

BEFORE THE OHIO POWER SITING BOARD

In the Matter of the Application of)
of Angelina Solar I, LLC, for a)
Certificate of Environmental)
Compatibility and Public Need)

Case No. 18-1579-EL-BGN

**POST HEARING REPLY BRIEF OF THE CITIZENS OF PREBLE
COUNTY, LLC, ROBERT BLACK, MARJA BRANDLY, CAMPBELL
BRANDLY FARMS, LLC, MICHAEL IRWIN, KEVIN AND TINA JACKSON,
VONDERHAAR FAMILY ARC, LLC, AND VONDERHAAR FARMS INC.**

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I. Introduction

The opening brief of Angelina Solar I, LLC (“Angelina”) opens (at 2) by disparaging the Concerned Citizens of Preble County and its membership as “a small number of residents and private entities oppose[d] to the Project.” But nine of these citizens are participating in this case as intervenors, while the Concerned Citizens have 67 members who are understandably opposed to this mammoth, poorly designed Project due to the harm it would cause to them and the community. And even if only one intervenor had sought protection from the Project’s hazards from the Ohio Power Siting Board (“Board” or “OPSB”), the Board has the statutory duty to conscientiously evaluate those hazards, to require mitigation of the hazards to limit them to the minimum adverse environmental impact, and if failing to accomplish that goal, to deny the certificate.

Angelina repeatedly touts its support from local officials, and much of Angelina’s brief is devoted to boasting about the amount of money that the Project will make for Angelina and Preble County’s local governments. The two are undoubtedly linked: the local governments’ misgivings about the Project’s adverse impacts have been muted by their expectations of a

financial windfall. Nevertheless, this proceeding is not a popularity contest. It is the Board's mandate to make sure that the Project's environmental impacts are not overlooked in the enthusiasm over profits, whether this protection is needed for just one person or many persons.

II. The Angelina Solar Project Does Not Represent The Minimum Adverse Environmental Impact And Does Not Serve the Public Interest, Convenience, And Necessity.¹

Much of the testimony cited in Angelina's brief consists of its expert witnesses' barebones opinions that have no data or other objective evidence whatsoever to support them. For example, Mr. Hessler opined that solar inverters cannot be heard beyond 150 feet, but he has no sound data or personal observations on which to base this opinion. Mr. Waterhouse stated that the Project will not cause drainage, flooding, or pollution from sediment, but he did not conduct the hydrology study necessary to support this opinion. These opinions, and others like them, are pure speculation. The Board's rules on the contents of applications are designed to avoid the reliance on such untrustworthy testimony by requiring actual data and objective evidence that the Board and the public can weigh and evaluate during an adjudication. Angelina's incomplete Application violates these rules.

OPSB's regulatory requirements for certification applications are designed so that the Board does not have to rely on unsupported opinions. An application is required to contain the information sufficient for the Board members and Staff to make up their own minds as to whether a project represents the minimum adverse impact or serves the public interest, not just blindly accept the generic opinions of an applicant's paid consultants. The public, including the Concerned Citizens, also are entitled to see and test data that fairly predicts the degree to which a project's risks may affect them. Angelina's Application fails to serve these goals.

¹ The letters for the titles in Section II correspond to the title letters of the same subject matter in Section II of the Concerned Citizens' opening brief to assist the reader in correlating them.

This lack of data is compounded by the absence of details in the Application about how Angelina plans to mitigate the impacts of the Project, with all of the mitigation plans being delayed until after certification. This has left the Concerned Citizens, and the Board, in the dark as to the facility's actual impacts and the effectiveness of the promised mitigation measures.

A. Without The Data On The Project's Visual Impacts And Mitigation Measures Required By OAC 4906-4-08(D)(4), The Board Has No Basis To Find That The Project Represents The Minimum Adverse Environmental Impact With Respect To Visual Impacts.

The neighborhood views of the solar project will be anything but "modest" as proclaimed (at 18) in Angelina's brief. Figure 7, Sheets 1 and 2 of the viewshed analysis in the Application disprove that characterization, showing that the solar equipment will be potentially visible for most of the area surrounding the Project Area. *See* the green colored area around the Project Area in this figure. Applic., Exh. I; Robinson, Tr. 187:16-21.

Angelina attempts (at 17) to disguise the Project's actual visual impact by focusing on its visibility within five miles, instead of the actual area of concern where the solar equipment will be visible to 82.26 % of the area within a half mile. Robinson Testimony, p. 4, A.8. Even in response to the questions of Angelina's counsel, Mr. Robinson admitted that the solar equipment will be highly visible to neighbors living within a half mile. Robinson, Tr. 206:6-11. The absurdly short setbacks for the Project, including a 10-foot setback from nonparticipating neighbors' land and a mere 100 feet between solar equipment and neighbors' houses, guarantees that the Project will be highly and annoyingly visible. Applic., p. 54. Pages 6-9 of the Citizens' Post-Hearing Brief discusses the overwhelming visibility of the Project in more detail.

