

**BEFORE THE OHIO POWER SITING BOARD**

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

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**Initial Post Hearing Brief of New Market Solar ProjectCo 1, LLC  
and New Market Solar ProjectCo 2, LLC**

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## I. INTRODUCTION

Construction of the New Market Solar Project (the “Project”) is almost complete and one phase of the Project is already producing clean, renewable energy for use by Ohio consumers. The Project was built exactly according to final engineering drawings submitted to the Ohio Power Siting Board Staff (“Staff”) during March 2021. Staff provided the Project team a go-ahead to begin construction after the submission of the final engineering drawings. Construction of the Project began shortly after Staff’s go-head, during the Spring of 2021, and continued until the Fall of 2021 when the New Market Solar (“NMS”) team discovered that the final engineering drawings reflected a 45-foot setback, while the original Application for the Project (as clarified in supplemental documents) identified a 100-foot setback from Project panels to public road centerlines and non-participating property boundaries. Despite the setback discrepancy, **all Project infrastructure, as constructed, remains within the original, Staff-approved fenceline.**

In evaluating the evidence presented during the hearing on November 14, 2023, the Board must determine whether (1) post-certificate submissions made during March 2021 constituted changes under Ohio Adm.Code 4906-3-13(D) and Condition 8 of the Joint Stipulation and Recommendation filed in this proceeding on January 22, 2021<sup>1</sup>; and (2) whether the changes were accepted by Board Staff. Based on the sequence of events during March 2021 and a plain reading of the rule and the condition, the Board could find that changes were submitted in accordance to the rule and condition, and accepted by Staff, and that the Project is presently compliant under the Project’s Certificate.

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<sup>1</sup> As adopted by the March 18, 2021 Opinion, Order, and Certificate and the June 24, 2021 Order on Rehearing.

However, if the Board finds that the Project is noncompliant, then it must identify a remedy that takes into account the advanced stage of construction of the Project and the resulting economic waste that will occur if strict compliance with a 100-foot setback is required. Indeed, strict compliance will cost \$7 to \$10 million to relocate panels just a small distance from current locations, while providing little to no benefit to the local community, as all Project infrastructure will continue to remain within the existing fenceline and some panels will just move a bit further away from this boundary.

If the Board finds panel locations are not in compliance, NMS urges the Board to avoid economic waste and consider leaving the panels as located and allow NMS to install additional screening. That additional screening, with the change to agricultural fencing already implemented, will improve the visual appearance of the Project far better than strict compliance (which would only move a few panels from 3 to 32 feet away from the fence which is not moving).

Alternatively, the Board can consider the remedy in Mr. Otarov's testimony, while still expensive at \$4.1 million, which takes into account existing conditions in the Project Area. It is comprised of three major components: the removal of panels near the primary roads in the Project Area; enhanced landscaping in several areas where panels are proposed to remain; and the installation of agricultural type fencing (which has already been done).

To assist the Board with its decision, NMS is presenting all relevant facts along with the various paths on how the Board could find compliance along with a description and discussion of the remedies the Board could consider if it finds non-compliance. NMS also urges the Board to consider all mitigating circumstances as it makes its determination in this matter. Lastly, NMS

remains available to provide any additional information required by the Board or to answer any further questions the Board may have regarding this matter.

## **II. FACTUAL SUMMARY**

The Board has sufficient evidence to make its determination in this matter as the relevant facts should not be disputed. A summary of the relevant evidence follows.

### **A. Project Background.**

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 (NMS Ex. 18 at 3).<sup>2</sup> The Project is located in Clay and Whiteoak Townships, Highland County, Ohio (*Id.*). Hecate Energy Highland 2, LLC and Hecate Energy Highland 4, LLC were the applicants for the Certificate (*Id.* at 3-4). The Board issued a Certificate to Hecate Energy Highland 4, LLC on March 18, 2021, and modified the Certificate on rehearing on June 24, 2021 to apply to the entire 100 MW facility (*Id.* at 4). The Board subsequently granted an application to transfer the 35 MW phase of the Project to Hecate Energy Highland 2, LLC (*Id.*).

Hecate Energy Highland 2, LLC was subsequently renamed New Market Solar ProjectCo 1, LLC and Hecate Energy Highland 4, LLC was renamed New Market Solar ProjectCo 2, LLC (NMS Ex. 18 at 4). As of today, New Market Solar ProjectCo 1, LLC holds the portion of the Project's certificate applicable to the 35 MW phase (New Market Solar I) and New Market Solar ProjectCo 2, LLC holds the portion of the Project's certificate applicable to the 65 MW phase (New Market Solar II) (*Id.*).

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<sup>2</sup> As a point of clarification, while the 35 MW and 65 MW phases are now known as New Market Solar I and New Market Solar II respectively, previously the 35 MW and 65 MW phases were called New Market Solar II and New Market Solar I respectively (NMS Ex. 18 at 4; Tr. at 149: 12-18).

**B. Project Setbacks to Public Roads and Non-Participating Property Lines.**

Staff has asserted that the Certificate requires that the Project's solar arrays are to be setback 100 feet from the middle of public roads (Staff Ex. 3 at 2-3). NMS does not dispute that the Project is subject to a 100-foot setback from the middle of public roads given the language in the Application and Figure 5 to the Application (App. at 32; NMS Ex. 11), a December 2020 response to a Staff data request (NMS Ex. 12), and Staff's understanding of the setback as presented to the Board in the January 4, 2021 Staff Report of Investigation (NMS Ex. 22 at 6). NMS, however, defers to the Board to determine if the layout and siting changes made to place a limited number of panels within the 100-foot setback area are prohibited, given the Board's rules and the conditions within the Certificate that allow changes to the Project layout and siting.

NMS also does not dispute that the Project is subject to a 100-foot setback to non-participating property boundaries. The Application filed on September 2, 2020 stated that "the established setbacks from property boundaries is 100 feet." (App. at 32 and see NMS Ex. 11). There are six non-participating properties where panel locations are within the 100-foot setback area. Again, however, NMS defers to the Board on whether those current panel locations are allowed under the Certificate conditions and the Board's rule on layout changes.

**C. Applicable Documents and Rules.**

The Board should pay specific attention to certain documents and rules in reaching its decision on whether there is a setback noncompliance from property lines and the middle of public roads. Those documents and rules consist of (1) the Application; (2) responses to Staff data requests; (3) the Staff Report; (4) the Joint Stipulation and Recommendation filed on January 22, 2021 ("Joint Stipulation") and the Supplemental Joint Stipulation filed on

January 25, 2021; (5) Ohio Adm.Code 4906-3-13(D) – Project Layout Changes; and (6) Ohio Adm.Code 4906-7-02(G) – Appropriate Remedies.

**1. The Application and a clarifying response to a Staff data request.**

The Application identified Project setbacks in the Figure 5 constraints map (NMS Ex. 11). The public road setback was clarified through a response to a data request on December 14, 2020 (NMS Ex. 12) and stated in the Staff Report, issued on January 4, 2021 (NMS Ex. 22 at 6). The Application and the Figure 5 constraint map also included the 100-foot setback commitment from non-participating property boundaries and the data request dated December 14, 2020 stated that the Project would be setback from property lines by 100 feet (App. at 32; NMS Ex. 11; NMS Ex. 12).

**2. The Stipulations (Condition 1 and Condition 8).**

The Joint Stipulation and Recommendation filed on January 22, 2021 (“Joint Stipulation”) and the Supplemental Joint Stipulation filed on January 25, 2021 both list conditions applicable to the Project. Although the stipulations presented to the Board and the Board’s Certificate orders are silent on Project setbacks, Condition 1 of the Supplemental Joint Stipulation filed on January 25, 2021 captures commitments made in the Application, responses to data requests, supplemental filings and recommendations in the Staff Report. That condition states:

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 the Joint Stipulation and Recommendation or as further modified by the Supplemental Joint Stipulation and Recommendation.

(Supplemental Joint Stipulation at 2). It is important to note that Condition 1 is subject to the remaining conditions in the stipulations (i.e., in the event of conflict, the other conditions should control).

The Joint Stipulation is very important to the Board's decision in this matter because it allows Project layout changes to be made post-certificate and also after the submission of final engineering drawings. Specifically, Condition 8, in part, states that:

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. \*\*\* 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.

### **3. The Board's rule allowing post-certificate layout changes.**

The language in Condition 8 regarding layout changes post-certificate is similar to Ohio Adm.Code 4906-3-13(D) which states:

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.

This rule only requires that any changes to the layout be provided to Staff. Only changes outside survey areas or within environmentally-sensitive areas are subject to Staff review and acceptance. The changes in panel locations at issue in this proceeding are not outside any survey areas or within environmentally-sensitive areas (Tr. at 139:7 – 131-9).

**4. The Board has flexibility in deciding what remedy to impose.**

Finally, Ohio Adm.Code 4906-7-02(G) outlines the appropriate remedies the Board may order if it finds a violation of R.C. 4906.98. Specifically, among other things, the Board may allow the approval of a remedy other than strict compliance with certificate conditions:

- (1) Direct the person to cease the violation.
- (2) Direct the person to comply with the certificate and/or a board order or suspension.
- (3) Direct the person to take corrective action and include a date by which such corrective action must be taken or completed.
- (4) Assess forfeitures in accordance with sections 4906.97 and 4906.99 of the Revised Code.
- (5) Direct the attorney general to seek enforcement of board orders, including orders assessing forfeitures and appropriate remedies, in state or federal court.
- (6) **Approve other appropriate remedies.**

(Emphasis added). The Board can rely on this rule to craft an appropriate remedy if it finds that the Project is not in compliance with the Certificate.

