

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Application of Alamo :  
Solar I, LLC, for a Certificate of : Case No. 18-1578-EL-BGN  
Environmental Compatibility and Public :  
Need to Construct the Alamo Solar Farm. :

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**REPLY BRIEF  
SUBMITTED ON BEHALF OF THE STAFF OF  
THE OHIO POWER SITING BOARD**

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**INTRODUCTION**

CCPC generally argues that the application is incomplete, and fails to satisfy the statutory criteria. The Board does not, nor has it ever, required that an application include all design details, nor is that the purpose of the power siting process. Rather, the Board has required that its Staff evaluate the possible impacts of a proposed project, and whether reasonable steps have been taken to minimize – not eliminate – such impacts. To the extent that Staff is unable to determine that impacts will be adequately mitigated, Staff recommends conditions to be implemented in the final planning. That is what the Staff has done in this case. Together with a wide range of interested and knowledgeable parties, including the Applicant, the signatory parties have modified and expanded those conditions, and recommend that the Alamo Solar project be approved.

## DISCUSSION

Intervenors argue, without merit or rationale, that the Board's long-standing certificate approval process "is an insufficient substitute for informed decision-making." CCPC Brief at 3. Moreover, CCPC argues that this approach constitutes an unlawful delegation of responsibility to the Board Staff. CCPC is wrong on both counts, and its arguments should be rejected.

The Ohio Supreme Court has denied CCPC's claimed unlawful delegation. In the first *Buckeye Wind* case the Court stated:

We stated in *In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St.3d 333, 2010-Ohio-1841, 928 N.E.2d 427, ¶ 20-21:

R.C. 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 officer, employee, or body other than the board itself." R.C. 4906.02(C).

Appellants argue that the board improperly delegated its decisionmaking authority . . . . The issues characterized as improperly deferred, however, simply require additional submissions \* \* \* to staff before the preconstruction conference.

*In re Application of Buckeye Wind, L.L.C.*, 2012-Ohio-878, ¶¶13-14. Further, the Court noted that:

R.C. 4906.10(A) allows a certificate to be issued *upon such conditions as the board considers appropriate*. The statutes authorize a dynamic process that does not end with the issuance of a construction certificate. The General Assembly vested the

board with authority to allow its staff to monitor \* \* \*  
compliance with conditions that the board has set, conditions  
upon which the neighbors already had the chance to be heard.

*Id.* at ¶16 (emphasis in original). The Court summarized, noting that “[s]imply because certain matters are left for further review and possible public comment does not mean that they have been improperly delegated to staff.” *Id.* at ¶17. None of the “12 plans” that CCPC argues constitute improper delegation grant any certificate or authority to Alamo. The Board does not improperly delegate its responsibility or authority when it allows for the further “fleshing out of certain conditions of the certificate” by ordering post-certificate submissions to its Staff. *Id.* at ¶18.

CCPC argues that the Board should instead adopt the reasoning of the dissenters in the *Buckeye Wind* case, claiming that the plans in this case “provide for design and operational procedures” that go “well beyond the activities” that passed muster in the *Buckeye Wind* case. But the appellants in the *Buckeye Wind* case raised four separate propositions of law alleging improper delegation, disputing the propriety of post-certificate review of transportation routing plans, location of collection lines, a determination of blade throw potential, and the relocation of turbines. It strains credulity to claim that the post-certificate submissions in this case go “well beyond” those in *Buckeye Wind*. These same arguments, including the alleged lack of meaning public participation, have all been raised to the Court before and were properly rejected. The Board should reject them here, as well.

## 1. Visual Impacts

The Application contains depictions of the facility. Moreover, both the Application and the Company witness supporting that portion of it described the various depictions and the rationale for their selection. CCPC complains that the Applicant's visual simulations do not accurately portray the facility, and makes no commitments for mitigation measures. Its sole basis is that the simulations are based on eight-foot tall panels, when panels may be as high as 15 feet.

CCPC also complains that the Application describes mitigation efforts that *could* be undertaken to mitigate the visual impacts, rather than committing to efforts that *will* be undertaken. What the rule requires is that the Application describe measures that will be taken. It does not require that every measure that is intended to be taken be identified, or the circumstances in which would be deployed. It is not necessary that the Applicant list the specific type of pollinator habitat<sup>1</sup>, for example, that will be selected.