After trying, unsuccessfully, to minimize the intrusive appearance of the solar equipment, Angelina fills an entire page of its brief (at 18) with promises to mitigate this visual blight. Tellingly, this page does not include a single citation to the Application, because the Application

contains no enforceable commitments to mitigate, as explained in the Concerned Citizens' opening brief (at 9-12). Nor does the Stipulation compensate for the Application's deficiencies, because it leaves all mitigation details to a future landscaping plan that has not yet been written and is not subject to adjudicatory review in the hearing process.

Angelina's Project does not represent the minimum adverse environmental impacts with regard to visual impacts, because the Application reveals that the impacts are severe. Moreover, the Application and Stipulation provide no enforceable details on how these visual impacts will be minimized. Without knowing those details, the Board has no way of knowing what the visual impacts will be once the unfinished, promised landscaping plan is prepared and implemented. The Board cannot make a determination of minimum adverse impact based on a vague promise that Angelina and the Staff will address these visual impacts.

B. Without The Data On The Project's Visual Impacts From Project Lighting And The Mitigation Measures Required By OAC 4906-4-08(D)(4)(f), The Board Has No Basis To Find That The Project Represents The Minimum Adverse Environmental Impact With Respect To Lighting.

Angelina's opening brief makes only one passing reference (at 56) to the need to prevent the Facility's lights from bothering the neighbors, stating that a lighting plan will be prepared after certificate issuance. Without any information in the Application to identify the lights' locations or the mitigation measures required by OAC 4906-4-08(D)(4), the Board has no information to find that the Facility represents the minimum adverse environmental impact with respect to lighting.

C. **Without The Decibel Data And Mitigation Measures For Operational Noise From The Inverters Required By OAC 4906-4-08(A)(3), The Board Has No Basis To Find That The Project Represents The Minimum Adverse Environmental Impact With Respect To Operational Noise.**

While Mr. Hessler lacks experience with solar projects, at least he modeled the daytime noise level of the Project's substation to include it in the Application. In contrast, he did not model the noise from the solar inverters, depriving the Board and the Concerned Citizens of the sound data necessary to determine whether the inverters' noise will bother the Project's neighbors. Nor did he offer any measurements of sound levels from solar inverters in other facilities.

As explained (at 16) in the Citizens' opening brief, the Application's representation (at 57) that Hessler's Report finds the inverter noise to be inaudible at 50 feet away is false. Mr. Hessler's report makes no such statement. Mr. Hessler's report does state that the inverters' sound fades away to insignificance at 150 feet away based on the Massachusetts Report. But that statement is equally false, as explained in detail (at 16-18) of the Citizens' opening brief. Angelina's statements, made without any sound data from inverters, were blatant attempts to mislead the Board.

Although Mr. Hessler's admissions on cross-examination discredited his use of the Massachusetts Report, Angelina continues (at 34) to rely on it to contend that operational noise will be minimal. CCPC Exh. 1. However, the Massachusetts Report notes that the inverters studied therein could not be heard above the background sound of 41.6 dBA to 50 dBA. Angelina argues (at 34-35) that a library or empty theater produces 40 dBA of sound and a dishwasher in the next room produces 50 dBA. To put these levels in perspective, the Massachusetts Report recounts that a faint inverter hum could be heard even where the sound level was 42.2. dBA at the "North East Boundary area" of Site No. 1 above highway traffic,

construction equipment, and dump trucks. CCPC Exh. 1, pp. 7, 9. So 40 dBA is not quiet at all. Moreover, the inverters' noise is a hum. Applic., Exh. E, pp. 12-13. No one can stand being exposed to a humming noise of any decibel level all day long, especially if it is as loud as a noisy dishwasher.

Importantly, an important consideration in determining the amount of annoyance that a new source will create is the variation between the new source's noise level and the existing sound levels available to mask that noise. A large variation makes the new sound noticeable and annoying. This community has a background level of only 31 dBA, which is 10.6 to 19 dBA lower than the sound levels in the Massachusetts study. If Angelina's inverters are as loud as the background levels in the Massachusetts Report, their noise would exceed the background sound level available to mask their noise by 10 dBA to 17.6 dBA. This would make the noise highly noticeable and annoying. Nevertheless, the Application would allow Angelina to place its inverters a mere 100 feet from neighboring houses and 10 feet from the property line. Applic., p. 54.

Angelina offers (at 35) to install noise mitigation features on the inverters such as cabinet damping and ventilation silencers if they prove to be too loud, thus tacitly admitting that the Application did not produce the sound data required by OAC 4906-4-08(A)(3) necessary to determine whether the inverters will be too noisy. For the same reason, Angelina promises (at 36) to install the inverters in the middle of the solar fields to put some undisclosed distance between the inverters and the public. But the Application and Stipulation provide no such mitigation measures. In fact, the Application specifically allows solar equipment to be located within only 100 feet from a non-participant's residence. Applic., p. 55.

Thus, the Application does not “[d]escribe the operational noise levels expected at the nearest property boundary,” as required by OAC 4906-4-08(A)(3)(b). Nor does the Application comply with OAC 4906-4-08(A)(3)(c), which requires the Application to “[i]ndicate the location of any noise-sensitive areas within one mile of the facility, and the operational noise level at each habitable residence, school, church, and other noise-sensitive receptors, under both day and nighttime operations.” Emphasis added. Instead of trying to mislead the Board with the Massachusetts Report, Angelina should have modeled the sound level of an inverter model that is eligible for use in this Project. Without this information, OPSB has no evidence that the project represents the minimum adverse environmental impact.

