar panels and associated facilities with a single interconnection to the electrical grid that is a major utility facility”. *Id.*

<sup>6</sup> Mr. Holderbaum testified that while setbacks have been changed on other projects he has been involved with, none of those changes were ever considered material. *See* Transcript at p.107, Lines 8-10.

- iii. Condition 8 Allowed for Changes After the Certificate was Issued, and OPSB Accepted and Approved 45' Setbacks.
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Condition 8 of the Joint Stipulation provides as follows:

- (8) At least 30 days prior to the preconstruction conference, the Applicant shall submit to Staff, for review and acceptance, one set of detailed engineering drawings of the final project design and mapping in the form of PDF, which the Applicant shall also file on the docket of this case, and geographically referenced data (such as shapefiles or KMZ files) based on final engineering drawings to confirm that the final design is in conformance with the certificate. Mapping shall include the limits of disturbance, permanent and temporary infrastructure locations, areas of vegetation removal and vegetative restoration as applicable, and specifically denote any adjustments made from the siting detailed in the application. The detailed engineering drawings of the final project design shall account for geological features (including, but not limited to Karst topography or earthwork considerations) and include the identity of the registered professional engineer(s), structural engineer(s), or engineering firm(s), licensed to practice engineering in the state of Ohio who reviewed and approved the designs. All final geotechnical study results shall be included in the submission of this final project design to Staff. If any changes to the project layout are made after the submission of final engineering drawings, the Applicant shall provide all such changes to Staff in hard copy and as geographically referenced electronic data. All changes are subject to Staff review to ensure compliance with all conditions of the Certificate prior to construction in those areas.

See EVS Exhibit 1, Attachment DB-14. Ohio Rule 4906-3-14 is identical to condition 8 and provides as follows:

(D) If any changes are made to the project layout after the certificate is issued, all changes shall be provided to staff in hard copy and as geographically-referenced electronic data. All changes outside the environmental survey areas and any changes within environmentally-sensitive areas are subject to staff review and acceptance prior to construction in those areas.

Mr. Holderbaum testified as to this rule as follows:

Q. Okay. And are you aware that there is a rule that addresses changes to project layout?

A. I'm aware there is. I couldn't reference it to you, but I am sure you are about to give it to me.

Q. I will -- and I am marking that now so we can talk about it. Mr. Holderbaum, I provided you a rule from the Board. Would you agree this is a copy of a Board rule titled "Construction and Operation" and it's Rule 4906-3-13?

A. It appears that way, yes.

Q. Okay. Now, if you look at part (D) of the rule, you'll see here that it says "If any changes are made to the project layout after the certificate is issued, all changes shall be provided to staff in hard copy and as geographically-referenced electronic data." So let's stop there. That happened in regards to the New Market solar project, correct?

A. We can agree or disagree on that. Again, there are-- 45-foot setback is shown in the maps. The changes to the project facility are not explicitly called out to make Staff aware of it.

Q. Okay. You agree -- well, we'll stop there. The next sentence "All changes outside the environmental survey areas and any changes within environmentally-sensitive areas are subject to staff review and acceptance prior to construction in those areas." Do you see that?

A. I do.

Q. Now, you will agree with me here that the alleged -- the exceedances we are addressing today, those are all inside the project fence line, correct?

A. Right. That's correct.

Q. And that none of them would be outside the environmental survey areas, correct?

A. I believe that's true, yes.

Q. And that's because typically environmental surveys are done for the entire project boundary.

A. Yeah, typically.

Q. And sometimes beyond the boundary depending, correct?

A. Correct.

Q. Yeah. And then here we don't have any changes within environmentally-sensitive areas either, do we?

A. Well, I mean, off the top of my head, I don't know of any, but Staff didn't review -- it's too hard for Staff to know that without reviewing the project in its entirety with the 45-foot setback. **If Staff**



**would have done a technical review of the mapping, we could have caught it. Staff did not do that.”**

See Transcript at pp. 129-133 (entirety) (emphasis added).

Mr. Holderbaum’s testimony was shocking. He acknowledged that had Staff done the review it was required to do under the Joint Stipulation Condition 8, Staff would have caught that there was an identified 45’ setback on every drawing. How does Staff comply with the Joint Stipulation and Rule 4906-3-14 if both require that engineering drawings be provided to Staff to so that “staff can determine that the final project design is in compliance with the Certificate”, when Staff admittedly and intentionally ignores every drawing? The answer is simple—it is not possible.<sup>7</sup> We also know from Mr. Holderbaum’s written testimony that despite changes to the project that are permissible under Condition 1 of the Joint Stipulation, “[a]s the Applicant is limited by the conditions set forth in the certificate, there is no added benefit to Staff performing an independent technical review of the final engineering drawings”. In essence, Mr. Holderbaum and Staff rely upon a false tautology to do nothing with final engineering drawings, despite the mandates of the Joint Stipulation and Rule 4906-3-14.

Legally, the Board may delegate tasks to its staff. See *In re Application of Am. Transm. Sys., Inc., supra*. There is no question both by rule and joint stipulation that the Board delegated

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<sup>7</sup> Part B of Rule 4906-3-14, which finds its way into Joint Stipulation Condition 8, provides as follows:

(B) Prior to commencement of any construction activities, the applicant shall conduct a preconstruction conference. Staff, the applicant, and representatives of the prime contractor and all subcontractors for the project shall attend the preconstruction conference. The conference **shall include a presentation of the measures to be taken by the applicant and contractors to ensure compliance with the certificate,** and discussion of the procedures for on-site investigations by staff during construction. Prior to the conference, the applicant shall provide a proposed conference agenda to staff. The applicant may conduct separate preconstruction conference for each stage of construction.