The Applicant described the measures it would take. It committed to develop a landscaping plan. That plan will include a variety of options, including those articulated that would be dependent on "specific issues" to be addressed. A fully developed plan is simply not practical until a project plan is finalized. Applicant committed to developing a plan. That plan will include vegetative screening elements.

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<sup>1</sup> CCPC's reference to Condition 18's discussion of the implementation and maintenance of pollinator-friendly plantings as "inadequate to provide for meaningful mitigation" completely misreads the Stipulation and Recommendation. Condition 16, not 18, relates to visual impact mitigation. Condition 18 relates to vegetation management within the project area in general.

CCPC's objective is clear – they “want the solar equipment to be completely screened from their homes by vegetation.” CCPC Brief at 8. That, of course, is not what the Board's rules require. Rather, the rules require that measures be taken to minimize, not eliminate, visual impacts, and that such measures include visual, but not necessarily vegetative, screening. Both the Application and Condition 15 recommended by the signatory parties include fencing, for example, as a means of addressing aesthetic impacts.

Similarly, the Staff Report and Stipulation adequately condition the impacts of lighting at the facility. CCPC's complaint that the Application does not provide the actual locations of lights and is therefore statutorily inadequate demands more than the law requires. Ohio Admin. Code 4906-4-08(D)(4)(f) requires that the Applicant describe measures to minimize any adverse visual impacts created by lighting at the facility. Condition 15 of the Stipulation requires Alamo to prepare a lighting plan to address those impacts prior to construction. Both the Application and the Staff Report note that all lights would be shielded, downward- or inward-facing and motion-activated. Applic. at 90, Staff Report at 8.

## **2. Noise**

CCPC's complaints about construction noise are limited to the “considerable period of time” that construction will likely take, and the lack of “adequate relief from this noise.” CCPC Brief at 18. Construction noise cannot be avoided. The signatory

parties have recommended reasonable restrictions on when construction activities can occur.

Noise created during construction is necessarily different than noise created during operations. Different, often heavier and noisier, equipment is often used, and tends to be more intermittent in nature. In addition, construction is shorter in duration, lasting only as long as necessary to put the facility into operation. For those reasons Staff recommended different conditions for noise during times when construction activities are occurring.

Condition 13 of the Stipulation limits construction activities generally to daylight hours, with louder activities such as pile driving and blasting even further restricted. Staff respectfully submits that these conditions reasonably limit noise from construction, and reasonably minimize the impacts of such noise.

CCPC also criticizes the noise from operations, and specifically those likely to be generated by the inverters. The only significant source of operational noise from the Project will be the substation and associated transformer. Company witness Hessler testified that there would be no significant change in what is audible at the adjoining residences. The Applicant's Post-Hearing Brief thoroughly summarized Mr. Hessler's findings, the only expert evidence on this subject in the record. Alamo Brief at 27-30.

CCPC's concerns about the noise created by the inverters relates to its claim that the setback between the solar equipment and neighboring homes in the Application is only 100 feet. CCPC Brief at 13. Much of the testimony at the hearing centered on Mr. Hessler's report and its reliance on a study performed for the Massachusetts Clean



Energy Center. Questioning focused on sound levels at a distance of 150 feet from the inverters.

But Company witness Herling testified that no inverter will be located within 150 feet of a residence. Tr. I at 103. Furthermore, based on input from the public, the Applicant supplemented its Application to move the substation farther away from neighboring residences. The Supplement reflects that distance between the substation and the residence nearest to the point of interconnection was increased from approximately 1000 feet to approximately 1,700 feet, far greater than any distance from which audible inverter generated noise has been measured. Given Company witness Hessler's testimony that the sound from inverters is "barely audible," Tr. I at 249, and the proposed distance between the substation and any sensitive receptor, CCPC's concerns are unfounded. The Board should find that the Applicant has adequately evaluated sound impacts from the Project.

### **3. Drainage Tiles**

The Board's rules require that the Applicant describe mitigation procedures to be employed both to avoid or to minimize damage to field tile drainage systems, and to make timely repairs when damage occurs. The Application, as modified by the Stipulation, satisfies these requirements.