**D. Relevant Engineering Drawing Submissions Under Condition 8.**

Post-certificate engineering drawing submissions to Board Staff pursuant to Condition 8 began in March, 2021, soon after the Project received the Certificate.<sup>3</sup> Relevant to this matter, on March 23, 2021, the layout drawing for the 65 MW portion of the Project was submitted to the case docket that included references to a 45 foot setback (NMS Ex. 18 at 7; NMS Ex. 5). The final civil engineering design drawings for the both the 65 phase and the 35 MW phase were

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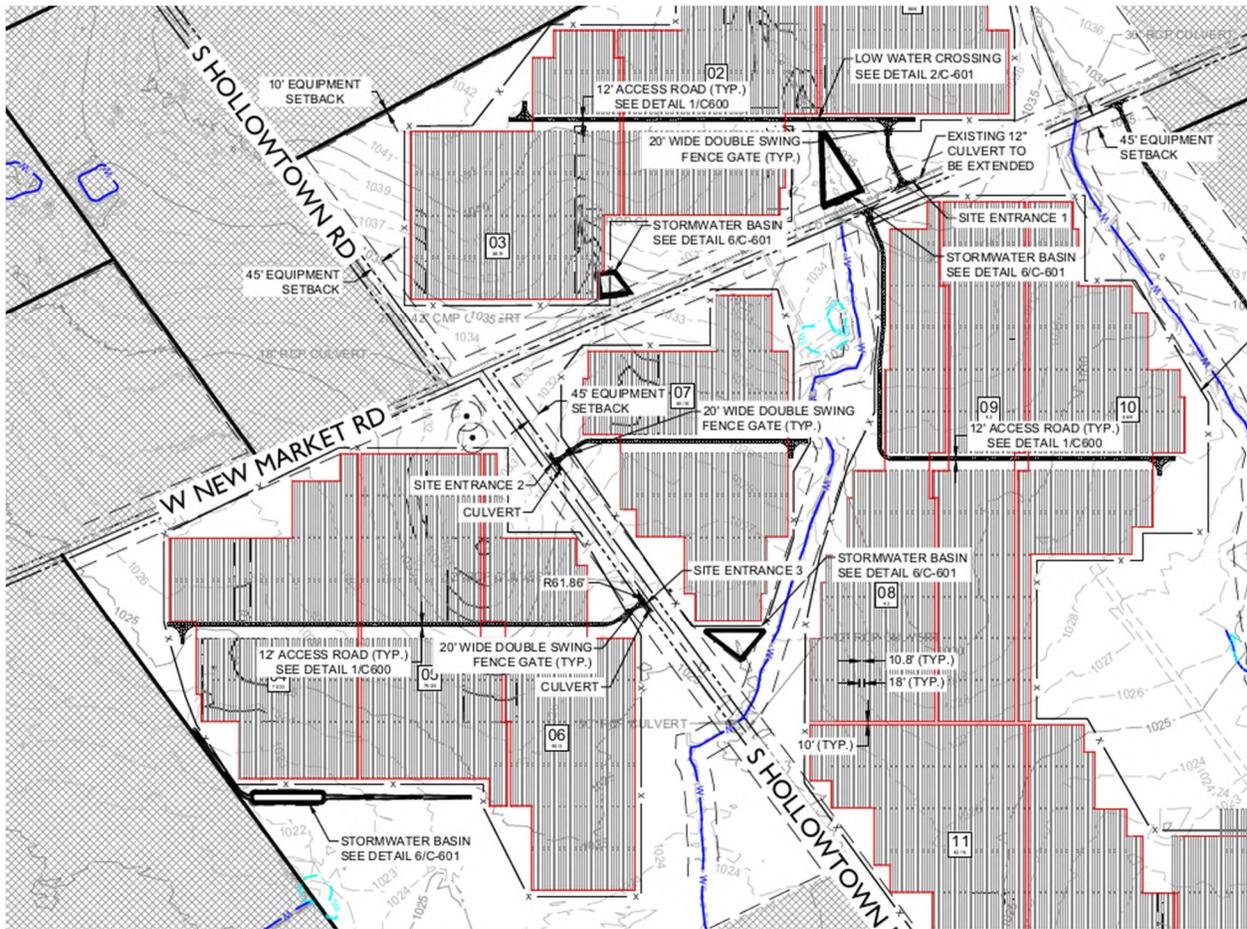
<sup>3</sup> During the hearing, Staff witness Holderbaum implied that drawings were received as early as February 2021 (*See, e.g.*, Tr. at 62:14-18; 81:5-13). NMS has confirmed post hearing that drawings were not submitted at that time.

previously submitted to Board Staff via Staff's sharefile on March 19, 2021, along with corresponding GIS data (NMS Ex. 18 at 7; NMS Ex. 5; NMS Ex. 6).

At the time of the initial submittals, the 65 MW portion was the only portion being treated as Board jurisdictional. Courtesy copies, as noted above, of the 35 MW phase were submitted to Board Staff at this time. Once the Board, through rehearing, modified the Certificate for the entire 100 MW phase, civil drawings for the 35 MW phase were formally submitted to the case docket on June 28, 2021 and emailed to Robert Holderbaum, the Staff project manager for the Project (NMS Ex. 18 at 7; NMS. Ex. 7; NMS Ex. 8).

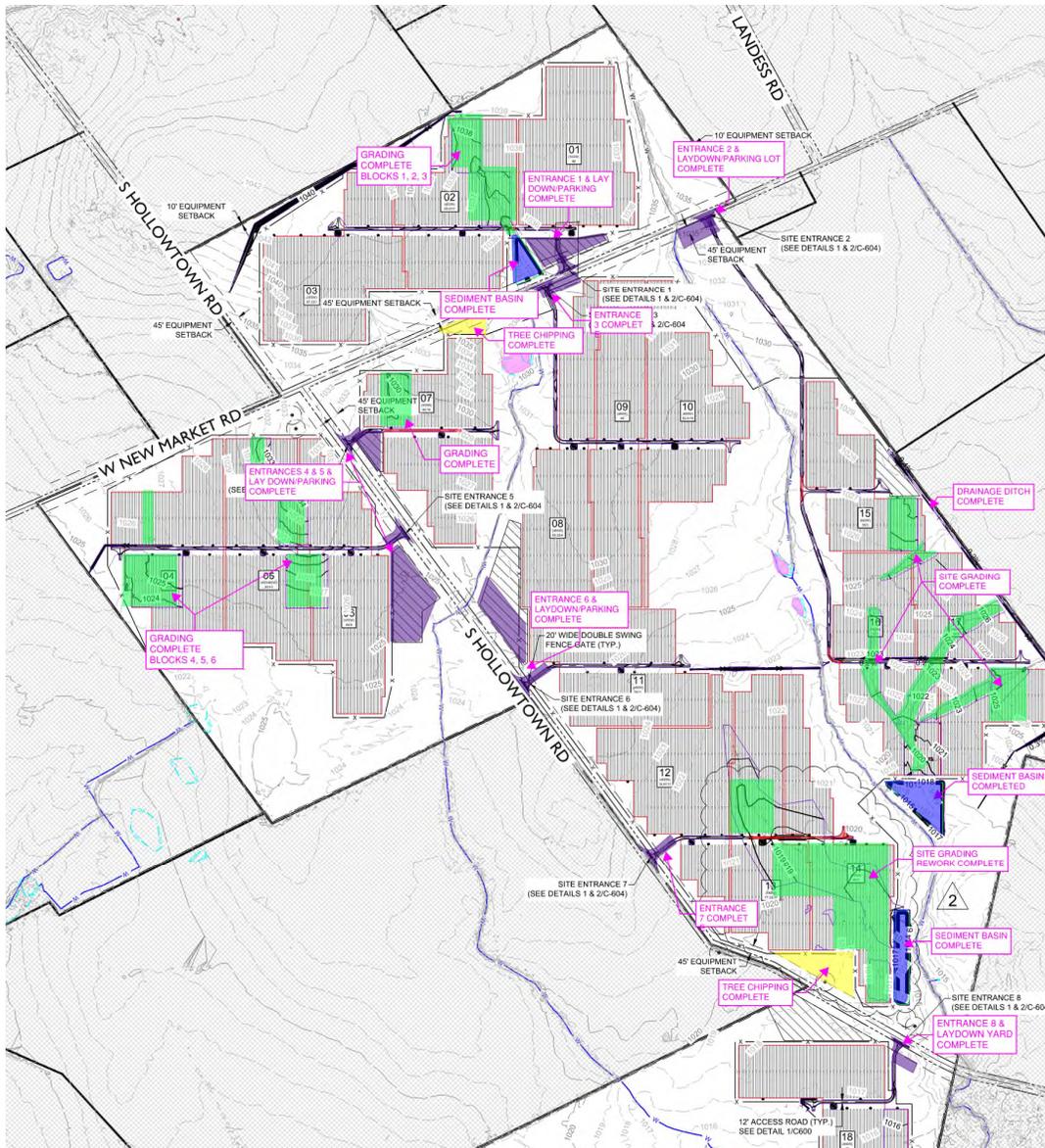
The civil drawings for both phases submitted to Staff at all times had notes identifying areas where a 45-foot setback was utilized from public road right-of-ways (NMS Ex. 18 at 7).

For example, a clip of the northern portion of the 65 MW phase from the March 19, 2021 submission clearly indicates 45-foot setback:



(NMS Ex. 17).

After the commencement of construction, the Project team also submitted construction updates to Staff, including one on November 18, 2021 via email (NMS Ex. 18 at 7-8; Tr. at 180:1-184:13). Like the March 2021 submissions, the submission on November 18, 2021 included engineering drawings indicating an equipment setback of 45 feet from public road right-of-ways (NMS Ex. 10). For example, a clip of the northern portion of the 65 MW phase from this submittal indicates the 45-foot setback:



(NMS Ex. 10).

NMS acknowledges that the drawings did not expressly state that the Project setback was changed to 45 feet from road right-of-ways, as compared to the Application. Staff, however, simply had to look at the drawings to see the clear notes throughout the drawings that a 45 foot setback was used in the design. In other words, no engineering skill was required. Indeed, it only took Staff witness Holderbaum 20 seconds to count the number of times the setback was noted on a larger rendition of a similar engineering drawing during the hearing (Tr. at 123:18-20).

Apparently, however, the drawings were never reviewed or looked at by Staff other than checking for drawing sign-off signatures and the format of the submission (Tr. at 150:22 – 151:6).

**E. Staff’s Review and Acceptance of the Project’s Layout Drawings.**

Condition 8 allows post-certificate layout changes at two distinct times. First, 30 days prior to the preconstruction conference, an applicant has to submit final engineering drawings to Board Staff, in the form of PDF and shapefiles **“for review and acceptance” by Staff** to “confirm that the final design is in conformance with the certificate.” (NMS Ex. 1 at Section II.A(8)). Second, Condition 8 also allows project layout changes after the submission of final engineering drawings (*Id.*). Any “changes are subject to Staff’s review to ensure compliance with all conditions of the Certificate prior to construction.” (*Id.*).