D. Without Effective Measures To Minimize Disagreeable Construction Noise As Required by OAC 4906-4-08(3)(d), The Board Has No Basis To Find That The Project Represents The Minimum Adverse Environmental Impact With Respect To Construction Noise.

Angelina’s argument that construction noise is minimal in volume and duration ignores several facts elicited during the hearing. First, the noise from post installation is as loud as a bulldozer. Applic., Exh. E, p. 14, Table 6.0.1; Hessler, Tr. 257:16-24. Second, this grating noise will be repeated about 45,300 times during construction, as about 45,300 posts will be installed. Applic., Exh. G, p. 7-4. Even if each post is pounded for only one minute, the amount of pounding could consume 755 hours or 94 eight-hour days. Angelina’s opening brief states (at 30) that a single crew could install 100 to 200 posts per day, and that multiple crews could be used. But even at 200 posts per day, this activity would take 226 eight-hour crew-days. While Angelina could use more than one pile driver simultaneously, the travel time for the pile drivers to go from post location to post location will drag out this mind-numbing activity.

The objective facts in the record demonstrate that Angelina’s construction noise will be minimal in neither volume nor duration. Simply requiring Angelina to warn the neighbors in

advance of impending noisy activities and to stop pounding the metal posts at dusk, as suggested by proposed Condition 10 of the Stipulation, will not provide the Facility's neighbors with adequate relief from pounding on 45,300 posts. The Board cannot find that the Project represents the minimum adverse environmental impact with regard to construction noise. Pursuant to OAC 4906-4-08(A)(3)(d), OPSB should not issue a certificate without first instructing Angelina to devise more effective mitigation measures to address this noise, or the Board should deny the certificate altogether.

E. Without The Procedures Necessary To Comply With The Requirements In OAC 4906-4-08(E)(2) For Avoiding And Repairing Damage To Field Drainage Tiles, The Board Has No Basis To Find That The Project Represents The Minimum Adverse Environmental Impact With Respect To Drainage Tiles.

Angelina's opening brief offers three points about drainage tiles.

First, Angelina discusses (at 41) its ongoing efforts to put together the report on benchmark conditions for drainage tiles required by Stipulation Condition 16. Angelina also mentions (at 41) its intent to prepare an action plan in the future to protect the tiles. These efforts should have been included in the Application as required by OAC 4906-4-08(E)(2), not performed afterwards, so that the Board and the public could determine during the hearing process whether the Project will represent the minimum adverse environmental impact with regard to drainage tiles.

Angelina's second point (at 41-42) is that it is not always feasible or necessary to fix drainage tiles immediately. The Citizens do not disagree with this general statement, but Condition 16 is so poorly worded that whoever ultimately operates the Facility could try to argue that a 30-day repair complies with the condition even if a 24-hour repair is necessary to prevent a neighbor's crop destruction. Curiously, Angelina is fighting the Citizens' efforts to close this

potential loophole, even though Angelina does not and cannot dispute that immediate repairs must be performed where necessary to avoid damage.

Compounding this problem is the fact that Angelina is making no effort to consult with and work with the Project's neighbors to improve these reports and plans. The Staff states (at 12) that, based on Company Exhibit 6, Angelina is consulting with the neighbors. This statement misrepresents the language of the exhibit, which actually states that Angelina is consulting with landowners "participating in the Project," not the neighbors. Although Angelina cites (at 43) Ms. Vonderhaar's statement that sometimes it is not necessary to consult with adjacent landowners prior to drain tile repair, the Application and Stipulation do not require Angelina to consult with its neighbors about tile repair under any circumstances. Based on Angelina's intransigence, Angelina promises to be a bad neighbor that will not take proper care to prevent its property from flooding its neighbors' land. In fact, as long as Condition 16 can be interpreted to allow as much as 30 days to repair tiles, depending on the circumstances, it is critical for Angelina to consult with affected neighbors to find out how quickly it needs to repair the tiles in order to avoid damage to the neighbors' crops. This neighborly consultation is vital to prevent harm, and the existing community follows this practice out of courtesy and necessity. Vonderhaar, Tr. 411:10-25. Angelina should be required to do the same. The certificate should require Angelina to consult with any neighboring landowners who may be affected by tile damage at the Facility.

Angelina's third point (at 43) is that Mr. Waterhouse has been not been involved in troubleshooting tile breakage from construction of a solar project. Actually, Mr. Waterhouse has been involved in drainage tile tasks at only one operating solar facility during his career. Waterhouse, Tr. 155:8-19. This points to Mr. Waterhouse's lack of experience with post-

construction drainage conditions at solar projects, not the solar facilities' lack of drainage problems. Indeed, if post-construction problems did develop at solar facilities for which Mr. Waterhouse had prepared the strategy for avoiding drainage problems, the solar operators would be unlikely to again request his help to fix the problems he should have prevented in the first place.

