BEFORE
THE OHIO POWER SITING BOARD

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

POST HEARING BRIEF OF CONCERNED CITIZENS OF PREBLE COUNTY, LLC, ERIC AND KELLY ALTOM, MARY BULLEN, CAMDEN HOLDINGS, LLC, JOHN AND JOANNA CLIPPINGER, JOSEPH AND LINDA DELUCA, DONN KOLB AS THE TRUSTEE FOR THE DONN E. KOLB REVOCABLE LIVING TRUST, DORIS JO ANN KOLB AS THE TRUSTEE FOR THE DORIS JO ANN KOLB REVOCABLE LIVING TRUST, KENNETH AND ELAINE KOLB, JAMES AND CARLA LAY, CLINT AND JILL SORRELL, JOHN AND LINDA WAMBO, JOHN FREDERICK WINTER, AND MICHAEL AND PATTI YOUNG

I. Alamo Solar's Lack Of Due Diligence And Failure To Communicate With The Persons Adversely Impacted By Its Solar Facility Have Resulted In An Incomplete Project Design.

On December 10, 2018, Alamo Solar I, LLC ("Alamo") submitted an application for a certificate to construct and operate a solar-powered electric generation facility ("Facility") within about 1002 acres of land (the "Project Area") in Gasper and Washington Townships in Preble County, Ohio. Company Exhibit 1, Application ("Applic."), pp. 1, 5. On January 31, 2019, Alamo filed a supplement to its original application. Hereinafter, the original application and its supplement will be referred to as the "Application."

The proposed Facility is not a typical, benign collection of solar panels that might be installed on the roofs of homes or in school yards. Alamo proposes to convert up to 919 acres, most of which is prime farmland used for food production, into this industrial facility. *Id*. at pp.

6, 92. Arrays of solar panels will be grouped into large clusters called "solar fields" that will cover entire farm fields of 40 to 300 acres in size. Herling, Tr. I 40:5-8, 55:4-7.[1]

Of the prime farmland to be lost to this project, 505 acres is located in an agricultural district. Applic., pp. 6, 92; Bellamy, Tr. III 521:13-24. An agricultural district is farmland that has been set aside exclusively for agricultural purposes, in exchange for tax benefits. Bellamy, Tr. III 520:4-9. The goal of this arrangement is to encourage farmland preservation. *Id*. at 520:10-16. Notwithstanding that commitment, the landowners in the Project Area have agreed to lease this land for Alamo's industrial facility for 40 years.

This Facility threatens the quality of life and livelihood of nearby residents, including the Concerned Citizens of Preble County ("CCOPC") and its members who have intervened in this case (collectively, the "Concerned Citizens"). The Facility threatens to expose them to unsightly views, intrusive lighting, noise, crop and livestock destruction by wildlife, loss of wildlife, noxious and invasive weeds, flooding and wet fields, drainage tile damage, sedimentation of streams, crime, road obstructions, and other hazards.

The Concerned Citizens are 67 persons and companies that live, work, and own property in communities that will be harmed by the Alamo and Angelina solar projects if constructed. CCOPC Exh. 2, Direct Testimony of Joanna Clippinger ("Clippinger Testimony"), p. 2, A.7 and A.8. Seventeen of the citizens are located adjacent to the proposed Alamo Project Area. *Id*. at p. 4, A.11, p. 3, A.10, and Exh. A (map of their locations); Clippinger, Tr. III 493:6-8. Twelve of them would be bordered on two or three sides by Alamo's solar panels. *Id*. at Exh. A. Joseph and Linda DeLuca bought land that is now bordered on three sides by the Project Area, on which

[1] Citations to the transcript of the hearing are abbreviated as "Tr." following the last name of the witness whose testimony is being cited.

they had hoped to build a retirement home and use as a retirement investment. CCOPC Exh. 3, Direct Testimony of Joseph DeLuca ("DeLuca Testimony"), p. 2, A.6.

The most troubling aspect of this case is the scarcity of information in the Application for evaluating the project's threats and for identifying measures to avoid or minimize these threats. To a large extent, the Facility's impacts are unknown, because the Application does not accurately or adequately evaluate them. While the conditions proposed in an Amended Stipulation filed by some of the parties seek to fill in some of this missing information by requiring Alamo to submit numerous studies (some of which are referred to as "plans") to the Staff after the certificate is issued, that approach is an insufficient substitute for informed decision-making on whether to grant the certificate and what conditions to include in it. This approach also is unlawful, as explained later in this brief.

This project has been plagued by Alamo's lack of transparency since its beginning stages. While Alamo discussed its plans early and often with local officials to enlist their support for the project and solicited landowners of farmland it wanted to lease, it made no effort to inform the citizens who would bear the brunt of the harm from the project until such time as OPSB's rules required communication with them.

Alamo had its first meeting with local officials in March 2017, when it met with the Economic Development Board. Herling, Tr. I 21:21-23. Alamo met privately with the Board's Staff in mid-2018 to discuss the project. Herling, Tr. I 23:16 to 24:2. Alamo sent letters to some landowners from 2016 to 2018 asking them to lease their land for the project. Herling, Tr. I 24:20 to 25:6. But, unless Alamo wanted to lease the landowners' land, it did not bother to provide them with information about the project until required by the Board's rules to do so in the third quarter of 2018. Herling, Tr. I 25:7-24. Generally, Alamo did not send letters or make

other contact informing neighbors about the project before required by the Board's rules, except for letters sent to people with whom they wanted to negotiate leases. Herling, Tr. I 114:6-14.

Alamo's reluctance to communicate with the project's neighbors has resulted in an Application that is wholly deficient in the details necessary to identify and deal with the threats to the neighbors. A couple of examples illustrate this point. Because Alamo has not worked out arrangements with neighbors for screening their homes and land from the objectionable sights of mammoth arrays of solar panels and annoying exterior lighting, the Application contains no meaningful, enforceable commitments to protect the neighbors against these intrusions. And if Alamo had solicited advice from its farming neighbors, it would have known to include procedures in its Application to prevent the propagation of noxious and invasive weeds that could spread from the Facility to adjoining farm fields and natural areas. The result of Alamo's lack of due diligence is an Application filled with generic unenforceable promises instead of specific, legally enforceable commitments for mitigation. The large number of concerns raised by the Concerned Citizens is the inevitable outgrowth of Alamo's incomplete investigation of the project's adverse impacts, its failure to design and commit to mitigation for these impacts, and its lack of communication with the citizens affected by its project.

Rather than becoming more forthcoming with information, Alamo and the Staff have now collaborated on a scheme to insulate the public from involvement and input into the decision-making process altogether. This scheme is described in the next section below.

II. The Amended Joint Stipulation Is An Unlawful Attempt To Circumvent The Board's Statutory And Regulatory Mandates To Base Its Proceedings On Complete Applications So That Citizens Can Provide Meaningful Input On Siting Decisions That Affect Them.

As explained in Section III below, the Application is missing many of the studies and information needed to evaluate the Facility's threats and the mitigation of those threats. Seeking

to compensate for the Application's deficiencies, Alamo, the Staff and other parties filed a Joint Stipulation and Recommendation on July 5, 2019 ("original Stipulation") designed to allow them to fill the gaps with post-certificate plans that would be proposed and approved in secret. The Board then held an adjudicatory hearing from July 17-19, 2019 ("original hearing"), and the parties thereafter filed their post-hearing briefs.

On July 31, 2020, one year after the conclusion of the original hearing, Alamo filed a motion to reopen the record, along with a "Restated and Amended Joint Stipulation and Recommendation" ("Amended Stipulation"). By that time, Alamo had completed a number of studies that had been slated for completion pursuant to the original stipulation. These studies were not included in the Application or subjected to the entire adjudicatory process, such as the public comment session of the hearing and discovery. The Amended Stipulation tries to compensate for the lack of information in the Application by requiring 12 other studies to be performed after certification: (1) detailed engineering drawings of final project design under Condition 3; (2) any changes to project layout after the submission of final engineering drawings under Condition 4; (3) a public information program under Condition 9; (4) a modification or mitigation plan for avoiding cultural resources or minimizing impacts on them under Condition 14; (5) a landscape and lighting plan under Condition 15; (6) a Storm Water Pollution Prevention Plan under Condition 16; (7) a vegetation management plan under Condition 18; (8) a construction access plan under Condition 22; (9) a final traffic plan under Condition 24; (10) a transportation management plan under Condition 25; (11) a comprehensive decommissioning plan under Condition 28; and (12) pre- and post-construction stormwater calculations under Condition 29. Jt. Exh. 2, pp. 6-12. So the Amended Stipulation requires

Alamo to perform and submit 12 studies to the Staff after the certificate is issued, instead of properly testing them in the adjudicatory process.