With regard to the submissions made in this proceeding beginning March 2021, Staff only confirmed that the drawings were signed by a professional engineering firm and that drawing files were in PDF format (Tr. at 92:4-10, 150:19 – 151:6). The only person who reviewed these submissions was the Staff project manager for this Project, Robert Holderbaum (*Id.* at 150:16-21). Though Staff has an engineer on its team, this employee did not review the final engineering drawings (*Id.* at 73:5-21). The record evidence is clear that Staff did not perform any substantive review the submitted drawings and did not look at the actual layout drawings.

Yet, Staff provided verbal approval to the Project team to proceed to construction – a tacit approval of the submitted layout drawings. (Tr. at 240:21 – 241:9). Mr. Otarov testified that he attend the preconstruction conference and that the Project “... received verbal approval from Mr. Holderbaum to proceed with construction” (*Id.*). He also pointed out that internal company meeting notes from that preconstruction conference indicated that Mr. Holderbaum had

no concerns or objections to the start of the construction at the preconstruction conference – a conference held after the final engineering drawings were submitted. (Tr. at 41:4-13: NMS Ex. 28).

The Board should also keep in mind during its considerations that Staff witness Holderbaum admitted that Staff did a thorough and substantive review of the landscaping and transportation plans submitted post-certificate (*Id.* at 156:16-23, 157:23-158:12, 160:6-16). Both of those plans were submitted in response to conditions that required Staff to review and accept the plans.

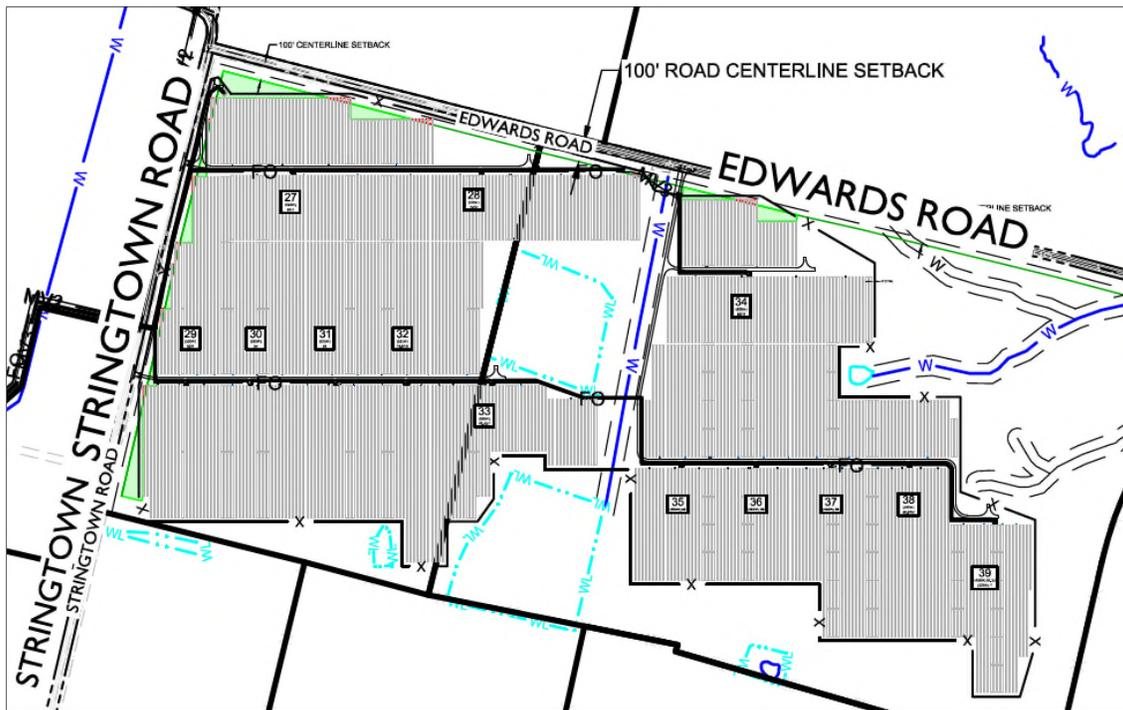
When asked why Staff would do a thorough review for Condition 12 (landscape and lighting plan) and not Condition 8 (final engineering drawings), Mr. Holderbaum said he did not have an answer for that question. (Tr. at 157:14-19). He also admitted that Staff's review of those other conditions was inconsistent with his written testimony that Staff treated the final engineering condition review like other condition compliance filings (Tr. at 160:6-16).

**F. Panel Locations as Constructed.**

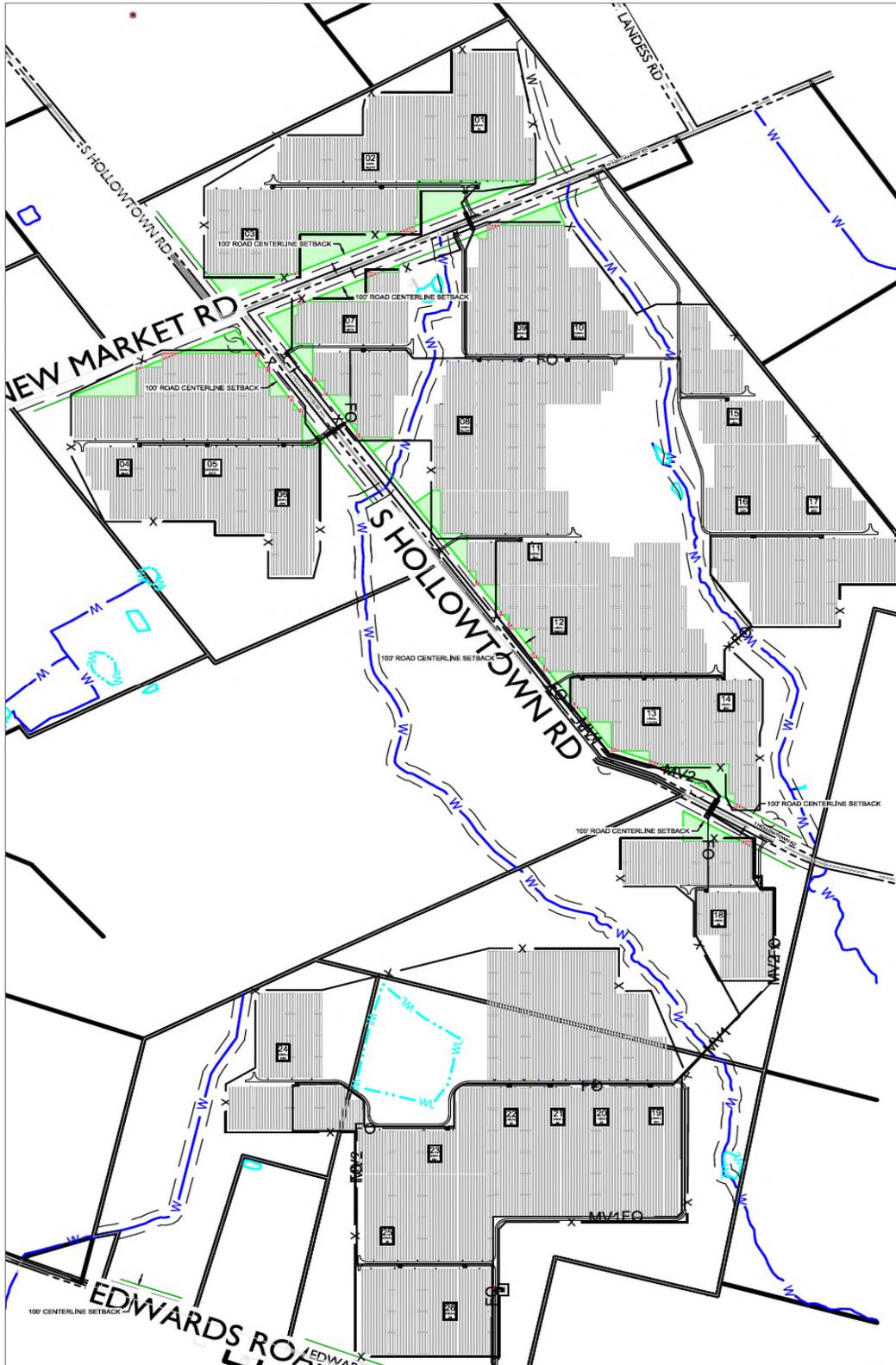
As constructed, a limited number of Project panels are located within 100 feet of public road centerlines. For this limited number, the distances from the nearest panel location to the public road centerline range from approximately 68 feet to 97 feet, per Staff's measurements in its October 18, 2022 Compliance Inquiry Report (Staff Ex. 3 at 21). In other words, the exceedances range from approximately three feet to 32 feet (Tr. at 174:17-21). The average exceedance is approximately 18 feet (NMS Ex. 18 at 9). Out of the 39 measurements taken by

Staff (and included in the Compliance Inquiry Report), 33 exceedances are less than 25 feet (Tr. at 175: 17-21; Staff Ex. 3 at 21).

The below drawings, which were submitted to Staff by the Project team on September 12, 2022 and which are also attached to Staff's October 18, 2022 Compliance Inquiry Report, demonstrate how most of the Project's exterior panels within each phase of the Project are 100 feet from public road centerlines. The areas in red (very small) show the minimal exceedances:



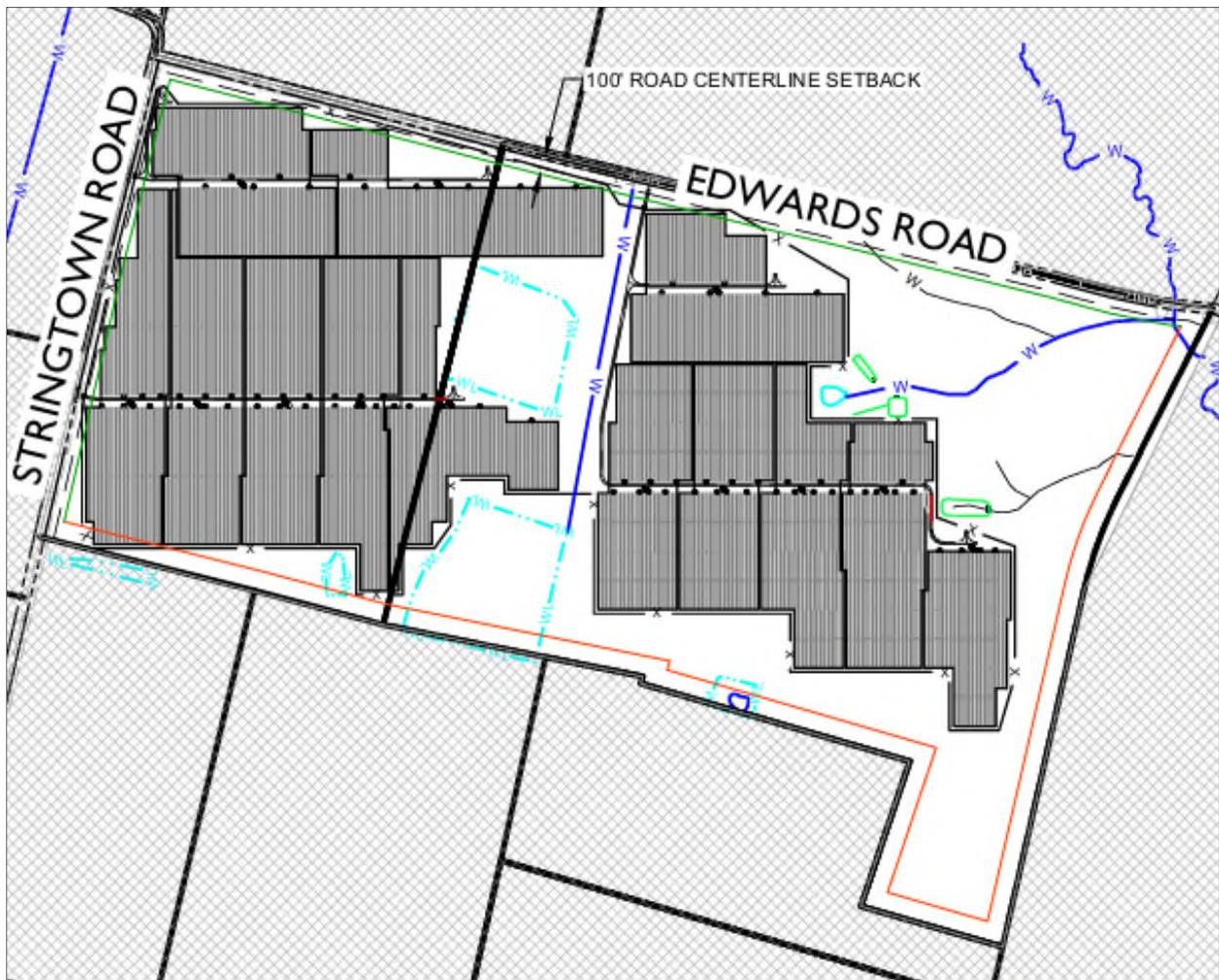
35 MW Phase



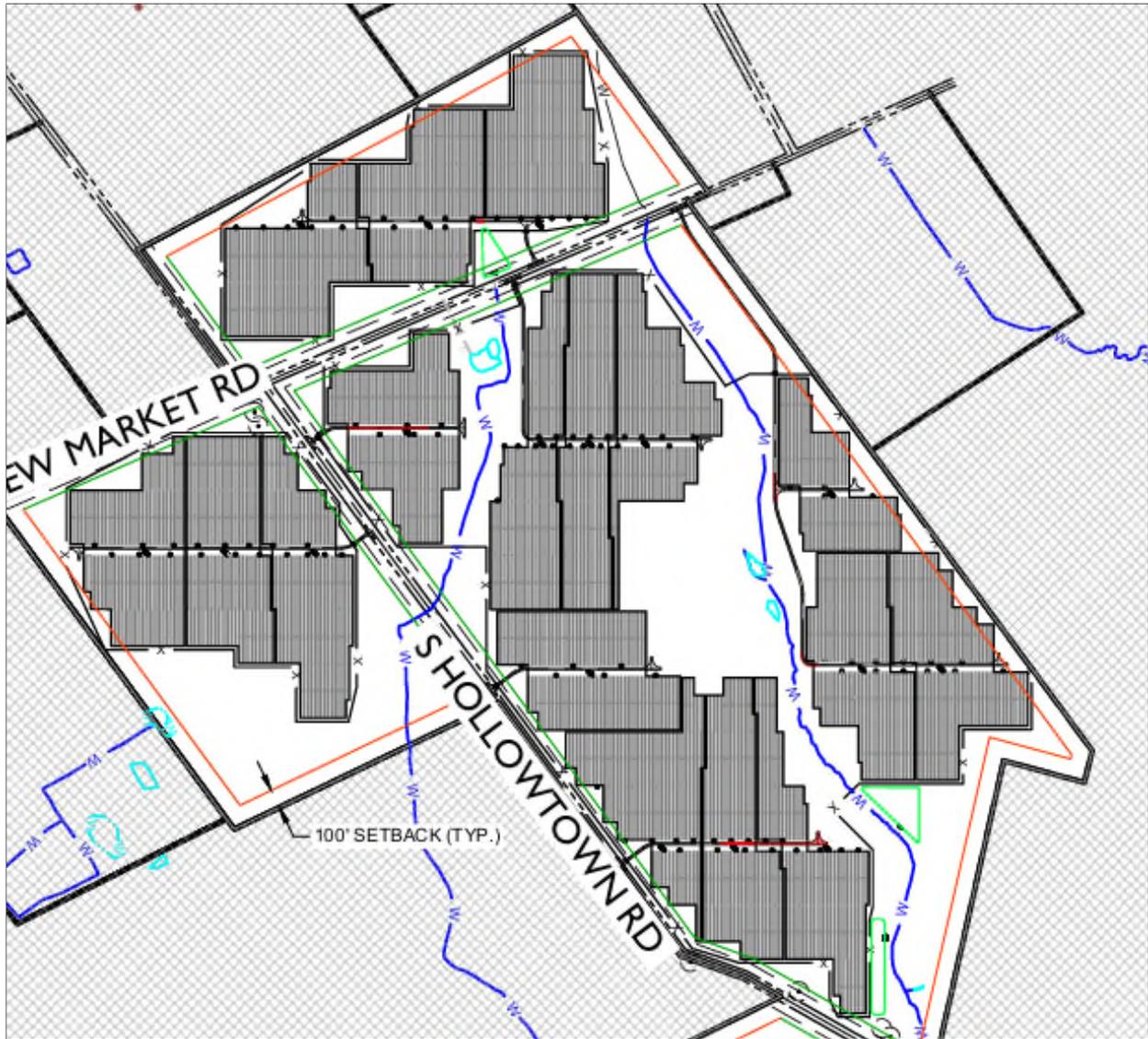
65 MW Phase

(NMS Ex. 18 at 9-11; NMS Ex. 14). Again, the areas in red show the panels within 100 feet of the public road centerlines, which is, as depicted, comprises a very small amount of the overall project.

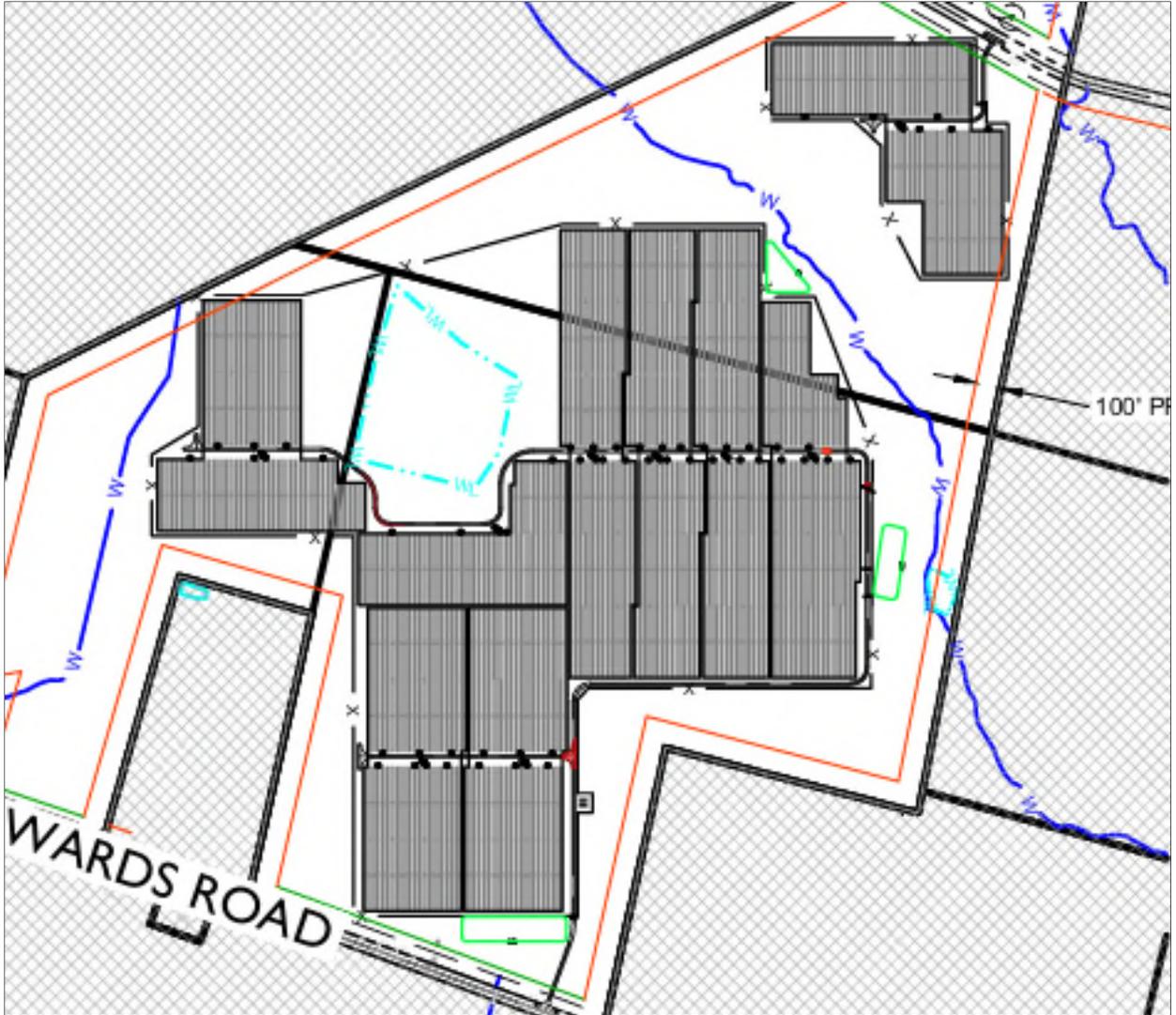
Similarly, a limited number of Project panels are located less than 100 feet from non-participating property boundaries. The non-participating property line setback is represented in red (the green line continues to represent the setback from public road centerlines). The below visuals, which were submitted to Staff on September 12, 2022 and are also attached to Staff's October 18 Compliance Inquiry Report, represent the minimal exceedances in both Project phases:



*35 MW Phase*



*Northern part of the 65 MW Phase*



*Southern part of the 65 MW Phase*

(NMS Ex. 18 at 12-15). There are a total of six non-participating properties, two of which are owned by the same person that have panels within 100 feet of the property boundary.<sup>4</sup>

It is important to note the minimal nature of the exceedances. **Every exceedance, whether from a public road centerline or a non-participating boundary, is within the Project fenceline and the landscape screening outside of the Project fencing** (NMS Ex. 18 at

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<sup>4</sup> Post-hearing, NMS confirmed the number of non-participating properties.