As explained in the Concerned Citizens' opening brief (at 22-27), Angelina has not included the information in the Application required by OAC 4906-4-08(E)(2) for avoiding, mitigating, and repairing damage to drainage tiles. Instead, Angelina and the Staff seek the Board's leave to bypass the rule's requirements and substitute post-certification activities for them. Without including this information in the Application, the Board has no basis for determining that the Project represents the minimum adverse environmental impact as to drainage tiles.

F. Without The Information Necessary To Describe Or Evaluate The Reliability Of The Project's Equipment For Preventing Criminal Access To The Facility As Required By OAC 4906-4-08(A), The Board Has No Basis To Find That The Project Represents The Minimum Adverse Environmental Impact With Respect To Crime That The Facility Could Attract To The Community.

OAC 4906-4-08(A)(1) requires the Application to "[d]escribe all proposed major public safety equipment," "[d]escribe the reliability of the equipment," and "[d]escribe the measures that will be taken to restrict public access to the facility." Angelina assures everyone (at 50) that its personnel will conduct some security checks and check the Facility's gates and fences. The problem is that none of these measures are included in the Application, in violation of the rule. The Stipulation does not contain them either. Thus, the unenforceable promises in Angelina's testimony merely highlight its failure to include measures for public safety in its Application.

Angelina shrugs off (at 51) the need for safeguarding its Facility against crime, asserting that the threat of crime is “conjecture.” Marja Brandly’s and Walter Mast’s testimony establishes that the threat of theft by drug-addled thieves from Fairhaven and elsewhere is anything but conjecture. *See* Pages 28-31 of the Citizens’ opening brief.

Angelina also tries (at 51) to deflect attention from its neglect to find out about the Fairhaven crime problem and its failure to plan for crime prevention in its Application by arguing that agriculture is dangerous. Angelina notes that farmers store diesel fuel, gasoline, herbicides, and pesticides. But most of these substances can be found in a typical residential garage. Angelina contends that grass fires can occur and farming accidents can happen. But fires and accidents occur everywhere. Essentially, Angelina is arguing that Israel Township is a dangerous place, so it does not matter if its Project makes it even more dangerous by luring crime there. However, rampant crime like that in Fairhaven does not occur everywhere, and Angelina’s carelessness on safety will bring it to the Project Area.

Angelina has a duty to use effective measures so that its Facility does not attract criminals to the area where they can harm the community’s residents. The Application does not contain these measures as required by OAC 4906-4-08(A)(1), and without them the Project does not represent the minimum adverse impact with regard to crime.

G. Without The Information Required By OAC 4906-4-08(A)(4) To Evaluate The Impact To Groundwater From Contaminants That Might Be Released From Solar Panels By Vandals And Disasters, The Board Has No Basis To Find That The Project Represents The Minimum Adverse Environmental Impact With Respect To These Contaminants.

Angelina has offered no data about the contaminants in solar panels or their ability to escape into the environment upon destruction of the solar panels. Simply having Mr. Herling say he does not think this is a problem does not satisfy Angelina’s burden of proof on this issue. The

Citizens have already addressed Angelina’s argument on this issue at Pages 31-33 of their opening brief, except for one point. Mr. Herling stated that tornadoes are “vanishingly rare.” Herling, Tr. 47. This statement betrays Mr. Herling’s lack of familiarity with Preble County, which was hit by multiple tornadoes just this spring.

H. Because The Application Does Not Provide Adequate Assurance Of Funding For Decommissioning, The Board Has No Basis To Find That The Project Represents The Minimum Adverse Environmental Impact With Respect To Decommissioning.

Angelina’s opening brief does not address the decommissioning deficiencies in the Application and Stipulation. The Concerned Citizens refer the Board to Pages 33-34 of their opening brief for a description of those concerns.

I. Because The Application Does Not Contain Adequate Provision For Emergency Services As Required by OAC 4906-4-08(A)(1)(e), The Board Has No Basis To Find That The Project Represents The Minimum Adverse Environmental Impact With Respect To Emergency Services.

As explained (at 34-36) in the Concerned Citizens’ opening brief, Angelina’s barebones promise to develop a post-certificate emergency response plan does not provide the necessary assurances that emergencies will be adequately handled. Without these assurances, the Board cannot find that the Project represents the minimum adverse environmental impact with respect to crime, fire, and medical emergencies.

J. Because The Application Fails To Show Whether Solar Equipment Will Obstruct Motorist Visibility at Intersections, The Board Has No Basis To Find That The Project Represents The Minimum Adverse Environmental Impact With Respect To Traffic Safety.

Angelina represents (at 35) that measuring the setbacks from road rights-of-way instead of the roadway edges will provide enough visibility at the crossroads, “to the extent that this is a legitimate concern.” This quote betrays the fact that Angelina did not perform the study necessary to determine whether its solar fences and panels will obstruct motorists’ views. Nor

did Angelina produce any information on the size of the setback necessary to preserve the motorists' line of sight at crossroads. Moreover, the record does not identify the extra room provided by the expansion of the setback from public roads.