On October 26, 2020, OPSB held a supplemental hearing ("supplemental hearing") to receive testimony on the Amended Stipulation. After the original hearing, Alamo's acoustics expert David Hessler had performed a noise study to model the sound from the Facility's central inverters, which was intended to fill the information gap left by the absence of an inverter noise study in the Application. A contour map of projected noise levels from central inverters was attached to David Hessler's supplemental testimony, but neither that map nor any report about the supplemental noise study was added to the Application. Co. Exh. 15, Exh. DMH-S1. The supplemental testimony of Douglas Herling (Co. Exh. 14) included attachments consisting of a preliminary site plan (Attachment DH2), a letter from the Ohio State Historic Preservation Office about Alamo's proposed cultural resources survey (Attachment DH3), a complaint resolution program (Attachment DH4), and a road use and maintenance agreement (Attachment DH5), none of which were included in the Application. The supplemental testimony of Mathew Robinson included a preliminary landscape plan for mitigating the Facility's visual impacts on the neighborhood. Co. Exh. 16, Attachment 1. Mr. Robinson's testimony stated that the preliminary landscape plan is subject to revision prior to finalization after Facility certification. *Id*., p. 5, lines 4-6. The supplemental testimony of Mark Bonifas included a preliminary vegetation management plan, which is subject to revision. Co. Exh. 19, Bonifas Testimony, Attachment 1; Co. Exh. 16, Herling Testimony, p. 5, lines 4-6. The supplemental testimonies are not part of the Application. Conway, Tr. IV 682:7-12. None of the studies attached to these supplemental testimonies have been incorporated into the Application, nor does the Amended

Stipulation require Alamo to incorporate any of their language into the final studies submitted pursuant to the Amended Stipulation.

OPSB's acceptance of studies introduced at the supplemental hearing without first incorporating them into the Application, and the Board's acceptance of the Amended Stipulation with its arrangements for a multitude of post-certificate studies would violate OPSB's enabling statute and its own rules. R.C. 4906.06(A)(2) requires the Application to contain "[a] summary of any studies that have been made by or for the applicant of the environmental impact of the facility." To implement R.C. 4906.06, OAC 4906-2-04(B) requires an application to include the information required by OAC Chapter 4906-4. OAC Chapter 4906-4 sets forth the studies that must be included in Alamo's Application. OAC 4906-3-06(A) requires the chairman of the OPSB to determine whether an application is complete and complies with the content requirements of the Board's rules, including OAC Chapter 4906-4, before the application can be processed.

Once an application is complete, the Staff conducts an investigation of the application and submits its Staff Report with recommendations on whether the application complies with the criteria of R.C. 4906.10(A) and the Board's rules. OAC 4906-3-06(C). The Staff Report is made available for intervenor and public review. R.C. 4906.07(C); OAC 4906-3-07(A)(2).

In the meantime, the applicant is required to publish public notices notifying the public about the application and where to find a copy of the application for review. R.C. 4906.06(C); OAC 4906-3-06(C)(4) & (5); OAC 4906-3-07; 4906-3-09. R.C. 4906.07(A) allows OPSB to schedule the public hearing for the general public and the parties only after receiving a complete application "complying with section 4906.06 of the Revised Code." The public is then provided the opportunity to comment on the application at the public comment session of the hearing,

including the studies required to be included in it. R.C. 4906.07(A). Thereafter, the adjudicatory portion of the hearing hears evidence from the parties, including intervenors.

In this case, the Application does not contain many of the studies required by OAC Chapter 4906-4, OAC 4906-2-04(B), OAC 4906-3-06(A), and R.C. 4906.06, so the Board is violating all of those authorities. The Board violated R.C. 4906.06(A)(2) and OAC 4906-3-06(A) by erroneously determining that the Application is complete and complies with the content requirements of the Board's rules, including OAC Chapter 4906-4. The Board violated R.C. 4906.07(A) by scheduling the hearing without receiving a complete, compliant application. An administrative agency such as OPSB is required to follow its own rules, as well as applicable statutes. *State ex rel. Cuyahoga Cty. Hosp. v. Ohio Bureau of Workers' Comp*., 27 Ohio St.3d 25, 27–28 (1986); *Parfitt v. Columbus Corr. Facility*, 62 Ohio St.2d 434, 436 & 437 (1980). These authorities that are being violated are designed to benefit the Concerned Citizens by affording them opportunities to provide the Board with input on an Alamo Facility that could seriously impact them, and the Citizens are prejudiced by OPSB's failure to comply with these authorities. Cf., *id*., at 436-37.

The Concerned Citizens' rights to vet Alamo's studies through the application process, including a review of the study, receiving a Staff investigation and Staff Report, conducting discovery, submitting comments at the public comment session of the hearing, and participating in the adjudicatory session of the hearing, will be bypassed by the Amended Stipulation's acquiescence to receiving studies only for Staff review and approval after this case has ended. The post-certificate studies will not be submitted to the public for review and comment, nor will they be subject to adjudication. The studies submitted at the supplemental hearing, *i.e*., the central inverter noise modelling results, the preliminary landscape plan, the preliminary

vegetation plan, the letter about the Phase I cultural resources program, the preliminary site plan, the road use and maintenance agreement, and the complaint resolution program, were not subjected to a Staff investigation and Staff report, a public hearing and the normal adjudicatory process including discovery, but instead were revealed to the Concerned Citizens only 17 days before the supplemental hearing. Instead of accepting the Amended Stipulation and the studies introduced at the supplemental hearing, the Board should vacate its findings under 4906-3-06(A) that the Application is complete and compliant with the rules, and require Alamo to supplement its Application to correct the deficiencies.

III. Alamo Solar's Application Is Incomplete And Lacks The Information Required By Statute And The Board's Rules.

Alamo'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. The Application Fails To Provide The Information About The Project's Visual Impacts And Mitigation Measures Required By OAC 4906-4-08(D)(4).

1. The Board's Rule Requires The Application To Describe The Visual Impact Of The Facility And To Describe The Measures That Will Taken To Minimize The Facility's Adverse Visual Impacts.

OAC 4906-4-08(D)(4) provides:

> (4) Visual impact of facility. The applicant shall evaluate the visual impact of the proposed facility within at least a ten-mile radius from the project area….The applicant shall:
>
> (a) Describe the visibility of the project, including a viewshed analysis and area of visual effect, shown on a corresponding map of the study area. The viewshed analysis shall not incorporate deciduous vegetation, agricultural crops, or other seasonal land cover as viewing obstacles.
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> ****
>
> (e) Provide photographic simulations or artist's pictorial sketches of the proposed facility from public vantage points that cover the range of landscapes, viewer groups, and types of scenic resources found within the study area. The

applicant should explain its selection of vantage points, including any coordination with local residents, public officials, and historic preservation groups in selecting these vantage points.

(f) Describe measures that will be taken to minimize any adverse visual impacts created by the facility, including, but not limited to, project area location, lighting, turbine layout, visual screening, and facility coloration. In no event shall these measures conflict with relevant safety requirements.

Emphasis added. The Application violates this rule in two respects. First, its simulations do not accurately portray the Facility. Second, it makes no commitments for mitigation measures that will be taken to minimize adverse visual impacts, even though the rule requires that the Application describe the "measures that will be taken." These deficiencies are more specifically addressed below.

2. The Application Does Not Adequately And Accurately Describe The Facility's Visual Impacts.

The Facility, if approved, would impose a serious blight on the scenic views in Preble County. Figure 7, Sheet 2 of the viewshed analysis shows 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. And this figure is based on the assumption that no one can see the equipment if vegetation is higher than five feet, six inches tall, even though the panels may be as high as 14 feet. Robinson, Tr. II 346:16-24, 348:3-24. The Application states the panels may be as high as 15 feet. Robinson, Tr. II 353:20-23. The fences around the solar equipment will take the form of a 7-foot tall chain link fence or a 6-foot tall chain link fence with three strands of barbed wire at the top, bringing the total height to 7 feet. Applic., Exh. I, p. 14.