(emphasis added).

very specific authority to the Staff not only preconstruction but also post construction. *See* Joint Stipulation- Conditions 1 and 8. *See* EVS Exhibit 1, Attachment DB-14. Such delegation was lawful, but Staff, in this case, failed to even bother reviewing a single drawing. In hindsight, Mr. Holderbaum had no choice but to conclude that he and Staff failed to adhere to Conditions 1 and 8 and simply accepted drawings because it had a logo and was in pdf format. *See* Transcript at pp. 129-133 (entirety).

Both Mr. Holderbaum and Mr. Otarov testified that the current as-built conditions did not change boundaries, did not change environmentally sensitive areas, and did not alter the current construction of the fence. Mr. Bowar testified that the average setback condition is 177.2 feet, well in excess of the alleged 100' requirement. Furthermore, the current as-built setbacks for the alleged areas of setback violations are imperceivable from a 100-foot setback. In other words, they are not noticeable.

The Ohio Supreme Court has previously reviewed and approved the Board's process of delegating final design approval to Board Staff as part of the preconstruction conference. *See In re Buckeye Wind, LLC*, 131 Ohio St.3d 449, 452 (2012). ("The order explains that the purpose of the preconstruction conference is to \* \* \* (2) demonstrate compliance with the certificate issued by the board.") The Court reviewed a similar condition 8 to the one in this proceeding and held it required the developer to "submit a variety of reports that contain final, detailed descriptions of its construction plan." *Id.* \*453. The Court went on to note that "the provision requesting additional submissions is designed to ensure compliance with conditions already ordered by the board." *Id.*

The appellants in *Buckeye* argued that the Staff's approval of final designs, among other reviews in other conditions was an improper delegation of the Board's authority and that any changes from when the project was approved should be an amendment which requires a hearing.

*Id.* \*456-457. The Court held that condition 8 in that case required the developer to submit plans for Staff review and acceptance and if the developer provides additional information to Staff that would require an amendment of the certificate the Board is required to hold a hearing on the amendment. *Id.* \*456. The Court cited to R.C. 4906.07(B) which requires the Board “hold a hearing in the same manner as a hearing held on an application for a certificate if the proposed change in the facility would result in any material increase in any environmental impact of the facility or a substantial change in location of all or a portion of such facility”. *Id.* \*457. The Court acknowledged not every potential change to what was proposed in an application should be considered an amendment and the Board has authority to make that determination. *Id.*

In this case, Staff reviewed and approved the final construction designs thereby confirming they conform with the conditions of the certificate pursuant to Condition 8. Staff’s review and approval was a proper delegation of authority. Staff’s approval of the 45-foot setback, was contemplated by the language of the Order because it approved the Joint Stipulation “as modified and/or clarified in supplemental filings” and the construction designs were a supplemental filing. Further, as discussed above, Staff Witness Holderbaum acknowledged that the 45-foot setbacks, as currently constructed as referenced in NMS Exhibit 26, are all within the originally approved fence line of the project and that none of them are outside the already Staff-reviewed environmentally sensitive area of the project. He also stated he was unaware of any actual impacts or changes to the environmentally sensitive area.

Therefore, consistent with R.C. 4906.07(B) and the Court’s decision in *Buckeye*, a change to 45-feet was contemplated by the Opinion and the approved conditions. Because that change did not result in any material increase in the environmental impact of the facility or a substantial change of location of any portion of the facility the change was not a material amendment that

would require a new hearing and specific Board approval. The approval of the 45-foot setbacks was squarely within Staff's properly delegated authority, and the Staff's approval of the final construction designs ratified and confirmed that the setbacks for this Project are 45'.<sup>8</sup>

#### **IV. CONCLUSIONS**

In sum, OPSB and New Market Solar agreed to certain conditions contained in the joint stipulation that permitted modification to the Project, including after the certificate was issued. This agreement specifically authorized project changes that were submitted directly to Staff through its filing system or otherwise (Condition 1 of the Joint Stipulation). These anticipated changes were clearly delegated to Staff for review and acceptance (or denial). The only testimony that was presented at the Hearing was that Staff accepted every New Market Solar submission, with at least five submissions containing clearly designated 45' setback requirements. There was not one bit of evidence that even hinted at Staff rejecting, disputing or even commenting upon the easily discernable 45' setbacks. Instead, Staff simply accepted the drawings and claimed ignorance.

In essence, Staff approved 45' setbacks because the Joint Stipulation properly provided the Staff with discretion for approving modifications. Given how de minimus levels of alleged setback violations as noted in NMS 26, these were by no means material or meaningful, especially in light of the clear testimony that the as built distances would be imperceptible from 100'.

*[Signature blocks on following page.]*

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<sup>8</sup> It bears repeating that the setbacks as designed and built are not 45'. Rather, they exist in the manner as evidenced by NMS Exhibit 26, with the average setback for the entire project averaging 177.2". Stated differently, while 45' setbacks were the design parameters consistent with Highland County's setback requirements, in actuality, the setback distances were much greater.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing has been served on all parties of record via the DIS system on December 19, 2023.

/s/ Robert Dove  
Robert Dove

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