To that end, the Applicant identified the steps that it is taking to identify all tile drainage systems that might be affected, both to avoid impacts and to be able to identify

where damage may have occurred. It will be doing so in conjunction with the County Engineer, the Soil & Water Conservation District, landowners, and on-site inspections.

CCPC complains that the Applicant is only required to make repairs only if not too costly or difficult. Staff disagrees. The Stipulation requires the Applicant to repair all drainage tile damage resulting from the construction, operation, and/or maintenance of the facility in agricultural areas. “Damaged field tile systems shall be promptly repaired.” Stipulation Condition 16. The practicability language in that condition relates to the standard to which installation and repairs must be performed, standards which were negotiated to amplify the condition recommended by Staff in the Staff Report. Tr. III at 536.

The Stipulation also requires that all repairs be made promptly, and in no event later than 30 days after discovery. Staff witness Bellamy testified that Staff’s understanding of this provision is that repairs would be performed as quickly as feasible, or as soon as possible. Tr. III at 539. Even CCPC’s own witness’s testimony attested that such repairs may actually be quicker than currently occurs. Tr. III at 498, 505.

The evidence of record indicates that damage to tile drainage systems is not common in the installation of solar arrays. Tr. I at 179. The Applicant has adequately described the reasonable measures that it is taking to identify existing systems to avoid or minimize any impacts from construction or operations. Furthermore, the Applicant is obligated to make timely and satisfactory repairs, a commitment that may actually improve current experiences with tile damage. The Application, as modified by the Stipulation, satisfies the Board’s rules with respect to drainage tiles.

#### **4. Criminal Access**

The Board's rule requires that the Applicant provide information on the safety and reliability of all equipment, including a description of measures to restrict public access to the facility. Alamo has done this. The Stipulation provides that the solar panel arrays would be fenced for public safety and equipment security, with locked gates at all entrances. Stipulation at 1. The rule does not require that all measures be absolutely fool-proof, which CCPC appears to demand. It does not require that the Applicant demonstrate that it will prevent criminal access. The Applicant has demonstrated that adequate measures will be taken to restrict public access.

CCPC has endeavored to make much of the potential for criminal activity at the facility. There is absolutely no evidence of record, nor does CCPC point to any, that the facility would contain anything of value that would attract attention, let alone criminal intent. There is no evidence that the facility would result in an "increase in neighborhood crime." CCPC Brief at 25. CCPC's fearmongering is nothing more than that, and mere speculation. The record demonstrates that Alamo will provide measures including fences, locked gates, lighting, and possibly security cameras to keep the facility safe.

#### **5. Groundwater Contamination**

There is no evidence in the record that solar panels in general, or any aspect of this installation, would include any material that could contaminate soil or water. CCPC's claim that a variety of events "can release contaminants onto the ground and consequently into the ground water and into the surface water run-off," CCPC Brief at

26, are without merit. It relies on the testimony of Joanna Clippinger, an affected non-participating landowner. Her cited testimony refers to literature distributed by Alamos's principal, not included in this record, that solar panels "contain 'some chemicals.'" Aside from the fact that Ms. Clippinger was not qualified as an expert in solar panels, chemistry, or environmental impacts, there is no evidence that any such "chemicals" would have any adverse impact whatsoever on soil or water. Indeed, the Preble County Soil & Water Conservation District, an intervening party, expert in this matter, whose very mission is "to ensure water quality and soil protection now and for future generations" (<http://www.prebleswcd.org/about.html>), is a signatory party to the Stipulation, further attesting to the adequacy of the Applicant's groundwater impact mitigation efforts.

## **6. Decommissioning**

CCPC is concerned that the Stipulation does not adequately guarantee that funds will be available to decommission the project. Significantly, it does not argue that the Applicant's proposal, or the Stipulation, fail to satisfy any statutory or regulatory provision. There are, of course, no such requirements.

Nonetheless, the Applicant's has pledged to restore the property to use for cultivation, unless another use is more appropriate or desired by the land owner. Alamo Ex. 1 at 39. Its decommissioning proposal is an effort to preserve the agricultural nature of this community, by restoring the land to agricultural purposes at the end of the

facility's useful life. While not a failsafe proposal, it is a reasonable plan. There is no reasonable basis for CCPC's concern.