Answer 8 of Robinson's initial testimony states: "Visual simulations from selected viewpoints where the Project is proposed in open agricultural fields adjacent to the viewer,

indicate a high degree of visibility and appreciable visual contrast with the existing landscape." "The effect really is for adjacent properties….For adjacent resources or adjacent public roadways, seeing panels in the field is certainly going to be a contrast to what is used to being seen." Robinson, Tr. II 355:16-20. The Amended Stipulation drives this point home, establishing a setback of a mere 25 feet between the solar facility and neighbors' yards and land and only 150 between the solar facility and neighbors' houses. Jt. Exh. 2, p. 6, Condition 3.

The project will potentially be visible from 73.4 % of the area within a half mile of the project, even if obstacles of vegetation, structures and topography are taken into consideration. Robinson, Tr. II 364:23 to 365:2; Applic., Exh. I, p. 22, Table 1. This is of particular concern to the Concerned Citizens, as evidenced by Joanna Clippinger's testimony that "[s]eeing hundreds of acres of solar panels near our properties and on nearby public roads will spoil the visual and aesthetic enjoyment of living and working there." CCPC Exh. 2, Clippinger Testimony, p. 4, lines 11-13. Alamo's viewshed report advises that, within a half mile, "a viewer is able to perceive details of an object with clarity. Surface textures, small features, and the full intensity and value of color can be seen on foreground objects." Applic., Exh. I, p. 18. The Facility equipment will potentially be visible from 26.3% of the area between a half mile and one mile. Robinson, Tr. II 365:3-6. *See* Exh. I, p. 22, Table 1.

The preliminary landscape plan attached to Mr. Robinson's supplemental testimony provides additional pictorial evidence of just how imposing the residents' views of the solar project will be unless effective mitigation is provided. Co. Exh. 16, Robinson Suppl. Testimony, Attachment 1. Section 5.0 of the preliminary landscape plan is an aerial photograph of the entire Project Area showing locations, depicted as green dots, of many residences throughout and surrounding the Project Area with potential views of the solar fields. *Id*., pp. 12-13. Section 6.0

of the preliminary plan contains aerial photographs of three non-participating residential properties abutting solar fields. *Id*., pp. 15-17. The aerial photographs show that three of these homes and their yards have close, unobstructed views of solar panels. *Id*. The descriptions for each of these three properties echo this fact, stating: "Residence adjacent to proposed solar array field, no existing hedgerow" and "Open views towards agricultural field with solar panel array". *Id*.

Alamo's statistics on the percentage of the surrounding area having views of the Facility were reasonably based on the visibility of 14-foot solar panels. However, the visual simulations set forth in Section 3.3.2 and Figures 11 and 13 of visual resource assessment are based on eight-foot tall panels. Robinson, Tr. II 349:13 to 350:5; Applic., Exh. I, pp. 28-33, and Figures 11 & 13 at pdf pp. 61-70. The Application provides Alamo with the option to install solar panels that are up to 15 feet high, so the simulations must portray them at that height in case Alamo installs panels of that height. Otherwise, these simulations do not accurately portray the public's views of the Facility's equipment and structures. These simulations do not comply with the mandate in OAC 4906-4-08(D)(4)(e) for photographic simulations or artist sketches to show the Board and public what the Facility will look like.

In addition, Amended Stipulation Condition 3 provides for ridiculously short setbacks of 25 feet between solar fences and neighbors' yards/land and 150 feet between solar equipment and neighbors' houses. Based on these setbacks, the Application does not comply with the requirement in OAC 4906-4-08(D)(4)(e) for "photographic simulations or artist's pictorial sketches of the proposed facility from public vantage points that cover the range of landscapes, viewer groups, and types of scenic resources found within the study area." The photographic simulations in the Application's Visual Resource Assessment do not depict the views from these

setbacks. Figure 9 of the assessment shows views from 300, 600, and 900 feet away, but not from 25 or 150 feet away. Applic., Exh. I, pdf p. 59. Figure 11 of the assessment simulates a distant view of the solar panels and fence adjacent to a resident's backyard, but portrays the solar equipment from the vantage point of someone standing on the public road to the front and side of the resident's yard, with a soybean field between the road and the yard, rather than the up-close view the resident will be forced to endure from the house or the backyard. *Id*., p. 31 & pdf p. 66. None of simulations depicts the yard of the unfortunate residents whose yards will be surrounded on two or three sides by solar panels. Moreover, because Alamo could decide to install 15-foot high solar panels as allowed by the Application, these simulations fail to portray the panels' appearance at elevations of eight feet above the seven foot fences at the close distances allowed by the setbacks in Amended Stipulation Condition 3. If Alamo had decided for sure to install eight-foot panels, then it should have and undoubtedly would have stated as such in the Application. A 15-foot solar panel is more intrusive and imposing than an eight-foot panel, and the simulations must accurately depict the appearance of the tallest model that the Application is applying for permission to use.

Alamo's visual simulations fail to show the ugly, imposing views of the 15-foot (or eight-foot) solar equipment that nonparticipating residents will have from only 25 feet and 150 feet away in their yards and houses. OAC 4906-4-08(D)(4)(e) requires simulations from the perspective of every "viewer group" exposed to Facility views. The residents within 25 feet or 150 feet are important "viewer groups" whose vantage points are not represented in the simulations. This information is important for evaluating the Facility's adverse impact on them. The failure to include these simulations violates OAC 4906-4-08(D)(4)(e) and deprives the

Board of information it needs to ascertain determining "[t]he nature of the probable environmental impact" of the project as required by R.C. 4906.10(A)(2).

3. The Application Does Not Include Measures That Would Minimize The Facility's Adverse Visual Impacts.

In addition, the Application does not describe the measures that would minimize the Facility's adverse visual impacts as required by OAC 4906-4-08(D)(4)(f). All the Application does is generally list three types of visual mitigation that are theoretically available:

> Situations such as these will be accounted for in the development of a landscape plan for the Project, which will be included as part of the final design. A number of cost-effective options are available to address specific issues in limited circumstances. First, in some cases, full screening with short trees, native hedges or low-growing vegetation outside a portion of the fence may be employed. Second, portions of the perimeter fence can be designed with different materials or colors to enhance its visual appeal. Finally, native pollinator habitat outside a portion of the fence can provide a partial screen that "softens" the visual differences between the Project and the rural character of the area.

Emphasis added. Noticeable absent are any commitments to actually mitigate any adverse visual impacts. Instead, the Application states only that one "may" or "can" implement these measures. Elsewhere, the Application states that it "is considering" pollinator plants and wildflowers and "is considering" the installation of native shrubs and trees in selected sensitive areas. Applic., Exh. I, p. 40. Thus, while the Application contains some vague promises to implement mitigation of some sort, it commits to no concrete details on what that mitigation will be, thus depriving the Concerned Citizens and the public of a meaningful opportunity to influence the choice of mitigation measures. The Application defers any actual commitment to a future time when Applicant submits a post-certificate landscaping plan to the Staff. This lack of specificity in the Application violates the mandate in OAC 4906-4-08(D)(4)(f) that the Application describe the measures that "will be taken" to minimize adverse visual impacts.

The stipulating parties attempt to remedy this shortcoming in the Application by stating in Amended Stipulation Condition 15 that Alamo shall submit a post-certificate landscape plan that contains "planting of vegetative screening designed by the landscape architect to enhance the view from the residence and be in harmony with the existing vegetation and viewshed in the area."[2] Alamo also introduced a preliminary landscape plan as an exhibit during the supplemental hearing, but it is not included in the Application either. Herling, Tr. IV 602:9-17; Robinson, Tr. IV 660:7-16. A post-certificate condition does not cure Alamo's failure to include this plan in the Application as required by OAC 4906-4-08(D)(4)(f). Moreover, this preliminary plan also is not incorporated into or referenced by the Amended Stipulation, so it is entirely unenforceable as a means to minimize visual impacts. Conway, Tr. IV 682:7-12. Moreover, Alamo's testimony illustrates why a post-certificate landscaping plan such as the preliminary plan introduced into evidence during the supplemental hearing provides little assurance that the Facility's visual blight will be satisfactorily managed and why the Application must commit to specific visual mitigation.