9; Tr. at 130:14-17). The fenceline will not change, and none of the exceedances are outside the environmental survey areas conducted for the Project (Tr. at 130:18-24).

Lastly, while most of the Project construction is complete, construction has stopped in certain areas where the setback issue was discovered (*Id.* at 172:24 – 173:2). Consequently, there are some solar panel trackers without panels (*Id.* at 172:21-23).

**G. Events Leading up to Staff’s October 18, 2022 Compliance Inquiry Report.**

The Project team initially discovered the setback discrepancy as to public roads around early June 2022 after taking measurements and comparing the measurements to the setbacks identified in the Application and associated data requests (NMS Ex. 18 at 15). The Project team then raised the issue with its EPC contractor, McCarthy Building Companies, Inc. (“McCarthy”) (*Id.* at 15-16). While the issue was reviewed internally, it was also determined that certain panel locations were within 100 feet of non-participating property boundaries (*Id.*).

After the Project team’s internal investigation into the setback issue was complete, the Project team self-reported the discrepancy to Ohio Power Siting Board Staff on September 8, 2022 (*Id.* at 16). On September 8, 2022, the Project team lead, Yuri Otarov, along with another team member, attended a call with Mr. Holderbaum, to explain that the final construction plans prepared by McCarthy utilized a 45-foot setback from the public road right of ways (*Id.* at 15-16).

Mr. Otarov also sent an email to Mr. Holderbaum on September 12, 2022 with attachments, which was reproduced in the Staff’s October 18, 2022 Compliance Inquiry Report (NMS Ex. 18 at 16; Staff Ex. 3 at 23-32; Tr. at 214:9-15). The mapping provided to Staff on September 12, 2022 showed the locations where panels were or would be located within 100 feet

of a public road centerline or a non-participating property boundary (NMS Ex. 18 at 16; Staff Ex. 3 at 23-32).

The Project team met again with Staff on September 16, 2022 with a McCarthy representative to discuss the issue again and try to reach a resolution (NMS Ex. 18 at 16). On September 30, 2022, Board Staff conducted a site inspection of the Project utilizing a Global Positioning System enabled device and a laser rangefinder to record measurements of panel locations and their setback to public road centerlines (Tr. at 65:13-20; Staff Ex. 3 at 2).

On October 5, 2022, Mr. Holderbaum requested the civil layout for the Project in geographically-referenced electronic data via email (NMS Ex. 18 at 16-17). Upon Mr. Holderbaum's request, Mr. Otarov provided a civil layout of the Project via a KMZ file via email to Mr. Holderbaum on October 8, 2022 (NMS Ex. 18 at 16-17; NMS Ex. 15). Finally, on October 18, 2022, Staff filed its Compliance Inquiry Report finding that 38 of the 39 setbacks measured by Staff during the September 30, 2022 field inspection were not in compliance with the Project Certificate (Staff Ex. 3 at 2; NMS Ex. 18 at 17).

#### **H. Relocating Panels will not Change the Project's Visual Impact.**

It is important that the Board consider all of the evidence presented in this proceeding. NMS has presented the relevant facts above but is using this section of the brief to highlight important expert witness testimony about how there will be no change to the Project's visual impacts if panels need to be moved to meet a 100-foot setback. **Specifically, Yuri Otarov with NMS and Dan Bowar with EVS both testified that relocating panels will not change the Project's visual impact to people driving down the roads.**

Mr. Otarov is the Director of Project Engineering at Algonquin Power & Utilities Corp. and the Project Manager for the Project, and has a graduate degree in engineering (NMS Ex. 18 at 1). He has 13 years of experience in the development of energy generation projects, including

rooftop solar, combined cycle natural gas plants, and utility-scale solar projects (*Id.*). He testified that the exceedances, which were generally within the distance of the hearing room, would be immaterial in a large field. (Tr. 251:1-11). He also testified that once the vegetative screening reached full maturity, any visual impact of the panels would be further mitigated much more than setting panels back 100 feet. (*Id.* at 251:21-25; 252:1-2).

Mr. Bowar gave the same testimony. Mr. Bowar is a senior civil engineer licensed as a professional engineer in multiple states (EVS Ex. 1 at 1). He has worked on and visited numerous solar projects, and like Mr. Otarov, has been on the Project site. (Tr. 224:21-25; 225:1-10; 229:25 - 230:7). He testified that the current panel locations (all within the Project fenceline) will not change the visual experience for anyone driving by the Project on a public road due to the distance (from the viewer and the panel), and the existing Project fence and vegetation (*Id.* at 221:1-9; 224:1-10). He also testified that moving panels back 3 feet, 10 feet, 20 feet and 32 feet in an open field would not be noticed. (*Id.* at 224:2-20).

The Board should afford significant weight to Mr. Otarov's and Mr. Bowar's testimony which is further reinforced that the panel exceedances fit within the smallest hearing room of the Commission's three hearing rooms. (*See* Tr. at 175-179 – tape measure demonstration).

### **III. STANDARD OF REVIEW**

As the complainant in this proceeding, Staff has the burden of proving that a violation occurred under R.C. 4906.98 by a preponderance of the evidence (Ohio Adm.Code 4906-7-2(F)). After reviewing the evidence presented at trial, pursuant to Ohio Adm.Code 4906-7-02(G), if the Board finds a violation of R.C. 4906.98, then the Board may order the appropriate remedies, which may include a remedy other than strict compliance with certificate conditions.

Specifically, under the rule, the Board “... **may** order appropriate remedies, which **may** include one or more of the following:

- (1) Direct the person to cease the violation.
- (2) Direct the person to comply with the certificate and/or a board order or suspension.
- (3) Direct the person to take corrective action and include a date by which such corrective action must be taken or completed.
- (4) Assess forfeitures in accordance with sections 4906.97 and 4906.99 of the Revised Code.
- (5) Direct the attorney general to seek enforcement of board orders, including orders assessing forfeitures and appropriate remedies, in state or federal court.
- (6) **Approve other appropriate remedies.”**

Ohio Adm.Code 4906-7-2(G) (emphasis added).

Additionally, in reaching its decision, the Board may take into consideration mitigating circumstances including the doctrine of economic waste. *See, e.g., Landis v. William Fannin Builders, Inc.*, 193 Ohio App. 3d 318, 2011-Ohio-1489, 951 N.E.2d 1078 (10th Dist. 2011); *In re Henry A. Selinsky, Inc.*, Case No. 01-585-TR-UNC, Finding and Order (Mar. 22, 2001).

#### **IV. NEW MARKET SOLAR’S POSITION IN THIS PROCEEDING**

NMS does not dispute the facts in this proceeding as to the panel locations in relation to public road centerlines and the six non-participating property boundaries. Only the Board, however, can interpret the relevant language in the applicable documents and its rules to decide whether the change on the final engineering drawings to a 45-foot setback from road right of ways that resulted in a small number of panels being within 100 feet of public road centerlines constitutes a change of layout that would be allowed under Ohio Adm.Code 4906-3-13(D) and Joint Stipulation Condition 8. And if the Board finds non-compliance, then NMS urges the Board to serve the public interest by eliminating economic waste and allow NMS to install

additional screening to allow the panels to remain as located – but still inside the Project fencing which will remain in the same location. Alternatively, the Board can impose a remedy similar to that proposed by NMS during the hearing, which includes the removal of certain panels near more travelled public roadways in this generally rural area, addition of more landscaping for further mitigation of the already minimal visual impact of the Project, and replaces existing chain-link fencing with new agricultural-type fencing.

**A. NMS does not Dispute that Some Panel Locations are Within 100-feet of a Non-Participating Property Boundary or the Middle of a Public Road.**

As Mr. Otarov stated during the hearing, NMS does not dispute that panels are designed to be and are located in some limited instances, as demonstrated by the visuals in Section II.F (Panel Locations as Constructed) above, within 100 feet of public road centerlines and some non-participating property boundaries (NMS Ex. 10). NMS is not challenging the measurements taken by Board Staff during its field inspection of the Project Area on September 30, 2022 and as identified in the Compliance Inquiry Report on October 18, 2022 (NMS Ex. 18 at 9; Staff Ex. 3 at 2, 21). In the Report, Staff found 38 of the 39 measurements it took from panels to the public road centerline were not setback 100 feet from the centerline (Staff Ex. at 2). For each panel block at issue, the distances from the nearest panel to the public road centerline range from 68 feet to 97 feet per Staff's measurements in the Report (NMS Ex. 18 at 9; Staff Ex. 3 at 2, 21). Similarly, NMS is not disputing that certain panel locations are within 100-feet of a non-participating property boundary (NMS Ex. at 12). However, as explained in the next section, the Board must determine if the original setback identified in the Application and the related December 14, 2020 data request, as identified in the Staff Report, was subsequently modified via post-certificate submittals to Board Staff beginning in March 2021.

**B. In Reaching a Decision in this Proceeding, the Board must Determine Whether the Project is in or out of Compliance, Taking into Consideration that a Board Rule and the Stipulation for the Project Allow for Post-Certificate Layout Changes.**

Critical to the Board's consideration of whether the Project is in compliance is the fact that beginning from the very first post-certificate submission to Staff, the drawings and shapefiles denoted 45-foot setbacks to public road right of ways. Both Ohio Adm.Code 4906-3-13(D) and Condition 8 allow for layout changes post-certificate as long as those layout changes are presented to Board Staff. As explained below, because the final engineering drawings expressly denoted the application of the 45-foot setbacks, the Board could determine that both the Ohio Adm.Code 4906-3-13(D) and Condition 8 allowed the Project layout to change such that a small number of panels would be within 100 feet of public road centerlines and non-participating boundaries to remain as placed.