Angelina contends (at 35) that existing corn crops might already obstruct views at some intersections. This does not give Angelina leave to perpetuate or expand the problem by substituting obstructive solar equipment for obstructive corn.

Angelina should have anticipated this visibility problem when it submitted the Application. After all, the Application provides for only a 25-foot buffer between the Facility fences and the roads' edges. Applic., p. 54. Without knowing how much extra room is added by the Stipulation and how much room is necessary for motorist visibility, the Board lacks the information necessary to determine whether this belated change will prevent traffic accidents or not.

K. Because The Application Does Not Provide For The Control Of Noxious and Invasive Weeds Required By OAC 4906-4-08(E), The Board Has No Basis To Find That The Project Represents The Minimum Adverse Environmental Impact With Respect To These Weeds.

Angelina attempts (at 24-25) to convey the impression that its Project will add a greater amount of beneficial vegetation than it will destroy. Angelina states that it will plant the Project Area with "a vegetative ground cover." This is a pretentious reference to mowed grass, which will cover the solar fields. Applic., p. 75. But exchanging crop fields and trees for 827 acres of mowed lawn and access roads is hardly a beneficial trade for wildlife or the environment in general. In addition, Angelina's vague promise to plant pollinator-friendly plants and hedgerows is meaningless without the details necessary to find out where and how much of these plants will be grown. For instance, rather than providing the public with an enforceable commitment to install a meaningful amount of vegetation, the Application states that pollinator-friendly plants

will be used only “in selected locations along the perimeter.” Applic., p. 75. Angelina and the Staff want the Board to let them make those determinations instead of the Board.

Angelina also claims (at 22) that it will control noxious weeds primarily through mechanical means instead of herbicides. But that promise is not in the Application, or required by the Stipulation. To the contrary, the Application emphasizes the use of herbicides without mentioning mechanical removal. Applic., p. 75.

Angelina contends (at 25) that Stipulation Condition 18 will prevent the area’s infestation with noxious and invasive weeds. But Condition 18’s loopholes make it ineffective, as explained in the Concerned Citizens’ opening brief (at 38). Even Angelina’s opening brief admits (at 25) that Stipulation 18 requires the company to purchase its seed only “to the extent practical.”

Thus, Angelina’s Project does not pose the minimum adverse environmental impact on vegetation, because (1) Angelina has made no meaningful commitment to plant and maintain new vegetation to replace the crops and trees it will destroy, (2) Angelina has plenty of loopholes to evade enforceable requirements for preventing the spread of noxious and invasive weeds, and (3) the procedures and standards for clearing existing, beneficial vegetation and preventing the growth of undesirable weed species are left to the future unfettered discretion of Angelina and the Staff through a vegetation management plan.

L. Because The Application Does Not Provide The Data Required By OAC 4906-4-08(B)(1) To Evaluate The Project’s Potential Adverse Impacts on Wildlife, The Board Has No Basis To Find That The Project Represents The Minimum Adverse Environmental Impact With Respect To Its Effects On Wildlife.

Angelina contends (at 19-21) that the Project’s adverse impacts on wildlife will be minimal, stating that Cardno did not find much wildlife in the Project Area. Of course, that conclusion has no basis, because Angelina did not actually look for wildlife. Cardno only made

note of species it happened to casually notice while performing its wetlands and waterbody surveys. Ryan Rupprecht, the Cardno witness who testified for Angelina, admitted that Cardno performed no bird, bat, or mammal surveys. Rupprecht, Tr. 214:2-10, 217:20-24. As evidence of this failure, Application Exhibit G contains no checklists of bird, bat, and mammal species and numbers found in the Project Area. Thus, unlike other energy projects that routinely conduct field surveys for wildlife, Angelina chose not to do them even though required by OAC 4906-4-08(B).

Nor did Angelina conduct a complete literature survey on plant and animal species as required by OAC 4906-4-08(B)(1)(c). All that Cardno's employees did was to perform a partial literature search and to note any species that they happened to notice as they were otherwise occupied in studying the waterbodies and wetlands in the area (the references to "surveys" in Application Exh. G refer to the wetland and surface water surveys). Angelina did not perform any of the wildlife surveys required by OAC 4906-4-08(B). Angelina conducted no survey of birds, bats, or other mammals.

Angelina also argues that the Project Area lacks the habitat conducive to supporting wildlife. But Angelina also failed to perform the plant survey required by OAC 4906-4-08(B) in order to find and evaluate the habitat.

Angelina does not dispute that the Project Area contains habitat for endangered and threatened species of bats. Instead, Angelina promises (at 20) that it will cut down trees that may host endangered Indiana bats only during the seasons when the bats are hibernating elsewhere. This is akin to stating that demolishing a family's house while they are away on vacation has no adverse impact on them, because the house did not fall down on them. Habitat loss has a serious negative impact on endangered species such as the Indiana bat.

OAC 4906-4-08(B)(1)(c) and (d) require the Application to contain reliable survey data on wildlife so that the Board can determine whether a proposed facility will have the minimum adverse environmental impact on wildlife. Angelina has not provided OPSB with this necessary data, instead choosing to argue that the Board does not need it. But the Board is not free to ignore its own rules, and Angelina is compelled to comply with them. Without this information, the Board cannot determine that the Facility will have the minimum adverse environmental impact.