Amended Condition 15 does not provide non-participating neighbors with a voice in determining what visual mitigation will be implemented for their residential properties or surrounding areas. The condition as revised provides that Alamo can vary from the vegetation planting requirements of the condition if "alternative mitigation is agreed upon with the owner of any such adjacent, non-participating parcel containing a residence with a direct line of sight to the fence of the facility," but, remarkably, does not require Alamo to even consult with any such

[2] The condition does not give Alamo the option of treating its perimeter fence as visual mitigation near neighbors' homes. The Application provides for a seven-foot chain-link fence without barbed wire, and/or a six-foot chain-link fence with three strands of barbed wire on top. Applic., Exh. I, p. 14. A chain-link fence, with or without barbed wire, is not visual mitigation. The fence itself is an unsightly structure that must be mitigated. Moreover, the Application's visual simulations show that the fences do not actually hide or even soften the views of panels behind and above them. See Applic., Exh. I, Fig. 13. And, as noted elsewhere in this brief, those simulations use eight-foot panels to provide the misleading appearance that the 15-foot panels do not loom above the fences.

owners to learn about their screening preferences or to accommodate them. These neighbors would have such a voice if Alamo had included a landscape plan in the Application so that the neighbors could comment on it at the public comment session of the hearing or contest/approve of it during the adjudicatory process. Amended Condition 15 does not even try to compensate for this failure. Instead, it allows Alamo to design the mitigation however it pleases, whether the victimized landowner likes it or not.

By allowing Alamo to do whatever it wants without the neighbors' consent, Amended Condition 15 fails to accommodate the reasonable expectation of the Concerned Citizens and any other nonparticipating neighbors who may want the solar equipment to be completely screened from their homes by vegetation. Even though Alamo is intruding on the neighbors' presently pleasant views, Alamo does not appear amenable to making such a commitment to salvage whatever can be salvaged of those views. Mr. Herling testified that Alamo will not commit to completely screening neighbors' homes from the solar equipment at this time. Herling, Tr. I 125:1 to 126:4. He stated: "In some cases, it could be completely screened from view, but it's not a commitment that we're going to be making today." Herling, Tr. I 125:22-24. Alamo's viewshed consultant, Mathew Robinson, testified that his goal is never to install 100 % screening, not even around residential yards. Robinson, Tr. II 377:16 – 379:1. He said that a person "certainly" could see the solar equipment through the hedgerow that he would want to install near neighbors' homes. Robinson, Tr. II 378:1-6. Although a complete screen along all of the roads in the Project Area may look unnatural, a complete screen between solar panels and houses/yards is entirely reasonable and should be installed for affected homeowners who prefer not to see the panels at all from their homes. The Amended Stipulation does not give the neighbors the option to insist on complete screening, or anything else. Amended Condition 15

requires, in vague terms, "planting of vegetative screening designed by the landscape architect to enhance the view from the residence and be in harmony with the existing vegetation and viewshed in the area." But it does provide any detail on how wide the row of vegetation must be or how far apart the plants will be planted. This allows Alamo to leave huge gaps between the plants at the time of planting, or for those gaps to develop later if vegetation dies and is not replaced.

The Application states that evergreen hedges will not be used as screening, based on the unpersuasive argument that evergreens and planted hedges would not be in keeping with the existing rural agricultural character of the Project Area. Applic., Exh. I, p. 41. Instead, Alamo plans to use deciduous vegetation that will leave the solar panels and fences highly visible during much of the year. If affected homeowners prefer an evergreen hedge around their residential properties, that preference should be accommodated. Amended Stipulation Condition 15 does not fix that problem, either.

Thus, Alamo plans to submit a post-construction landscape plan that leaves gaps between the plants so nearby residents can still see the ugly facility. Now, in the supplemental hearing, Alamo has introduced a new concept that makes this problem even worse, by proposing a provision in Amended Stipulation Condition 15 that requires Alamo to keep only 90% of the plants alive for five years, and then does not specify how much of the screening must stay alive in years six through 40 of the Facility's life expectancy. So Alamo intends to start out by planting trees and bushes with gaps between them, the gaps will be allowed to multiply in size and number by allowing up to 10% of these plants to die in the first five years, and thereafter there is no standard whatsoever as to how many plants have to survive. This arrangement does not provide for a meaningful vegetative screen between the solar facility and nonparticipants'

homes. There is no good reason why Alamo, with its own employees, cannot keep 100% of the screen intact by caring for and, where necessary, replacing the trees and bushes. The ineffective arrangement for vegetative screening is a good example of why the final landscaping plan should have been included in the Application and subjected to public hearing and a complete adjudicatory process to vet and improve the plan.

Mr. Robinson sought to defend his objection to complete screening by arguing that it would look unnatural if some plants died. There are three solutions for this situation: (1) properly care for the plants so they do not die; (2) replace the plants that die; and (3) plant at least two rows of plants so that a dead plant will not open a view to the Facility. Given the visual blight that the Facility will cause, this small extra effort to give neighbors some relief from the views is warranted. Moreover, if the Facility is as profitable as portrayed by the Application, Alamo can afford to plant and maintain enough vegetation to make its screening effective for the life of the facility. Amended Stipulation Condition 15 does not fix this deficiency. The condition provides only that the "Applicant shall maintain vegetative screening for the life of the facility and the Applicant shall replace any failed plantings so that, after five years, at least 90 percent of the vegetation has survived." This provision leaves hanging some important questions.

First, after five years, how much of the vegetative screening must be maintained for the life of the facility? The condition states that Alamo is required to maintain at least 90% of the vegetation for only five years. If only 50%, or even less, of the screening survives in years six through 40 of the Facility's life expectancy, is that enough to satisfy the condition's requirement to "maintain vegetative screening for the life of the facility"? If Alamo builds the Facility, it very well might argue that this condition does not specify how much vegetation must survive

during years six through 40. Even during the first five years, must Alamo maintain 90% of the screening in front of every nonparticipating neighbor's homestead, or is Alamo allowed to let all vegetation in front of a neighbor's home die as long as 90% of the screening still survives in the facility overall? Mr. Robinson testified that he thought 90% of the screening on each nonparticipants' yard would be maintained, but he confessed that he could not tell if Condition 15's language matched that understanding. Robinson, Tr. IV 658:20 - 660:6. With regard to the 90% requirement, Staff member Andrew Conway confessed: "I don't know how it would be implemented." Conway, Tr. IV 684:7. These questions could have been answered by including a vegetation maintenance plan in the Application, but none was provided. These loopholes in the amended condition could eviscerate the screenings' effectiveness.

Second, the Application and Amended Stipulation say nothing about how tall the vegetation will be or about whether the plants must be as high as the solar panel or fences. As currently worded, Alamo might later contend that the Application and Amended Stipulation require planting of no more than "pollinator" plants. Pollinator plants do nothing to block the view of solar equipment, since they are short plants that do not hide the 15-foot tall solar panels or seven-foot fences. Figure 13, Simulation 2, Sheet 4 of 6 in Application Exhibit I depicts what pollinator habitat looks like. Robinson, Tr. II 374:25 to 375:8. At most, pollinator plants grow to average heights of four to six feet in the summer (Applic., Exh. I, p. 40), so these plants will not conceal or disguise the solar panels even at maximum height and they will be even shorter at other seasons. Even if Alamo plants trees and bushes in front of neighbors' homes notwithstanding the Amended Stipulation's failure to specify them, the views of the solar panels from other public vantage points still will be screened only by short pollinator plants.

Third, the Application and Amended Stipulation contain no commitments that Alamo will follow effective, professional practices in designing and maintaining visual mitigation. Herling's initial written direct testimony represents that Alamo will use "best practices for visual mitigation developed in solar markets across the U.S." Co. Exh. 7, p. 13, lines 1-2. However, there are no standards for these practices. Herling, Tr. I 126:22-24. He was just referring to "what's generally known in the industry." Herling, Tr. I 126:25 to 127:5. These practices are not contained in the Application or the Amended Stipulation. Herling, Tr. I 127:13-15. The Application and Amended Stipulation punt the selection of these practices to the post-certificate landscaping plan.

Alamo seeks to defuse its lack of commitment by stating it will consult with the neighbors to find out whether they want vegetative screening and to present different options. Herling, Tr. I 104:17-22. But neither the Application nor the Amended Stipulation require Alamo to actually consult with the neighbors. And even if Alamo engages its neighbors in these discussions, this is no substitute for properly and lawfully including the mitigation measures in the Application and adjudicating them at the hearing. Nothing in the Amended Stipulation provides the neighbors with any rights of approval for the visual mitigation near their homes and land, so the neighbors are completely at the mercy of Alamo to design and the Staff to approve the landscaping as they wish. The landscaping plan should have been included in the Application as required by OAC 4906-4-08(D)(4)(f) so that the neighbors could adjudicate the details and adequacy of the vegetative designs chosen for their homes and land.