## **7. Emergency Services**

The plan for fire protection, safety, and medical emergencies is to develop a plan for such contingencies, and in cooperation with local agencies. The Stipulation provides that Alamo will train local fire and EMS personnel in how to respond to emergency situations. Condition 27 requires pre-construction in-service training, and multiple training dates to ensure that all responders have adequate training.

CCPC claims that criminals will be attracted to steal recyclable materials from the facility. There is, of course, nothing in the record to support this spurious claim. There is no evidence that the facility will even contain materials of value that could be stolen, even if access to the facility could be gained. There is no evidence that any such activity, even were it to occur, would have any impact on anyone other than the Applicant. There is simply no basis for requiring, as CCPC requests, that the Applicant hire and train additional law enforcement personnel. The affected county and townships that support these services are signatory parties to the Stipulation, and obviously reasonably satisfied no additional funding to hire a deputy to patrol the Project area is necessary.

## **8. Visibility at Intersections**

Without more, CCPC complains that there is no way of determining whether motorists view of crossroads at intersections will be obstructed. That, of course, is the very purpose of setbacks. As CCPC itself noted, the Stipulation expands the project

setbacks to provide that the project perimeter will be set back 25-feet from the public road right-of-way. There is no evidence of record indicating that any view would be obstructed with these setbacks.<sup>2</sup>

## **9. Noxious and Invasive Weeds**

The Applicant will take adequate measures to prevent noxious and invasive weed species from spreading to neighboring farmland. This is required by the vegetative management plan that is required by Condition 18 of the Stipulation. Contrary to CCPC's assertions, the plan is intended to address vegetative management issues both during construction and during maintenance operations. The Stipulation condition significantly modifies the recommendation made in the Staff Report, with guidance from local officials and the Ohio Farm Bureau. Among other things, the stipulated condition requires that the plan describe the steps to be taken to prevent establishment and/or further propagation of noxious weeds. It also specifies that the Applicant consult with the Ohio Seed Improvement Association, Ohio's official Noxious Weed Free Forage and Mulch Certification agency, to limit the spread of noxious weeds.

## **10. Wildlife**

Staff respectfully disagrees with CCPC's reading of Ohio Admin. Code 4906-4-08(B)(1)(c). That section requires an applicant to conduct and provide the result of a

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<sup>2</sup> Indeed, a number of the Viewpoints in Exhibit I (Visual Resource Assessment) to the Application show mature corn crops much nearer the roadway than the setbacks proposed in the Stipulation. There is no reason to believe that the facility will cause any greater obstruction at intersections than that already posed by current farming operations. See, e.g., Viewpoint 89, Sheet 45 of 50.

literature survey of plant and animal life within a quarter mile of the project area boundary. CCPC argues that the rule requires a literature survey of all plant and animal life. It predicates this conclusion on the assertion that the second sentence of the rule does not limit the survey.

But that second sentence prescribes what is intended to be included in the survey. It clearly states that the “literature survey shall include” certain species. While it does not restrict the survey *solely* to these species, logic and reason would militate against reading the requirement to require each and every plant and animal species. Such a requirement would be overly burdensome and unnecessarily broad. Nor has this Board ever imposed such a requirement on an applicant.

The Applicant reasonably conducted its survey of those species designated as endangered or threatened. Specifically, it requested information from the Ohio Department of Natural Resources (ODNR) and the U.S. Fish and Wildlife Service (USFWS) regarding state and federal listed threatened or endangered plant and animal species. Staff’s evaluation considered additional published ecological information. The signatory parties agreed to include Condition 21 to protect those potentially threatened or endangered species of plants and animals that may be encountered during construction.

CCPC’s concerns that the Applicant did not conduct a bat survey have also been addressed. Staff recommended, and the Stipulation includes, Condition 19 that restricts tree removal to seasonal guidelines intended to avoid impacts to bats.

CCPC witnesses acknowledged that wildlife currently encroach on their properties and destroy their crops. There is, however, no expert testimony supporting their

allegations that the Project will increase those losses. The only expert testimony on the subject of the impact of displaced wildlife on surrounding properties, was Company witness Rupprecht, who based his opinion on data developed by ODNR. It was his expert opinion that deer in the surrounding area would increase by less than 5%, and should not have a negative effect on surrounding properties. Tr. I at 296.

The Applicant satisfied the requirements of Ohio Admin. Code 4906-4-08(B). The Board should find that the impacts have been adequately identified and described, and that adequate measures will be taken, given the conditions contained in the Stipulation, to minimize those impacts.