M. Because The Application Fails To Provide Information Required By OAC 4906-4-08(B)(3) To Assess, Avoid, And Mitigate Impacts On Wildlife That Will Result In Crop And Livestock Damage On Nearby Farms, Board Has No Basis To Find That The Project Represents The Minimum Adverse Environmental Impact With Respect To This Problem.

While Angelina argues that the Project Area lacks the habitat conducive to supporting wildlife, Angelina failed to perform the plant survey required by OAC 4906-4-08(B). Consequently, except for some limited plant identification in wetlands and waterbodies, the Application contains no data for the Board's scrutiny to determine whether the plants in and along the Project Area's ditches, hedgerows, and woods are capable of hosting wildlife that may be using the soon-to-be-destroyed crop fields for consuming insects (a necessary activity for birds and bats), foraging on and among the crops, or other uses. Nor did Angelina look to see if wildlife is actually using this habitat or the fields themselves for feeding, living, or reproduction, including the foraging of grain left on the fields after harvest that feeds resident and migratory birds, raccoons, deer, and other animals. While Angelina quotes Mr. Rupprecht for the proposition that the fields provide habitat for a limited number of species, Mr. Rupprecht admitted that "we did no surveys that were directly in line to count or enumerate mammals within the Project Area." Rupprecht, Tr. 217:22-24.

Mr. Rupprecht attempted to compensate for the absence of wildlife data in the Application by concocting a desktop calculation with internet records to predict the number of deer that would be diverted from the Project Area into the surrounding crop fields and community. Rupprecht, Tr. 219:5 to 223:8. He even went so far as to assume that the results of his deer calculation also would apply to coyotes, even though he had no population data on coyotes. Rupprecht, Tr. 231:5 to 232:8. However, Rupprecht's testimony does not reveal any expertise on deer or other animals. Without any such expertise, he did not have the qualifications necessary to calculate the additional number of deer or coyotes that will afflict the surrounding neighborhood due to displacement from the Project Area. The Board should not accept as accurate a calculation from someone without the expertise to perform it.

Angelina's understandable lack of confidence in this calculation is betrayed by its decision to withhold the calculation from the Application rather than subjecting it to Staff and public scrutiny. No information on this calculation was included or even mentioned in the Application. Co. Exh. 1. The Board should not trust a calculation done without objective data on animal populations from a survey of the Project Area by an individual with no expertise to perform it.

OAC 4906-4-08(B)(3)(b) requires the Application to contain information about potential impacts to ecological resources during the operation and maintenance of a facility, including measures to mitigate the Project's adverse impacts. Angelina has not provided OPSB with the information necessary to evaluate and mitigate damage to the neighbors' crops from wildlife diverted from the Project Area into the neighbors' fields. Without this information, the Board cannot determine that the Facility will have the minimum adverse environmental impact.

N. **Without The Data On The Quantity Of And Mitigation Measures For The Surface Water Draining From The Facility Required By OAC 4906-4-07(C), The Board Has No Basis To Find That The Project Represents The Minimum Adverse Environmental Impact With Respect To Drainage And Flooding.**

As explained in the Concerned Citizens' opening brief (at 43-52), the Application lacks the information required by OAC 4906-4-07(C). The Application also does not contain the information required by OAC 4906-4-08(A)(4)(e) for analyzing the prospects of floods for the area, including the probability of occurrences and likely consequences of various flood stages. Nor does the Application contain any plans to mitigate any likely adverse consequences. Angelina's opening brief does not, even once, cite the Application for information germane to the Facility's effects on surface water drainage and runoff, because the Application contains none.

Instead, Angelina relies (at 39-41) solely on Noah Waterhouse's and Matt Marquis' statements that solar facilities generally do not cause drainage problems, citing only their general experience with other facilities. However, without meaningful data on this Facility, they have no basis to conclude that this Facility will not aggravate the flooding problem that already exists in the community. This is especially the case where, as here, water levels are commonly only an inch from endangering life and property. CCOPC Exh. 5, Mast Direct Testimony, pp. 3-4, A.11.

Angelina also cites (at 40) Rachael Vonderhaar's statement that grass and other plants can slow down runoff. That may be true at times. However, Mr. Mast has provided 13 reasons why the solar fields will increase, not decrease, surface water runoff. *See* Pages 48-50 of the Citizens' opening brief.

The Board has promulgated OAC 4906-4-07(C) for a reason. Rather than being relegated to accepting the paid opinions of applicants' consultants that runoff will not be a problem, the

rule requires applicants to produce data to prove it. The rule requires applicants to provide this data so the Board can make up its own mind about whether drainage will harm the public and the environment. Thus, OAC 4906-4-07(C)(2)(b) requires “an estimate of the ... quantity of aquatic discharges from the site clearing and construction operations” in the Application. Emphasis added. OAC 4906-4-07(C)(3)(d)(vii) requires the Application to contain a “quantitative flow diagram or description for water ... through the proposed facility ... including ... [r]un-off from soil and other surfaces” during facility operation. Emphasis added. Based on this data, OAC 4906-4-07(C)(2)(c) requires applicants to “[d]escribe any plans to mitigate the above effects.” The Application does not quantify the stormwater flowing from the Project Area during construction or operation, depriving the Board of the information necessary to make an informed judgment about this issue.