The preliminary landscape plan submitted by Alamo at the supplemental hearing shows that it was feasible for Alamo to include a final landscape plan in the Application. The preliminary landscape plan contains maps and plant lists showing where the screening plants

could be located along the borders of three nonparticipants' properties. Co. Exh. 16, Attachment 1, pp. 15-17. The detail on these pages is sufficient for nonparticipating neighboring landowners to tell whether the proposed screening is adequate. Had Alamo included such information in the Application for every affected nonparticipating neighbor, those neighbors could have consented to or contested the sufficiency of those screens during the public comment session of the hearing and the adjudicatory session of the hearing. The plan is still subject to post-certificate revisions at the whims of Alamo and the Staff and, in fact, could be changed in its entirety since neither the Application nor the Amended Stipulation require any degree of adherence to the draft attached to Mr. Robinson's testimony.

Requiring a post-certificate landscaping plan through a certificate condition, as provided by Condition 18, is not a lawful substitute for a compliant Application. The Amended Stipulation does not correct this violation of law, or any of the other issues discussed above. The Board should not approve the Application unless and until the deficiencies described above are addressed in the Application.

B. The Application Fails To Provide The Information About The Visual Impacts Of Project Lighting And Mitigation Measures Required By OAC 4906-4-08(D)(4)(f).

OAC 4906-4-08(D)(4)(f) provides:

> (4) Visual impact of facility. The applicant shall evaluate the visual impact of the proposed facility within at least a ten-mile radius from the project area. ...The applicant shall:
>
> ****
>
> (f) Describe measures that will be taken to minimize any adverse visual impacts created by the facility, including, but not limited to, project area location, lighting, turbine layout, visual screening, and facility coloration. In no event shall these measures conflict with relevant safety requirements.

Emphasis added. The Application violates this rule with respect to lighting.

The Application states that lights will exist at gates. Applic., p. 89. However, it provides no details about the actual locations of the lights, because Alamo has not decided where to build the gates. This has left the Concerned Citizens unable to determine whether their individual homes will be subjected to these lights. This lack of information violates the requirement in OAC 4906-4-08(D)(4) to "evaluate the visual impact of the proposed facility."

Once again, the Application makes no commitments for mitigation measures that will be taken to minimize adverse visual impacts of lighting, even though the rule requires that the Application describe the "measures that will be taken." Instead, it generally describes the types of mitigation that "may be incorporated into the design" such as downward facing lights, side shields, and motion sensors. Applic., p. 90. This lack of information violates the requirement in OAC 4906-4-08(D)(4) to "[d]escribe measures that will be taken to minimize any adverse visual impacts created by the facility, including … lighting."

Amended Condition 15 does not correct this deficiency in the Application. The condition provides that "[l]ights shall be motion-activated and designed to narrowly focus light inward toward the facility, such as being downward-facing and/or fitted with side shields." However, this language is still missing from the Application, where Alamo was required to place it. In addition, while this language belatedly makes it mandatory for the lights to be focused towards the Facility and motion-activated, these requirements fall short of the detail necessary for nonparticipating neighbors to know whether the lights will bother them. For example, if the lights are bright and close to a neighbor's house, additional mitigation such as complete vegetative screening (not Mr. Robinson's gapped plantings) may be necessary to prevent the lights from illuminating the neighbor's house. This reality is betrayed by the fact that Condition 15 still requires the lighting details to be fleshed out in a later plan. The Certificate cannot be

issued without first including this plan in the Application and testing the plan during the adjudicatory process.

C. The Application Lacks The Decibel Data And Mitigation Measures For Operational Noise From The Inverters Required By OAC 4906-4-08(A)(3).

1. Alamo Wants To Install Its Solar Project In An Extremely Quiet Community In Which New Noises Will Be Easily Heard.

Alamo wants to construct its solar project in a quiet rural community, as it discovered when its acoustics consultant, Hessler Associates, Inc., measured the background sound level in the Project Area. The background sound level "can provide some masking where it covers up the sound from some plant or source if it's high enough." Testimony of David Hessler, Transcript ("Hessler, Tr.") II 251:21 to 252:2. In the Project Area, the average L90 background sound level in daytime is "very low" at "only 34 dBA," which "means the background level is insignificant; there's no ability for it to cover anything up." Hessler, Tr. II 252:3-7. *Also see* Hessler, Tr. II 242:9-12. Ambient L90 sound levels in the Project Area typically range between 28 dBA and 40 dBA. Co. Exh. 2, Suppl. Applic. ("Hessler's Report"), p. 5; Co. Exh. 10, Hessler Testimony, p. 3, Answer 7. The acronym "dBA" as used in this measurement stands for A-weighted decibels. Hessler, Tr. II 242:3-8.

Hessler's Report on the project's anticipated noise impacts measures the ambient sound using the L90 metric, which the report characterizes as the "parameter of primary relevance and importance to this kind of survey." Co. Exh. 2, p. 4. This metric identifies the sound level exceeded during 90% of time. *Id*.

During the supplemental hearing, Alamo introduced a different sound metric into the discussion, the Leq, through Mr. Hessler's testimony. Tr. IV 638:22 – 639:21. Mr. Hessler did not define the Leq, or explain why its consideration has any relevance given the use by Hessler's

Report of the L90 to measure ambient sound. Hessler's Report provided a figure depicting both the L90 and Leq readings for the Project Area, but did not identify the average Leq for the Project Area and did not use the Leq readings for any purpose. Co. Exh. 2, p. 5. Hessler's Report does refer to the Leq as a metric that measures "average" sound levels (*id*.), and that nomenclature explains why the Leq should not be used to judge a project's noise impact. A simple mathematical exercise illustrates the reason why an average provides skewed results. For illustration, assume that we have 8 sound measurements of 30 dBA and two measurements of 50 dBA. An average would be 34 dBA, which exceeds the normal ambient sound of 30 dBA by four dBA for 80% of the time. If a new noise source received a noise limit based on the average of 34 dBA, this would result in uncomfortable levels of annoying noise off-site. For that reason, Hessler's Report uses the L90 metric, not the Leq metric, to judge the acceptability of the project's anticipated noise.

2. <u>OAC 4906-4-08(A)(3) Requires The Application To Describe The Operational Noise Levels Expected At The Nearest Property Boundary And At Each Habitable Residence</u>.

OAC 4906-4-08(A)(3) describes the information that the Application must provide about the anticipated noise impacts from the Facility:

> (3) Noise. The applicant shall provide information on noise from the construction and operation of the facility.
>
> ****
>
> (b) <u>Describe the operational noise levels expected at the nearest property boundary</u>. The description shall address:
>
> (i) Operational noise from generation equipment.…
>
> (ii) Processing equipment.
>
> (iii) Associated road traffic
>
> (c) <u>Indicate</u> the location of any noise-sensitive areas within one mile of the facility, and <u>the operational noise level at each habitable residence</u>, school,

church, and other noise-sensitive receptors, under both day and nighttime operations. Sensitive receptor, for the purposes of this rule, refers to any occupied building.

(d) Describe equipment and procedures to mitigate the effects of noise emissions from the proposed facility during construction and operation, including limits on the time of day at which construction activities may occur.

Emphasis added.

3. The Application Represents That The Sound From The Project's Inverters Is Almost Inaudible.

Alamo's Application is missing important noise information required by this rule for the inverters that Alamo plans to install in the solar fields. Inverters convert the energy from solar panels from direct current to alternating current and step up the voltage so it can be transmitted in a larger collection line. Herling, Tr. I 99:8-18. During that process, the inverters generate a humming noise and sometimes a high frequency ringing noise. Co. Exh. 2, Hessler Report, p. 12.

The Application represents that a solar facility "comes close to operating silently." Applic., p. 57. It further states that "the noise that inverters and their associated step-up transformers generate is inaudible at a distance of 50 to 150 feet from the source." Applic., p. 58. Alamo stated that this position is based on the report from Hessler Associates in Exhibit E of the Application. Applic., p. 58; Herling, Tr. I 101:8-17. Exhibit E subsequently was replaced by Hessler Associates' revised report in Company Exhibit 2 ("Hessler's Report").