**1. Ohio Adm.Code 4906-3-13(D) allows post-certificate changes to the Project layout.**

Though NMS does not dispute that the Project was subject to 100-foot setbacks from public road centerlines and non-participating boundaries as of the Certificate issuance date, every final engineering drawing submission made to Board Staff denoted 45-foot setbacks. Importantly, Ohio Adm.Code 4906-3-13(D) allows changes to the Project layout after the issuance of a certificate. Under Ohio Adm.Code 4906-3-13(D), any layout changes under this scenario have to be provided to Staff in hard copy and as geographically-referenced electronic data. Additionally, changes outside of the environmental survey area and changes within environmentally sensitive areas "are subject to staff review and acceptance prior to construction in those areas." Ohio Adm.Code 4906-3-13(D). There is no specific process identified under Ohio Adm.Code 4906-3-13(D) for the submission of changes made to a project layout post-certificate.

Here, post-certificate submissions (both directly to Staff and on the case docket) during March 19 and 23, 2021 and June 28, 2021 identified a 45-foot setback from public road right-of-ways (NMS Ex. 18 at 7). The Project team uploaded corresponding shapefiles to the civil engineering drawings (i.e. electronic data) previously on March 19, 2021, during the submission for the tree clearing phase of construction (*Id.*). These shapefiles also identified 45-foot setbacks from panels to public road right (*Id.*) As Mr. Otarov testified during the hearing, drawings submitted to Board Staff post-certificate **always contained** the 45-foot setbacks and did not identify 100-foot setbacks at all (Tr. at 243:14-17; 246:22-25). None of these changes were outside the environmental survey areas or within environmentally-sensitive areas, thereby obviating the need for Staff’s “review and acceptance” under the rule (Tr. at 130:7 – 131:9). Consequently, the Board could find that the post-certificate submissions, which occurred in March and June of 2021, identified post-certificate changes, and these changes were properly submitted to Staff in accordance with Ohio Adm.Code 4906-3-13(D).

**2. Condition 8 allows project layout changes after the submission of final engineering drawings.**

In addition to Ohio Adm.Code 4906-3-13(D), post-certificate changes are also allowed under Condition 8 of the Joint Stipulation. The first part of this condition indicates that 30 days prior to the preconstruction conference, an applicant has to submit final engineering drawings to Board Staff “for review and acceptance” to “confirm that the final design is in conformance with the certificate.” (NMS Ex. 1 at Section II.A(8)). The condition also allows changes to the siting detailed in the Application to be made but requires that the drawings “... **specifically denote any adjustments made from the siting detailed in the application**” (*Id.*).

Given the facts and the language in Condition 8, the Board could decide that the panel locations as to the public roads were changes to the siting detailed in the Application and were

properly denoted on the final engineering drawings. The Board could also find that, regardless of Staff's testimony, Mr. Holderbaum's verbal approval to the Project to proceed with construction reflected a review and acceptance by Staff of the final engineering drawings. Indeed, there is no dispute that the March 2021 submissions Staff received contained (1) the 45-foot setback (a change from what was original identified in the Application) and (2) the civil drawings and related shapefiles that indicated these setbacks (Tr. at 108:9 – 109:2). Further, during the April 2021 preconstruction conference, Staff provided a green light for construction to go ahead (Tr. at 240:21 – 241:9).

Whatever Staff's position may be on the level of review required for post-certificate final engineering drawings under Condition 8 (which is for the Board to determine), what is clear is that a simple, quick review of the documents submitted (and the corresponding shapefiles) would have alerted Staff that the final engineering drawings denoted 45-foot setbacks throughout the Project Area (NMS Ex. 18 at 7; Tr. at 123:18-20). Because the 45-foot setback was expressly noted on the final engineering drawings and panels locations shown (of which most met a 100-foot setback) and because Staff gave the Project team direction for construction to commence, the Board could find that Staff did review and accept the final engineering drawings, including the change in the Project's siting, through Condition 8.

**3. The September 2022 self-report could also be viewed as a Condition 8 layout change submission; something that likely has not been considered in this proceeding.**

Condition 8 also allows Project layout changes **after the submission of final engineering drawings** (NMS Ex. 1 at Section II.A(8)). If such a change is made, then these changes have to be provided to Staff in both hard copy and geographically-referenced electronic data (*Id.*). Staff has to review these changes to ensure compliance with all conditions of the issued certificate prior to construction in those areas (*Id.*). Other than providing the hard copy

and geographically-referenced data, the condition does not identify any other specific requirements for change submissions.

After making the initial September 8, 2022 self-report about the 45-foot versus 100-foot setback discrepancy, Mr. Otarov followed up with Board Staff and provided mapping to Staff (NMS Ex. 18 at 16). A civil layout of the Project (as-built) in geographically-referenced electronic data was also provided to Staff on October 8, 2023 (NMS Ex. 18 at 16-17; NMS Ex. 15). Because of the provision of the drawings and related shapefile information, the Fall 2022 submission could be viewed as a Project layout change provided after final engineering drawing submission. Under this approach, Staff would still need to review the new panel locations to confirm that the changes satisfy the other conditions of the Certificate. The only non-compliance issue would be that construction would have occurred prior to Staff's review of the new panel locations.

Notably, under this approach, Condition 1 would not control because the express language of Condition 1 makes any prior applicant commitments subject to the other conditions of the Joint Stipulation. Condition 1 states:

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 the Joint Stipulation and Recommendation or as further modified by the Supplemental Joint Stipulation and Recommendation.**

(Supplemental Joint Stipulation at 2) (emphasis added). Because Condition 8 of the Joint Application allows layout changes, that condition takes precedence over the requirements in Condition 1, which directs the Applicant to build the Project pursuant to the Application and other supplemental filings.

To implement this approach, Staff need only review the locations of the panels to confirm consistency with the other conditions of the Certificate. That should be non-controversial as all panels are within the Project fencing (which will not move). This is a viable approach to resolving this matter through the express terms of Condition 8 of the Joint Stipulation.

**C. If the Board Finds that the Project is Non-Compliant, the Board Should Craft a Remedy that Minimizes Economic Waste and Additional Environmental Disturbance.**

It is not in the public interest to promote and create economic waste. To avoid that result and if the Board were to find that the Project is non-compliant, the Board should use the flexibility it has under its rules to craft a remedy that avoids economic waste and improves the Project through additional vegetative screening. Such a remedy would be in the public interest.

**1. The Board has the flexibility under Ohio Adm.Code 4906-7-02 to craft a remedy other than strict compliance.**

Important for the Board's consideration is that Ohio Adm.Code 4906-7-02(G) allows the Board to allow the panels to remain as designed and as presently located. While this rule allows the Board to order strict compliance (subsections (1) through (3)) and/or forfeitures (subsections (4) and (5)), it also allows the Board to "[a]pprove other appropriate remedies." And, as explained further in Section IV.D below, one remedy that could be in the public interest and avoid some (but not all economic waste) would be to relocate some panels, provide for additional screening, and updated fencing. Thus, even if the Board were to now find that the Project is not compliant, it is within the Board's discretion to craft a remedy that would allow a limited number of panels to remain as located in conjunction with additional vegetative screening.

**2. Courts and administrative agencies often consider economic waste when crafting remedies.**

In Ohio, various appellate courts have adopted the economic waste rule and apply it in situations where the cost of repairing a construction defect is high to determine appropriate

damages in breach of contract cases. “Under the economic waste rule, if repair of a construction defect ‘will involve unreasonable economic waste, damages are measured by the difference between the market value that the structure contracted for would have had and that of the imperfect structure received by the plaintiff.’” *Landis v. William Fannin Builders, Inc.*, 193 Ohio App. 3d 318, 2011-Ohio-1489, 951 N.E.2d 1078 (10th Dist. 2011) (quoting *Ohio Valley Bank v. Copley*, 121 Ohio App.3d 197, 210, 699 N.E.2d 540 (4th Dist.1997)). Such “[e]conomic waste arises when the total cost to remedy a construction defect is grossly disproportionate to the good to be attained.” *Id.*

Following this rule, in certain situations, the destruction of an already constructed costly structure is a matter of economic waste, and courts have refused to order such destruction. *See, e.g., Miller v. W. Carrollton*, 91 Ohio App.3d 291, 632 N.E.2d 582 (2d Dist.1993) (ordering a municipality to take various measures to minimize issues stemming from a car wash built in violation of local zoning instead of ordering the outright destruction of the car wash); *Martin v. Lake Mohawk Prop. Owner’s Ass’n*, 7th Dist. Carroll No. 04 CA 815, 2005-Ohio-7062 (upholding the trial court’s refusal to grant a permanent injunction forcing a destruction of an already constructed lakeside home when any harm could be adequately compensated by monetary damages). **In fact, a court might be deemed to have acted arbitrarily if the economic waste doctrine is not considered.** *See Stonebridge Neighborhood Ass’n v. Knapinski*, 2018-Ohio-424, 128 N.E.3d 742 (2d Dist.) (“we hold that the trial court arbitrarily ordered the destruction of Appellants’ pool house without addressing the economic-waste doctrine...”).

While NMS recognizes that the Board does not have jurisdiction over matters sounding in contract or tort, the Board should take into consideration the economic waste doctrine in this

matter. As explained in the next sections, redesigning the Project and relocating panels so that all equipment has a 100-foot setback from public road centerlines and non-participating boundaries is estimated to cost at least \$7 to \$10 million (NMS Ex. 18 at 44). Furthermore, this costly repair would bring little public benefit to surrounding non-participating property owners and passersby on public roads as it results in an “imperceivable aesthetic change” (Tr. at 224:9-10; *see also* Tr. at 251:2-11). It is crucial that the Board weigh the high cost of redesigning the Project against the fact that strict compliance would negligibly enhance (if any) the public interest.

### **3. Strict compliance will result in significant economic waste.**

The Board should consider the guidance set by Ohio appellate courts and find that replacing a minimal number panels at a cost of \$7 – 10 million would constitute economic waste. Of the 100 MW project, approximately 1 MW worth of panels are setback less than 100 feet from public road centerlines and non-participating boundaries (NMS Ex. 14; NMS Ex. 18 at 9). Further, though the Project was designed with a 45-foot setback, all of the 38 exceedances measured by Staff are setback greater than 45 feet from public road centerlines (Staff Ex. 3 at 21). And, as Mr. Otarov testified, removing all panels not adhering to a 100-foot setback would not mean simply removing those panels. Because panels are attached to trackers, it would mean removing entire strings of panels, some of which would be beyond a 100-foot setback to reconfigure the Project (NMS Ex. 18 at 20; Tr. at 172: 21-23).