## **11. Surface Water Drainage**

CCPC overstates the requirements of the surface water provisions of Ohio Admin. Code 4906-4-07(C). That section is specifically concerned with water quality regulations, not the quantification of water that will flow off of the Project area. Its three subparagraphs address preconstruction water quality and permits, water quality during construction, and water quality during operation of the facility.

The neighbors point to the possible use of dirt moving machinery, and the ground compaction necessary for installing access roads and solar arrays. They complain about “potentially increased flows,” that “flows could increase” or “will likely increase” without any evidence of their own to support such claims.

As CCPC duly noted, the Application stated that the Company did not anticipate any changes in flow patterns or erosion, and that little, if any, grading would be



necessary. CCPC Brief at 38. Staff found that solar facilities “are constructed and generate electricity without impacts to surface or groundwater.” Staff also found that construction would “generate[] very little wastewater discharges at the project site.” Staff Report at 16.

Furthermore, as CCPC also acknowledged, the Applicant intends to perform a hydrology study after the Project is complete to determine whether surface water flows have increased. CCPC Brief at 40. In light of the Company’s expectation that no changes in flows are expected, performing such a study once the facility is operational is reasonable to determine what mitigations may be necessary to comply with the water quality regulations.

## **12. Solid Waste Disposal**

The Board Staff found that the Applicant’s solid waste disposal plans would comply with solid waste disposal requirements set forth in R.C. Chapter 3734. While CCPC complains that the application fails to estimate the amount of waste that will be generated, Applicant did identify the kinds of waste that would be generated, and how it would appropriately be disposed.

While there is no description of what would be done with waste from demolishing and buildings in the Project area, it is not certain that any such demolition would even be necessary. The Ohio Environmental Protection Agency (EPA) regulates disposal of construction and demolition (C&D) debris. Condition 8 of the Stipulation requires the

Applicant to obtain and comply with all permits or authorizations required by federal or state laws and regulations, including those of the EPA relating to C&D debris.

### **13. Roads and Bridges**

Stipulation Condition 25 requires the Applicant to enter into a road use agreement with local authorities to ensure the removal of unwanted temporary improvements, and the prompt repair of any damage caused. This is the description of the measures that the Applicant intends to take, and satisfies the requirements of Ohio Admin. Code 4906-4-06(F)(3).

CCPC's complains that the Applicant is not prohibited by the Stipulation from using certain roads that are in poor condition or in need of repair are misplaced. To the extent that the Applicant chooses to use such roads, it must either fit them to its purposes, or repair any damage done. The travelling public is adequately protected.

The same is true of the Applicant's potential interference with local traffic. The public roads are not, of course, for the exclusive use of those residing in the area. Construction activity of all kinds, including the delivery of construction-related materials, affect roads and traffic. Applicant is well aware of the roads in the Project area, and the limits that its activities will place on two-way traffic. But those limits do not necessarily require that the Applicant be prohibited from using the roads during planting and harvest seasons as CCPC demands. Farmers' access to the public roads is not the only use that must be protected.

Consequently, Condition 24 requires the Applicant to develop a Transportation and Traffic Management Plan to balance these interests. Applicant is required to coordinate, with the county engineer, the Ohio Department of Transportation, local law enforcement, and health and safety officials and others, regarding any temporary road closures, lane closures, road access restrictions, and traffic controls necessary for construction and operation of the proposed facility.

## **CONCLUSION**

CCPC has raised a number of “concerns,” all of which have been adequately addressed either by the Application or by the Stipulation and its conditions. To the extent that CCPC’s “concerns” consist of arguments that that Board’s rules have not been satisfied, Staff respectfully submits that reasonable provisions have been made to ensure that appropriate measures are taken to minimize the impacts of the Project. The Stipulation is supported by a broad coalition of parties, representing the interests of the public and the agricultural community. It is reasonable, lawful, and benefits the public interest, and Staff urges that it be adopted.

Respectfully submitted,

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*On behalf of the Staff of  
The Ohio Power Siting Board*

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief, submitted on behalf of the Staff of the Ohio Power Siting Board, was served via electronic mail upon the following parties of record, this 27<sup>th</sup> day of September, 2019.

/s/ Werner L. Margard III

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