Hessler's Report actually states that "field measurements indicate that inverter sound fades to insignificance relative to normal background levels at a distance of 150 ft.," not 50 to 150 feet as stated in the Application's narrative. Co. Exh. 2, Hessler Report, pp. 2, 15. Hessler's Report also contends that inverter sound "is rarely audible at the perimeter fence of typical solar fields." *Id*.

The Application estimates that there will be a distance of 50 feet between the solar equipment and the project's "site property boundary," as "conservatively interpreted." Applic., p. 57. The Application's false representation that Hessler's Report finds the inverter noise to be inaudible at 50 feet away is obviously intended to demonstrate that inverter noise will not reach nonparticipating neighbors' land and homes, since the Application's setbacks from the solar equipment to nonparticipants' property lines and homes are merely 25 feet and 100 feet, respectively.[3] Applic., p. 55.[4] However, the Application, including Hessler's Report, contains no noise data showing the amount of inverter noise that will travel 50 feet.

Actually, neither the Application's narrative nor Hessler's Report contain any noise data to show the amount of inverter noise that will travel 150 feet, either. The statement in Hessler's Report, representing that "field measurements indicate that inverter sound fades to insignificance relative to normal background levels at a distance of 150 ft.," is based on a report for the Massachusetts Clean Energy Center (hereinafter referred to as the "Massachusetts Report"). Co. Exh. 2, Hessler's Report, p. 13; Hessler, Tr. II 251:3-10. In fact, this statement is based solely on the Massachusetts Report, since this was Mr. Hessler's only information on inverter volume at the time he did his report. Hessler, Tr. II 259:9-14.

When called upon to find information in the Massachusetts Report revealing the volume of inverter noise at a distance of 150 feet away, Mr. Hessler confessed that the Massachusetts Report contained no such data. Hessler, Tr. II 259:15 to 263:3. He admitted that the report "tells you nothing about inverter noise really." Hessler, Tr. II 261:9-13. Even after taking a 20-minute intermission in the hearing to discuss the report with Alamo's counsel, Mr. Hessler was unable to

[3] The Amended Stipulation now calls for a 150-foot setback instead of the 100-foot setback.
[4] The setbacks are slightly larger where solar fields and nonparticipants' properties are separated by public roads, but much of the solar fields abuts nonparticipants' yards and land.

identify any such data in the report as revealed by the lack of redirect examination on the issue. Tr. 263:11-18, 264:4 to 267:17.

The Massachusetts Report did not identify the inverters' sound volumes at 150 feet away. Instead, it only found that the inverter sound at three study sites did not exceed the background sound levels at that distance. Hessler, Tr. II 259:15 to 263:3. However, "the normal background level varies from site-to-site." Hessler, Tr. II 251:11-13. And at the sites studied in the Massachusetts Report, the background sound levels were considerably higher than the 34 dBA average L90 background sound level in Alamo's Project Area. In contrast, the background sound levels in the Massachusetts Report ranged from 41.6 dBA to 50 dBA at a distance of 150 feet from the inverters. Hessler, Tr. II 256:16 to 257:17.

Mr. Hessler attempted to rescue his opinion by testifying that, after the Application was filed, he had measured sound from a solar inverter in New York State and found it equaled background at 100 feet away. Hessler, Tr. II 249:21 to 250:17. However, he did not say how high the background sound level was. Hessler, Tr. II 150:16-17. Nor did he produce any data or other written documentation for his measurements. This statement by Mr. Hessler does no more to identify the inverters' noise level at 150 feet, or at any other distance, than the Massachusetts Report.

Thus, the Application assures the public that the Project's inverters will be almost silent, which was based solely on Mr. Hessler's characterization of data in the Massachusetts Report. At the original hearing, Mr. Hessler was forced to admit that the Massachusetts Report contained no such data. Nevertheless, Mr. Hessler adamantly defended this position during the original hearing, representing that his measurement of sound from a single solar inverter in New York State supported the Application's statement that the sounds from inverters are barely audible.

4. Alamo Now Admits That Inverters Emit Noise At A Level of 38 dBA At A Distance Of 500 Feet.

As described above, the Application represents that a solar facility "comes close to operating silently" and that inverter sound "is inaudible at a distance of 50 to 150 feet from the source." Applic., pp. 57-58. Mr. Hessler insisted that these representations were accurate during the original hearing.

Mr. Hessler took a very different position at the supplemental hearing. By that time, he had obtained a manufacturer's sound test report for a commonly used inverter. Co. Exh. 15, Hessler Suppl. Testimony, p. 2, lines 11-20. He then used the manufacturer's data to model the noise from the central inverters for the Project. *Id*., lines 8-23. He discovered that central inverter noise is 38 dBA at a distance of 500 feet. *Id*., p. 4, lines 3-4. The contour map of noise levels in Mr. Hessler's supplemental testimony shows that noise from the central inverters will be as high as 40 dBA at the property lines of nonparticipating neighbors. Hessler, Tr. IV 636:17-22; Co. Exh. 15, Exh. DMH-S1 (with blue lines showing that 40 dBA from four inverters intersect or cross the project area's boundaries).

Mr. Hessler did not calculate the inverter noise level at a distance of 50 feet, which is the setback that he and the Application assured the Board would be adequate to avoid adverse noise impacts in the original hearing. Needless to say, the inverter noise level at 50 feet is higher than at 500 feet. The information introduced in the supplemental hearing on the actual 38 dBA noise level for inverters has destroyed any credibility for representations made by Alamo or Mr. Hessler.

With an average L90 ambient sound level of 34 dBA, the central inverters will increase the community's average noise level by four dBA to 38 dBA at 500 feet. Although Alamo

contends that the noise at neighboring nonparticipants' homes will not exceed 35 dBA, it will still raise the sound level to 40 dBA on neighboring land. Alamo attempted to disguise the harmful impact of this noise increase during the supplemental hearing by having Mr. Hessler testify that the 38 dBA is less than the Leq level of 39 dBA. Hessler, Tr. IV 638:22 – 639:21. There are two problems with this contention. First, nothing in Hessler's Report documents 39 dBA as an accurate Leq for the Project Area, and with a typical L90 range of 28 to 40 dBA, a 39 dBA Leq does not appear credible. Second, even if the Leq is 39 dBA, allowing the inverters' noise to come close to that level off-site would expose neighbors to unacceptable noise increases for most of the time that ambient sound is ranging between 28 dBA and 40 dBA. At 38 dBA, inverter noise would be 10 dBA above background at 500 feet when the ambient level is at the low end of its range at 28 dBA. At 50 or 150 feet away, the average noise increase likely is more than five dBA above background. This means that the representations in the Application and by Mr. Hessler during the original hearing that inverter sounds would fade to the 34 dBA ambient level within 50 feet, or even 150 feet, were demonstrably false.

While the Amended Stipulation attempts to compensate for the Application's failure to identify the noise levels for central inverters, neither the Application nor the Amended Stipulation identify the noise levels for string inverters. String inverters convert the electricity on a single string (row) of solar panels. Herling, Tr. IV 592:14 – 593:2. The project may use string inverters. Herling, Tr. IV 592:5-8.

OAC 4906-4-08(A)(3) requires the Application to identify "the operational noise levels" at the nearest property boundary and nonparticipants' residences for all project noise sources, and string inverters emit noise. Since string inverters can be sited "pretty much anywhere along a string of panels" (Herling, Tr. IV 607:9-13), string inverters can be located close to the project

border. Nevertheless, the Application contains no noise measurements or modeling for string inverters. At locations at which the noise from string inverters will be combined with noise from central inverters, the combined noise levels should have been modeled. Alamo could have provided this modeling, because David Herling had sound test information that he could have used for that purpose. Hessler, Tr. IV 619:11-16, 624:7-18. But Alamo neglected to tell him that string inverters might be used. Hessler, Tr. IV 624:20-24.