Not only would this require additional engineering, it would also create further environmental disturbance as a result of relocating equipment, including panels, trackers, and piles (NMS Ex. 18 at 20). Because the Project is partially operational, additional delays as a result of further construction could also delay the Project’s commitments under any offtake agreements (NMS Ex. 14).

Consequently, if the Board finds non-compliance, NMS urges the Board to craft a remedy that takes into account the mitigating circumstances, minimizes additional environmental impacts and that prevents economic waste.

**D. NMS Proposed One Such Remedy Through Mr. Otarov’s Testimony.**

NMS believes that the best remedy in this situation would be to allow the panels to remain as they are with additional screening and fencing changes (NMS Ex. 18 at 20).<sup>5</sup> However, if the Board were to deem the Project noncompliant with Certificate conditions, then the Board should consider implementing the remedy that Mr. Otarov presented during the hearing (Tr. at 250:17 – 251:1; NMS Ex. 18 at 20). This remedy would setback panels 100 feet from the centerline of the primary roads within the Project Area (W. New Market Road, Edwards Road, and Stringtown Road), leave in place the recently installed agricultural fencing in areas adjacent to public roads, and install additional screening in various viewpoints, as needed, where some panels would remain (NMS Ex. 18 at 20). This proposal would still cost around \$4.1 million, but would minimize the economic impact of relocating all equipment within 100 feet of road centerlines (which would cost \$7-\$10 million) and avoid additional environmental disturbance as a result of relocating all of the equipment (*Id.* at 20, 45).

**1. Summary of the Proposed Remedy.**

a. Panels would be relocated along three public roads.

<b>Staff Measurement Location</b>	<b>Location</b>	<b>Phase</b>	<b>Description</b>
1-8	Stringtown Road	35 MW	Panels will be relocated (NMS Ex. 25).
9-12	Edwards Road	35 MW	Panels will be relocated ( <i>Id.</i> at 25).

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<sup>5</sup> This can be accomplished by a requirement that NMS update its landscaping plan to provide the additional screening. The fencing has already been changed along the public roads.

<b>Staff Measurement Location</b>	<b>Location</b>	<b>Phase</b>	<b>Description</b>
13-31	S. Hollowtown Rd.	65 MW	Panels will not be relocated. Additional vegetative screening to be installed with new fencing ( <i>Id.</i> at 27, 38, 40, 43).
32-38	W. New Market Road	65 MW	Panels will be relocated ( <i>Id.</i> at 25).
39	Southeastern point of block 2 along W. New Market Road	65 MW	No mitigation necessary in this area because the panels in this area are set back 100'1" (Staff Ex. 3 at 20).

- b. Panels would remain in place by non-participating property boundaries.

<b>Location</b>	<b>Phase</b>	<b>Description</b>
Southern end of block 29.	35 MW	A small number of panels in this location will not be relocated. The southern end of the solar array encroaches into the 100' setback from the property line. However, the view of the solar array is obstructed by natural screening and wetlands. The adjoining property is also owned by another solar facility developer (NMS Ex. 18 at 26).
Northwestern parts of blocks 1, 2, and 3	65 MW	A small number of panels in these blocks will not be relocated. These three locations are very secluded and cannot be easily seen from the roads and residences. Additional landscape screening will be added to the north end of block 3 for an extra buffer to a residence on S. Hollowtown Road ( <i>Id.</i> at 36-37).
Northwestern corner of block 24	65 MW	A small number of panels in this location will not be relocated because this area is heavily secluded from the public and residences. There is also a natural tree buffer along the property line ( <i>Id.</i> 25 at 30-31).
Southeastern corner of block 18	65 MW	26 solar panels would remain in this area. This location is heavily secluded, adjacent to other crop fields, and not close to any residences. Solar panels in this area are not immediately visible to the public and residences around the Project Area ( <i>Id.</i> at 32).
Eastern sides of blocks 15 and 17	65 MW	Certain panels would remain located along the east side of these blocks. This area is heavily secluded, is adjacent to other crop fields, and not visible from any public roads or residences. No

Location	Phase	Description
		mitigation is necessary in this particular area due to its distance from public roads and nearby residences ( <i>Id.</i> at 34).

- c. Fencing has been converted to agricultural fencing from chain link fencing.

Even though this proceeding is ongoing and no Board entry has been issued ordering a remedy, NMS is **voluntarily replacing 25,000 linear feet** of chain link fence with barbed wire (NMS Ex. 18 at 20). The fencing is now agricultural fencing and no longer chain link (*Id.* at 22). The height of the fence is now 7 feet, without the originally-approved barbed wire (*Id.*). The cost to install the revised fencing was approximately \$250,000 (*Id.*). NMS and its contractor made this change voluntarily to address concerns raised about the aesthetics of the original chain link fencing that was approved for the Project (*Id.*).

The October 18, 2023 Compliance Inquiry Report contains a picture of the old fencing:



(Staff Ex. 3 at 22)

A picture of the new fencing follows:



(NMS Ex. 18 at 21).

Finally, the below diagram demonstrates the areas of new fencing (purple lines represent areas where fencing has been changed out):



d. Additional vegetative screening will be added.

NMS is proposing to add additional vegetative screening in certain areas to better mitigate the view of panels that are not being removed. As noted above, these include certain locations along S. Hollowtown Road, which is a less-traversed public road within the Project Area (NMS Ex. 18 at 28, 38-40, 43). That screening, once it reaches full maturity, would further mitigate any visual impact of the panels much more than setting panels back 100 feet. (Tr. 251:21-25; 252:1-2). This is one way to avoid economic waste and at the same time provide additional Project screening.

**2. This middle-of-the-ground approach would benefit the public interest far more than a remedy ordering strict compliance.**

As a package, NMS believes that the remedy outlined above is firmly in the public interest of the local community due to the enhanced benefits offered by the updated fencing, the new vegetative screening, reduced economic waste, and diminished visual impact.

a. The exceedances that will remain are located in relatively isolated areas without residences, or along public roads where the impact of panels being 3 to 32 feet closer to the Project fencing would be minimal.

While the remedy proposed by Mr. Otarov does not relocate every single panel that is within the 100 feet of public road centerlines, this comprehensive proposal takes into account the existing conditions within the Project Area, the nature of the public roads adjoining the Project, and the location of residences adjoining the Project Area (NMS Ex. 18 at 22). The proposal redesigns eight specific areas of the Project so that panels will be 100 feet from the centerlines of W. New Market Road, Edwards Road and Stringtown Road (*Id.*). These are roads with more traffic than other roads adjacent to and through the Project Area, where views of the Project would be more apparent to travelers (*Id.* at 50).

In other areas, the design location of the panels would not change but these areas can include new and additional vegetative screening and in some areas, agricultural style fencing, which will better mitigate visual impacts from the panels (*Id.* at 22). Finally, in areas where panel locations would remain as designed, the impacts from the retained panels would be minimal because of screening provided by existing vegetation and/or the area's relative seclusion from the public whether via public roads or residences (*Id.*).

Considering the fact that the visual impact of panels that will remain are already mitigated due to existing vegetation or will be further mitigated due to the addition of new, enhanced screening, the Board could impose this remedy or a similar remedy which will minimize economic waste and reduce environmental impacts.

- b. Two witnesses experienced in the industry confirmed that the visual impact of leaving panels in the current locations would be negligible as compared to relocating panels.

The Board was presented with the testimony of two credible witnesses who confirmed that the visual impact of the panels within the 100-foot setback would be negligible due to the flat topography of the Project Area and its rural nature (Tr. at 221:7-9, 224:2-20, 250:17-251:11). Specifically, Mr. Otarov, who has developed energy projects since 2010, testified that 30 feet was an immaterial distance within a large field and it would not be visually impactful to move panels five or 50 feet within the fenceline (*Id.* at 250:22 – 251:11). Mr. Bowar, who has worked in the solar industry for over 14 years, testified that the impact of the exceedances would be unperceivable to traveling motorists on public roadways adjacent to the Project (*Id.* at 221:1-9). In Mr. Bowar's opinion, moving certain panels 3 feet, 10 feet, 20 feet, or 32 feet to meet a 100-foot setback would not result in any real aesthetic change to the Project (*Id.* at 224:2-20). Thus,

the information in the record establishes that if the panels were left as is in areas already partially obstructed from public view, this would create no additional negative impacts for the public.<sup>6</sup>

- c. The proposed enhanced landscaping will further minimize any visual impacts from the Project.

NMS is committing to install additional vegetative screening along certain areas which are visible to the public and where panels are being retained (NMS Ex. 18 at 20). Under NMS's proposal, panels are being left in areas which are along roads where there is a low volume of traffic (e.g. S. Hollowtown Road), blocks of panels where existing natural screening exists (e.g. southern end of block 29 and northwestern parts of blocks 1, 2, and 3), or blocks of panels which are located in secluded areas such as crop fields which are not close to any residences (e.g. southeastern corner of block 18 and eastern sides of blocks 15 and 17). (*Id.* at 28-44).

For example, panels are being retained along the southwestern portion of block 3 along S. Hollowtown Road, which has minimal traffic, because these panels are only 89.9 feet from the road centerline. (*Id.* at 28-29). NMS is proposing to install additional screening to some of these areas to limit the visibility of the Project to a greater extent from certain roads and residences, including the southwestern portion of block 3 along S. Hollowtown Road. (*Id.*) The additional screening is being proposed as a good faith effort to resolve the issues raised in the Compliance Inquiry Report and community concerns generally (NMS Ex. 18 at 49).

Public interest will be enhanced by the additional landscaping element of this proposed remedy because it will improve the visual impact of the Project through additional vegetative screening in a way that strict compliance with a 100-foot setback will not (*Id.* at 45). In other

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<sup>6</sup> Also important for the Board's consideration is that another solar project neighboring the New Market Solar Project only has 50-foot setbacks (Tr. at 139:13-23).

words, strict compliance will not provide the benefits of additional screening and reduced visual impacts (*Id.* at 50).

On this point, Mr. Otarov, who is an experienced solar industry professional, testified that “once the landscaping reaches full maturity, the visual impact would be much further mitigated than simply setting back the panels to 100 foot” and **“it’s really in the public’s best interest to have the visual sort of cover screen by trees and landscaping rather than \* \* \* simply moving back panels anywhere between 5 to 30 feet”** (Tr. at 250:22 – 251:1, 251:24 – 252:2, emphasis added). Thus, the Board should consider the enhanced benefit to the local community if the remedy proposed by NMS is implemented.