If an applicant’s general assurances that drainage will not be a problem were adequate to guard against drainage problems, OAC 4906-4-07(C) would not have been promulgated to require detailed water quantity data and mitigation measures in the applications. Neither Angelina nor the Board is free to bypass these requirements. And without this data, the Board has no basis to determine that the Project represents the minimum adverse environmental impact with regard to surface water issues.

- O. **Without The Data Required By OAC 4906-4-07(C) To Be Included In The Application About The Quality Of And Mitigation Measures For The Surface Water Draining From The Facility, The Board Has No Basis To Find That The Project Represents The Minimum Adverse Environmental Impact With Respect To Sediment Pollution From The Facility.**

Angelina admits (at 46) that it will be required to obtain pollution control permits for the discharges of eroded sediment from its construction activities. Nevertheless, Angelina’s opening brief does not point to any water quality data in the Application meant to satisfy the requirements

in OAC 4906-4-07(C). The Application is entirely devoid of this required information. Instead, Angelina dismissively states (at 46) that not much pollution is expected from its construction activities. This argument entirely misses the point of the mandates in this rule. This rule requires the Application to contain the water quality data so that the Board can determine whether polluted runoff will be a problem. Angelina's ungrounded assertion that it will not be a problem does not enable the Board to independently evaluate this issue rather than deferring to Angelina's unsupported assertion. Without this data, the Board lacks the information necessary to determine whether the Project represents the minimum adverse environmental impact with regard to the water quality of its discharges.

P. Since The Application Contains No Estimate Of The Volume Of Solid Waste Generated During Construction, Or Its Disposal Destination, As Required By OAC 4906-4-07(D), The Board Has No Basis To Find That The Project Represents The Minimum Adverse Environmental Impact With Respect To Solid Waste Disposal.

Angelina's opening brief does not point to any information in the Application that satisfies the requirements of OAC 4906-4-07(D)(2)(a) to estimate the amount of solid waste, including demolition waste, that the Project will generate. Herling, Tr. 109:10-17. Nor does Angelina note any information in the Application that complies with the requirement of OAC 4906-4-07(D)(2)(b) to explain what will be done with the demolition waste from the old building(s). Without this required information, the Board cannot determine whether the Project represents the minimum adverse environmental impact with respect to solid waste.

Q. Because The Application Contains Inadequate Detail To Explain How Its Construction Traffic Will Avoid Interference With Local Farming Operations, School Buses, And Other Public Road Traffic, The Board Has No Basis To Find That The Project Represents The Minimum Adverse Environmental Impact With Respect To Traffic Interference.

Angelina's discussion (at 27-29) about repairing road damage and avoiding traffic obstructions is full of promises about future plans and studies that should have been included in the Application. Without this information, any finding that the Project represents the minimum adverse environmental impact with respect to public roads is speculation. This information should have been included in the Application.

A good example of this deficiency in the Application is demonstrated by the quote from Mark Bonifas' testimony on Page 29 of Angelina's opening brief. That testimony explains that a transportation management plan would typically provide for escort vehicles and flaggers to organize the traffic. The problem is that this plan does not yet exist, so there is no commitment to use any of these measures. Instead, Stipulation Condition 25 requires a transportation plan and a traffic plan to be submitted to the Staff after certification, and Angelina is not even required to obtain Staff approval for the plan.

The Application has the same deficiency about preventing and repairing road damage. The Application and Stipulation leave this problem to a future road use agreement that does not yet exist.

Angelina states (at 25) that road blockage should not be a problem, since traffic delays will be short. The Staff goes so far as to inaccurately represent (at 7) that there is no evidence that traffic impacts "would be any greater than that caused by current farming operations." However, Angelina intends to send about 1,700 to 1,800 loads of equipment and construction materials onto these narrow roads. Applic., Exh. D, p. 7. Since the Application contains no

traffic plan to figure out how these loads can be accommodated without hindering the farmers' planting and harvesting activities, the Board has no basis to find that that the Project represents the minimum adverse environmental impact on the public's road usage. Mr. Bonifas' bare statement that delays will be short is hardly adequate to conclude that no problems will occur.

The Application does not contain meaningful information about mitigation measures to prevent and repair road and bridge damage or to prevent interference with local traffic. Consequently, the Board lacks the information necessary to determine that the Project represents the minimum adverse environmental impact with respect to these issues.

R. The Board Has No Basis To Find That The Project Represents The Minimum Adverse Environmental Impact With Respect To Its Destruction Of Prime Farm Land.

Angelina argues (at 52) that the Project will have a minimal impact on the viability of the 827 acres of agricultural land that will be converted into an industrial solar facility. Destroying the capacity of 827 acres to produce food for 40 years is hardly a minimal impact. Removing farmland from production also deprives young, beginning farmers of the land needed to initiate their own farming operations. Vonderhaar, Tr. 391:2-18. The Board cannot find that this impact is minimal just because there is a chance that it might return to agriculture in 40 years.