Mr. Herling represented that he has seen some string inverters, and their noise was not noticeable to him above the ambient noise levels. Herling, Tr. IV 608:10 – 609:3. But he did not measure the noise outputs from any of those string inverters, nor has he or anyone else at Alamo measured the sound from any string inverters. Herling, Tr. IV 611:23 – 612:11. Alamo did not even bother to request sound test reports for string inverters from the manufacturers. Herling, Tr. IV 612:12-14. Like Mr. Herling, Mr. Hessler said that string inverters are quiet. Hessler, Tr. IV 624:24 – 625:8. However, we have heard this tune before, in the original hearing, in which Mr. Herling reassured everyone that the solar arrays are "near-silent" and Mr. Hessler testified that inverter sound is "barely audible." Co. Exh. 7, Herling Testimony, p. 8, lines 21-23; Hessler, Tr. II 249:21-25. And those assertions now have been proven false by Mr. Hessler's modeling of 38 dBA at a distance of 500 feet. So there is no reason to believe the same type of testimony for string inverters, unless their noise has been modeled. String inverters do produce noise, as shown by Mr. Hessler's acknowledgement that their humming can be heard at about 65 dBA at a distance of one meter. Hessler, Tr. IV 625:2-4. This level is comparable to the sound from a central inverter, which emits 60 to 70 dBA at 10 feet. Co. Exh. 2, Suppl. Applic., p. 12. Sound modeling should have been included in the Application for string inverters, as well as central inverters.

5. Revising The Setback Between Solar Equipment And Nonparticipants' Homes By Stipulation Does Not Satisfy The Requirements In OPSB's Rules That The Application Provide The Setbacks And Noise Estimates At Project Boundary Lines And Nearby Homes.

The Application states that "[t]he Project will be designed to site the inverters within the solar fields to ensure they do not cause material, adverse impacts to any sensitive, off-site receptors." Applic., p. 58 (emphasis added). Given the Application's 25-foot setback from nonparticipants' property lines, the inverters could be a mere 25 feet from the boundary and still comply with the Application's statement that they will be located "within the solar fields."

In the original hearing, Mr. Herling testified that inverters should be located "in the center of the Project" "in the center of an array," to efficiently gather the energy from the panels. Herling, Tr. I 101:18-25. He said that no inverter will be located within 150 feet of a residence. Herling, Tr. I 103:5-6. But he admitted that the Application does not identify the locations for the inverters. Herling, Tr. I 102:5-8, 109:10-12. At the original hearing and in its two subsequent post-hearing briefs, Alamo refused to agree to a condition in the Stipulation requiring the company to site the inverters even 150 feet from the property line. Herling, Tr. I 110:3 to 111:12.

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. The Application fails to identify the inverter noise levels at the nonparticipants' residences within a mile of the Facility.

Realizing the indefensibility of its position, Alamo has now entered into an Amended Stipulation with its allies that would institute a 500-foot setback between central inverters and the homes of nonparticipating neighbors. This attempt to retrofit a new setback into the Project by stipulation does not comply with the mandate of OAC 4906-4-04(B)(1) to include the setback in the Application in a constraint map that shows the locations of nonparticipants' homes in relation to the facility. David Hessler's supplemental direct testimony contains a map showing locations using this new setback for central inverters with sound contours around them. Co. Exh. 15, Exh. DMH-S1. Neither the Application nor the Amended Stipulation contain this map or require Alamo to adhere to this map. This information should have been included in the Application, where it could have been subjected to public comment, discovery, and the complete adjudicatory process and made enforceable as a condition of the certificate.

Neither the Application nor any witness testimony reveals the sound level at boundary lines and sensitive receptors from string inverters. Without including this information in the Application as required by rule, OPSB cannot issue a certificate for the Alamo project.

6. <u>The Application Fails To Describe The Mitigation Equipment And Procedures For Mitigating Noise Problems From Operating The Inverters As Required By OAC 4906-4-08(A)(3)</u>.

OAC 4906-4-08(A)(3) describes the information that the Application must provide about the anticipated noise impacts from the Facility:

> (3) Noise. The applicant shall provide information on noise from the construction and operation of the facility.
>
> ****
>
> (d) <u>Describe equipment and procedures to mitigate the effects of noise emissions from the proposed facility during construction and operation</u>, including limits on the time of day at which construction activities may occur.

Emphasis added.

Hessler's Report states that options exist for mitigation of inverter noise "should any problems arise" during operation. Co. Exh. 2, Hessler Report, p. 2. These mitigation measures include cabinet damping and ventilation silencers. *Id*. at 13. However, except for including silencers, this statement conflicts with the mitigation measures identified in Mr. Hessler's supplemental testimony: acoustical hoods, louvers, and silencers. Co. Exh. 15, p. 4, lines 13-15. Consequently, the Application fails to identify the mitigation measures that will be used to address noise problems from the inverters, not to mention that mitigation is a poor substitute for the Application's failure to employ proper siting to prevent the problem altogether.

D. The Application Lacks Effective Measures To Minimize Disagreeable Noise From Construction Required by OAC 4906-4-08(3)(d).

OAC 4906-4-08(A)(3) requires the Application to contain the following information about noise levels expected to occur during construction of the Facility:

> (3) Noise. The applicant shall provide information on noise from the construction and operation of the facility.
>
> (a) Describe the construction noise levels expected at the nearest property boundary. The description shall address:
>
> (i) Blasting activities.
>
> (ii) Operation of earth moving equipment.
>
> (iii) Driving of piles, rock breaking or hammering, and horizontal directional drilling.
>
> (iv) Erection of structures.
>
> (v) Truck traffic.
>
> (vi) Installation of equipment.
>
> ****
>
> (d) Describe equipment and procedures to mitigate the effects of noise emissions from the proposed facility during construction and operation, including limits on the time of day at which construction activities may occur.

Emphasis added.

The Application predicts that "numerous piles" will be driven into the ground to serve as posts for the solar panels. Applic., p. 57. The Facility will hold between 186,400 and 279,600 solar panels. Applic., p. 8. The posts for the solar panels will be pounded or screwed into the ground. Herling, Tr. I 44:10-20. They are screwed into the ground if bedrock is encountered. Herling, Tr. I 44:1-19.

The Application admits that the pile driver and/or drill rig truck used to drive the posts into the ground will produce a noise that is 84 dBA at a distance of 50 feet, which the Application represents to be "conservatively interpreted" as the distance to the project's boundary. Applic., p. 57; Hessler, Tr. II 253:6-18. This is equivalent to the noise from a bulldozer. Co. Exh. 2, Hessler's Report, p. 14, Table 6.0.1; Hessler, Tr. II 254:6-8. The pile driver used to install solar panel posts "does make a disagreeable noise." Hessler, Tr. II 255:9-16.

The Application states that the pile driving noise will be "temporarily produced." Applic., p. 57. Hessler's Report asserts that this activity will be "fairly short-lived in any particular location." Co. Exh. 2, Hessler Report, p. 2. Mr. Hessler speculated that posts are typically installed in a particular area within "I would speculate, a week or two." Hessler, Tr. II 243:15-24.

However, no information in the Application supports this optimistic prediction. To the contrary, the construction of a solar project typically takes nine to 12 months. Herling, Tr. I 95:11-13. While installing posts may not take that entire time period, Alamo has provided no information to identify how long this task will take. For example, Mr. Herling could not say how long it will take to install the solar panel posts in a 300-acre solar field in the Facility that adjoins properties owned by at least six non-participating families. Herling, Tr. I 96:3-25. Each

solar panel has its own post. *See* the diagram of the solar panel unit in Exh. I of the Application, Figure 2, Sheet 1. With one post per solar panel, the Facility will install between 186,400 and 279,600 posts. Thus, the neighbors could be subjected to these loud, "disagreeable" noises over a considerable period of time. Certainly, nothing in the Application or hearing testimony indicates otherwise.

Simply requiring Alamo to stop pounding the metal posts at dusk, as suggested by proposed Condition 13 of the Stipulation, will not provide the Facility's neighbors with adequate relief from this noise. Pursuant to OAC 4906-4-08(A)(3)(d), OPSB should not issue a certificate without first instructing Alamo to devise more effective mitigation measures to address this noise.

E. The Application Lacks The Procedures Necessary To Comply With The Requirements In OAC 4906-4-08(E)(2) For Avoiding And Repairing Damage To Field Drainage Tiles.

OAC 4906-4-08(E)(2) provides:

> (2) Agricultural information. The applicant shall provide, for all agricultural land, and separately for agricultural uses and agricultural districts identified under paragraph (E)(1) of this rule, the following:
>
> ****
>
> (b) An evaluation of the impact of the construction, operation, and maintenance of the proposed facility on the land and the following agricultural facilities and practices within the project area:
>
> ****
>
> (iii) Field drainage systems.
>
> ****
>
> (c) A description of mitigation procedures to be utilized by the applicant during construction, operation, and maintenance to reduce impacts to agricultural land, structures, and practices. The description shall illustrate how avoidance and mitigation procedures will achieve the following:
>
> (i) Avoidance or minimization to the maximum extent practicable of any damage to field tile drainage systems and soils in agricultural areas.
>
> (ii) Timely repair of damaged field tile systems to at least original conditions, at the applicant's expense.