- d. NMS has installed agricultural style fencing, which was not proposed in the original Application, which will further mitigate visual impacts.

As noted above, even though there has been no finding of noncompliance, NMS is **voluntarily replacing 25,000 linear feet** of chain link fence with barbed wire to agricultural fencing (NMS Ex. 18 at 20). The cost to install the revised fencing alone was approximately \$250,000 (*Id.*). NMS made this change voluntarily to improve the viewshed and the change is substantially complete (Tr. at 236:6-19). In fact, during the hearing, Staff indicated that it prefers agricultural fencing on projects (Tr. at 172:2-5). Again, while balancing a directive of strict compliance with the comprehensive proposal NMS has presented, the Board should consider the voluntary replacement of fencing, which will further improve the aesthetics of the Project Area.

**E. Strict Compliance with the Certificate Conditions would Create Millions of Dollars in Rework to Relocate even a Limited Number of Panels.**

If it finds the Project is noncompliant, the Board should not impose strict compliance as a remedy due to the ample evidence in the record demonstrating that such a remedy would lead to

millions of dollars of economic waste and create no discernable difference. First, relocating panels requires significant design changes and is not simply a matter of only removing certain panels (NMS Ex. 18 at 20). Instead, entire strings of panels, some of which are well beyond the 100-foot setback, would have to be removed (*Id.*). As EVS witness Bowar testified:

**Q. Given how the system works together, can you please explain the impact of moving the corners of the impacted areas to achieve a 100-foot setback.**

A. Yes, since the system has to operate together there is no possible way to just move the impacted corners. In order to achieve a 100-foot setback now that the system is designed and partially installed the entire system must be re-worked and redesigned including some removals and reconstructions or modifications of installed components. The economic impact of re-designing and re-configuring the entire system to address minimal intrusions into a 100-foot setback envelope is wasteful.

(EVS Ex. 1 at 14).

Second, strict compliance would require NMS to expend \$7-\$10 million dollars to redesign the project and remove and replace entire strings of panels (NMS Ex. 18 at 20; Tr. at 250:9-17). And third, all of this additional effort and expense would only equate to panels moving anywhere from 3 feet to 32 feet within the fenceline of the Project, which was sited according to the Certificate and will not be moved (NMS Ex. 18 at 19-20; Tr. at 249: 12-22). The resulting change in visual impact would be unperceivable (*Id.* at 224:17-20). Thus, as a remedy, strict compliance offers the **least amount of benefit** to the public.

**F. The Board Should Consider the Mitigating Circumstances that Exist on this Issue in its Decision.**

There are many mitigating circumstances that must be considered by the Board prior to reaching any decision in this matter. *See, e.g., In re Buckeye Charter Services, Inc.*, Case No. 00-1621-TR-UNC, Finding and Order (Mar. 22, 2001) (approving a settlement agreement, under which Public Utilities Commission of Ohio Staff waived a third of the originally assessed civil forfeiture as a response to mitigating circumstances); *see also In re Henry A. Selinsky, Inc.*,

Case No. 01-585-TR-UNC, Finding and Order (Mar. 22, 2001). These circumstances include, but are not limited to, the minor nature of the exceedances relative to the entire project, that Staff did not review the drawings as required under Condition 8 of the Joint Stipulation but still green-lighted Project construction as well as the fact that the Project's fence will remain exactly as located because the fencing was installed as approved.

**1. The vast majority of panel locations along the Project's edge are over 100 feet from public roads and property boundaries.**

The Board should take into account that the vast amount of the Project meets the 100-foot setback requirement. As the drawings included in Section II.D (also included in Staff Ex. 3 and NMS Ex. 14) demonstrate, the vast majority of the project panels along public roads and property boundaries are setback 100 feet. Only about 1 MW worth of panels (of the entire 100 MW project) are within the 100-foot setback. Further, the panels within the 100-foot setback are 3 to 32 feet from the fenceline; or in other words, are setback at a greater distance than 45 feet, which is the setback under which the Project was designed during final engineering and shown on the engineering drawings (Staff Ex. 3 at 21). And, as explained extensively above, the cost of redesigning and relocating these panel locations is high (\$7-\$10 million) versus the minimal public benefit (no discernable difference in visual impact) would equal economic waste.

**2. The Project fencing location and existing screening will not change even if panels are relocated inside the fence.**

The Board should also keep in mind that **none of the panels** are setback less than 100 feet from public road centerlines and non-participating parcel boundaries **are outside of the Project fenceline** (Tr. at 171:6-14). The fenceline remains exactly as it was proposed in the Application (NMS Ex. 14). Thus, any redesign of the Project to include 100-foot setbacks would **not change the current location of the fence** (Tr. at 171:6-14). Further, as Mr. Otarov testified, any existing screening already placed outside the fenceline as part of commitments made through

the Application and as a result of Condition 12 of the Joint Stipulation, would not be removed (Tr. at 171:16-17; NMS Ex. 18 at 9). Thus, if the Board were to order strict compliance, the panels would only move a few feet inward from the fence, and create no discernable visual difference (Tr. at 224:2-10 (Bowar), Tr. at 251:2-11 (Otarov)).

**3. Staff had an obligation to review engineering drawings and did not, thereby compounding this issue.**

Condition 8 to the Joint Stipulation indicates that 30 days prior to the preconstruction conference for the Project, the Applicant had to provide a set of detailed engineering drawings (and associated shapefile data) to Staff for “review and acceptance” so that Staff could “confirm that the final design is in conformance with the certificate.” (NMS Ex. 1 at II.A.8). NMS did so during March 2021 and these final engineering drawings contained the 45-foot setback (NMS Ex. 6-8; NMS Ex. 18 at 7). During the hearing, Mr. Holderbaum testified that Staff did not confirm that the final design represented in the final engineering drawings were in conformance with the Certificate (Tr. at 118:8-12). Mr. Holderbaum further testified that the phrase “review and acceptance” did not obligate Staff to a “substantive review” of the submissions (*Id.* at 109:1 – 110:15).

Regardless of how Staff interprets the phrase “review and acceptance,” the plain language of Condition 8 indicates that Staff had the obligation to conduct some review of the documents submitted. Simply checking whether submitted drawings are in PDF format and whether it had an engineering stamp cannot constitute “review and acceptance” (*Id.* at 110:9-15). Even a quick visual review of the PDFs submitted during March 2021 by Staff (and filed on the case docket), should have revealed that 45-foot setbacks were being used (because they were clearly marked on the final engineering drawings). In fact, during the hearing, Mr. Holderbaum

was able to count the number of times the 45-foot setbacks were referenced on a drawing within 20 seconds (Tr. at 123: 16-20).

Yet, despite not having reviewed the documents to determine their conformance with the issued Certificate, on April 9, 2021, during a preconstruction meeting, Staff gave NMS a verbal approval to go ahead with construction (NMS. Ex. 28). The Project was then constructed in compliance with the final engineering drawings submitted to Staff during March 2021 (NMS Ex. 18 at 19). That greenlight by Staff further compounded this issue.

Importantly, NMS is not arguing that Staff's error excuses non-compliance on the part of a certificate holder. But at a minimum, if Staff would have conducted its review as required by the Board, the issue would have been caught prior to construction rather than NMS self-reporting the issue at the tail-end of construction. Instead, this sequence of events further compounded the issue by allowing construction to continue for over year. Thus, the Board should recognize that Condition 8 requires Staff to review submissions to ensure conformance with the Certificate, which was not completed in this case – and consider that as a mitigating factor in any decision by the Board.

**4. NMS discovered and self-reported the setback discrepancy to Board Staff.**

Another mitigating factor for the Board's consideration is that NMS was proactive about communicating with Board Staff as soon as NMS' internal investigation into the discrepancy was complete (NMS Ex. 18 at 16). But for Mr. Otarov's direct communication with Mr. Holderbaum on September 8, 2022, Staff may not have discovered the discrepancy at all. For example, while Condition 3 of the Joint Stipulation requires that NMS provide as-builts to Staff within 60 days of commercial operation, it is not clear that Staff would have identified the 45-foot setback because Staff admitted it does not do a substantive review of any engineering

drawings submittals (NMS Ex. 1 at II.A.3; Tr. at 109:1 – 110:15). Consequently, the Board should take into account that NMS appropriately self-reported the setback discrepancies to Staff as a mitigating factor in any decision by the Board.

**5. NMS has voluntarily replaced chain link fencing even though not required.**

Finally, the Board should also consider the voluntary steps NMS has taken despite the Board not having ruled whether the Project is in compliance or not and whether a remedy is required. As described in Section IV.D above, NMS has replaced 25,000 linear feet of chain link fence, which had barbed wire, with agricultural style fencing (NMS Ex. 18 at 20). The cost of this revised fencing alone is \$250,000 (*Id.* at 22). NMS made this change voluntarily to address concerns raised about the aesthetics of the original chain link fencing that was approved for the Project (*Id.*).

\* \* \*

Many mitigating circumstances exist on this issue, all of which the Board should consider as it reaches its decision in this proceeding, just as the Board should consider and apply the economic waste doctrine in this proceeding.

**V. CONCLUSION**

The Board is tasked in this proceeding with determining whether the Project is or is not in compliance. In doing so, the Board must interpret and apply its rules along with the Certificate conditions and take into consideration the undisputed facts. Regardless of what the Board decides on the issue of non-compliance, NMS urges the Board to consider the economic waste doctrine when making its decision. The Board should also consider the mitigating circumstances that exist on this alleged compliance matter. Lastly, if the Board finds non-compliance, any remedy should avoid economic waste and allow for a remedy that actually presents an

improvement to the Project's visual impacts compared to a strict compliance remedy. That can be accomplished by leaving the panels as located with additional robust screening or using a remedy similar to or the same as proposed by Mr. Otarov in his testimony. As EVS witness Dan Bowar's stated, "[t]he economic impact of re-designing and re-configuring the entire system to address minimal intrusions into a 100-foot setback envelope is wasteful."

Respectfully submitted,

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**Case No(s). 20-1288-EL-BGN**

Summary: Brief Initial Post Hearing Brief of New Market Solar ProjectCo 1, LLC and New Market Solar ProjectCo 2, LLC electronically filed by Mr. Michael J. Settineri on behalf of New Market Solar Project Co 1, LLC and New Market Solar Project Co 2, LLC.