S. Summary

The Application does not contain the information required by the Board's rules. As constituted, the incomplete Application does not provide the Board with a basis for issuing a certificate or for identifying and designing mitigation protections for the public. Angelina's Application is incomplete, as it fails to provide much of the information about the Project's impacts and proposed mitigation measures required by the Board's rules. Without this information, the Board lacks the authority to approve the Application and issue a certificate. A

government agency cannot grant an approval based on an application that does not contain the information required by law. *Anderson v. Vandalia*, 159 Ohio App.3d 508 (2nd Dist. 2005).

The incompleteness of the Application prevents the Board from determining the nature of the probable environmental impact under R.C. 4906.10(A)(2). The Board also cannot find that the Project represents the minimum adverse environmental impact under R.C. 4906.10(A)(3), because the Application fails to provide adequate information for that determination and because the evidence at the hearing actually dictates the opposite conclusion. The Concerned Citizens have identified about 20 hazards from the Project that will harm them and that have not been satisfactorily addressed in the Application or Stipulation. *See* Section II of their opening brief. For all of those reasons, the Project also fails to serve the public interest, convenience, and necessity under R. C. § 4906.10(A)(6) and fails to serve the public interest, convenience, and necessity under R.C. § 4906.10(A)(6). The Board should deny Angelina's application for a certificate.

III. The Proposed Stipulation Cannot Be Used To Delegate The Board's Authority And Responsibility For Certification Decisions To The Staff, Nor It Does Provide For A Facility That Represents The Minimum Adverse Environmental Impact Or Serves the Public Interest, Convenience, and Necessity.

The Stipulation, if accepted, would grant a certificate for the Facility based on an Application that violates the Board's rules in a multitude of ways as described herein and in the Concerned Citizens' opening brief. The Board cannot circumvent its own rules by approving a deficient application. Nor can it accept a Stipulation that proposes to approve a Project that does not meet the statutory criteria under R.C. 4906.10 for representing the minimum adverse environmental impact under R.C. 4906.10(A)(3) and serving the public interest, convenience, and necessity under R.C. § 4906.10(A)(6). For these reasons, the Stipulation violates important regulatory principles and practices and is contrary to the public interest.

The Stipulation would provide for an unlawful and unconstitutional delegation of power to the Staff for the reasons explained in Section III of the Concerned Citizens' opening brief. Most of the Stipulation's supposed accomplishments touted (at 53-60) by Angelina are future submittals of plans that should have been included in the Application, but which now are proposed to be delivered after certification by Angelina and approved in secret by the Staff. The Stipulation mostly just postpones, until after certification, the Applicant's evaluations of the Facility's potential threats to the public and the Applicant's identification of mitigation measures work that should have been included in the Application.

The Stipulation also is carelessly worded to provide loopholes by which Angelina can avoid its responsibilities. Those loopholes are identified in Section II above and on Pages 68-72 of the Citizens' opening brief.

The Staff argues (at 14) that a stipulation is entitled to "substantial weight." However, the Stipulation in this case is not a negotiated compromise of all parties. It is a deal among allied parties who favor the Project because they want the money; it is not the product of arm's length negotiations. It is entitled to no weight or deference.

While Angelina again extols (at 54-55) the money that Angelina and local officials will enjoy from the Facility, the neighbors will pay the highest price for this Project in the form of health and safety impacts and the reduction of their quality of life. Since neither Angelina's officers nor the county's local officials have to live with these hazards, their signatures on the Stipulation were not difficult to obtain. It is the Board's statutory responsibility to make sure Angelina has provided a complete and honest assessment of the Project's hazards and has designed the Project to reduce those hazards to a minimum. Adopting the Stipulation will not fulfill this responsibility.

IV. Conclusion

Angelina's proposed Project has been poorly evaluated by Angelina and inadequately investigated by the Staff, who have unquestioningly accepted Angelina's representations about the Project's impacts without independent research. Angelina's strategy has been to refrain from looking for evidence of its Project's adverse impacts so that it can claim that the Project will have no adverse impacts. Angelina, the Staff, and some local government intervenors have compounded these errors by proposing a Stipulation that asks the Board to issue a certificate despite the Application's and the Stipulation's deficiencies. These parties urge the Board to compensate for the Application's failures by requiring Angelina to submit 14 mitigation plans after certification in order to cut the members of the Board, Concerned Citizens, and general public out of the decision-making process.

But the Board is not free to ignore its own rules, and Angelina is compelled to comply with them. OPSB has no authority to issue a certificate based on an Application that does not contain the information required by the Board's rules. Nor can OPSB issue a certificate to a Facility that has not presented the evidence necessary to determine that the Facility represents the minimum adverse environmental impact under R.C. 4906.10(A)(3) and serves the public interest, convenience, and necessity under R.C. § 4906.10(A)(6). Lacking this evidence, the Board must deny Angelina's application for a certificate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, I hereby certify that, on November 1, 2019, a copy of the foregoing document also is being served by electronic mail on the following:

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