Emphasis added.

The vigilant monitoring, maintenance, and repairs of field drainage tiles are of utmost importance to a crop farmer. Wet fields cannot be planted or harvested. Flooded fields kill crops. For example, planted corn seeds or small corn plants will die if they are flooded for 24 to 48 hours. Direct Testimony of Donn Kolb ("Kolb Testimony"), p. 4, A.7. Damaged tiles must be repaired immediately to prevent this damage. *Id*.

Contrary to OAC 4906-4-08(E)(2)(c)(ii), the Application does not provide for the "[t]imely repair of damaged field tile systems to at least original conditions." The Application states only that Alamo will "use commercially reasonable efforts" to repair tiles. Applic., p. 93. This implies that Alamo will not repair damaged tiles if it deems the repairs to be too costly or difficult, and sets up a conflict with language in Condition 16 that requires all damaged tile systems to be repaired. Although Mr. Herling disclaimed any such intent (Herling, Tr. I 119:16 to 120:5), there is a potential that Alamo may interpret this ambiguous term to excuse the company from making repairs in the future. This does not satisfy the rule's mandate to repair all damaged tiles. A certificate should not be issued as long as the Application contains this vague language.

The timing of repairs also is a problem. The Application states that repairs will be made "promptly." Applic., p. 93. Stipulation Condition 16 muddles the meaning of this commitment by requiring tiles to be "promptly repaired no later than 30 days after such damage is discovered." The witnesses had various interpretations as to the meaning of this requirement. Mr. Kolb believed that the stipulated condition would allow up to 30 days of flooding to occur, even if immediate repairs were necessary to save a flooded crop that otherwise would perish in

24 to 48 hours. Kolb Testimony, p. 4, A.7. Staff member Mark Bellamy thought that this provision requires repairs "as quickly as feasible" or "as soon as possible." Bellamy, Tr. III 539:20 to 540:10. Doug Herling opined that the provision allowed up to 30 days where earlier repairs were not necessary to prevent damage to a neighboring property. Herling, Tr. I 142:19 to 143:3. He was unable to define the proposed condition's use of "promptly." Herling, Tr. I 143:4 to 144:1.

If a certificate is issued, Condition 16 badly needs repair. The Concerned Citizens recommend the following sentence utilizing Mr. Bellamy's interpretation of the condition's intent: "Damaged field tile systems shall be replaced as quickly as feasible, but in no event later than 30 days after the damage is discovered." Making this change is necessary to satisfy the edict in OAC 4906-4-08(E)(2)(c)(ii) for the "[t]imely repair of damaged field tile systems." . If broken tiles are not replaced early enough to prevent damage, the certificate should require the Applicant to reimburse the damaged landowner for the resulting loss based on an estimate of loss provided by a Certified Crop Advisor.

Condition 16 should use the term "replaced" throughout its language instead of "repaired." Broken tiles or sections of tiles must be replaced; they cannot be repaired by patching them. Kolb Testimony, p. 4, A.7; Herling, Tr. I 118:14-17.

The Application does not satisfy the requirement in OAC 4906-4-08(E)(2)(c) to provide procedures for avoiding and mitigating damage to field tiles. Some of the tiles in the Project Area have reached or are close to reaching their life expectancy and will need to be replaced completely when they fail, including a main tile that flows from the Project Area through Mr. Kolb's tile. Kolb Testimony, p. 4, A.7. Procedures for these replacement activities will necessitate the temporary removal of solar panels to provide room for the equipment used to

replace the tiles, but no such procedures are provided. *Id*. at pp. 4-5. The Application does not identify any procedures that will be used to determine whether tiles have been broken, damaged, or deteriorated during project operation, even though tiles reach the end of their usable lives over time. Herling, Tr. I 60:8 to 61:6. Thus, the Application does not discuss this issue, nor deal with it. Applic., p. 93. Neither does the Stipulation. Kolb Testimony, p. 4, A.7.

In addition, the Application must provide a procedure for detecting tile damage caused by construction. A construction crew will not be able to tell that a tile has been broken if the posts for the panels are driven into the ground. Kolb Testimony, p. 3, A.7. Clay or plastic tiles offer little resistance to heavy pressure. *Id*. The construction workers will not be able to hear the tiles break over the noise resulting from pounding the metal posts into the ground. *Id*. The Application must be amended to provide a procedure for detecting this tile damage at the time it occurs, rather than waiting for flooding to occur to look for the damage. Without such a provision, the Application does not comply with the mandate in OAC 4906-4-08(E)(2)(c)(i) to avoid damage to tiles "to the maximum extent practicable."

The Application also fails in another way to satisfy the requirement in OAC 4906-4-08(E)(2)(c)(ii) to provide procedures for the "[a]voidance or minimization <u>to the maximum extent practicable</u> of any damage to field tile drainage systems." Emphasis added. To comply with this standard, Alamo must consult with landowners whose land may be affected by any tile that Alamo damages or blocks. *Id*. Consultation with all potentially affected upstream and downstream landowners (both adjacent and non-adjacent to the Project Area) is essential to make sure that the Applicant and County Engineer have all of the information they need to address the problem. *Id*. This consultation is necessary to make sure the tile repairs or replacement are effective to correct any drainage problem on the affected landowners' land. *Id*.

Mr. Herling acknowledged that the Application and Stipulation do not require Alamo to consult with adjoining non-participating landowners about how to repair tiles that may affect their drainage. Herling, Tr. I 144:19 to 145:6, 146:4-9. Nor was he willing to agree to a certificate condition requiring this consultation, arguing that he had to consult with his co-workers first. Herling, Tr. I 145:7 to 146:3.

In addition to the foregoing deficiencies, the Application and the original Stipulation did not require Alamo to contact nonparticipating landowners to obtain information about the locations of their tiles to assist Alamo in avoiding tile damage. At that time, Alamo refused to make a commitment to engage in this act of common sense. The Amended Stipulation now requires Alamo to make those efforts and it has begun that process. Remarkably, however, the Amended Stipulation does not correct any of the other problems noted above, not even the issues that could have been fixed with simple revisions in language.

In sum, the Application is noncompliant with OAC 4906-4-08(E)(2)(c) for six reasons: (1) the Application states only that Alamo will "use commercially reasonable efforts" to repair tiles, instead of providing for the "[t]imely repair of damaged field tile systems to at least original conditions;" (2) while the Application states that repairs will be made "promptly, Stipulation Condition 16 conflates "promptly" with 30 days even where immediate repairs are essential to prevent crop damage; (3) the Application does not identify any procedures that will be used to determine whether tiles are broken, damaged, or deteriorated due to old age or other causes during project operation; (4) the Application does not identify any procedures for replacing damaged tiles, especially where a long segment has deteriorated due to old age; (5) the Application provide no procedure for detecting tile damage caused by construction, which

cannot be heard over the loud noise of post driving; and (6) the Application does not require Alamo to consult with affected non-participating landowners to repair tiles.

F. The Application Does Not 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).

OAC 4906-4-08(A) provides:

> (A) The applicant shall provide information on health and safety.
>
> (1) Equipment safety. The applicant shall provide information on the safety and reliability of all equipment.
>
> (a) Describe all proposed major public safety equipment.
>
> (b) Describe the reliability of the equipment.
>
> ****
>
> (d) Describe the measures that will be taken to restrict public access to the facility.

Emphasis added. The Application contains little provision for security to prevent criminals from stealing wire and other recyclable components at the Facility. This makes the Facility an easy target that could attract criminals to the community where they might also harm Concerned Citizens.

While this rule requires the Application to describe all proposed major public safety equipment, its reliability, and measures to prevent public access, the Application only identifies "perimeter fencing with locked gates" and "warning signage." Applic., p. 54. These generic descriptions do little to satisfy the rule's objective for public safety.

The solar Facility will be largely isolated. The Application states that "[o]nly a few operational personnel will be needed for the Project, and they will be present at any given location in the Project only occasionally." Applic., p. 75. "On most days, at any particular location at the Project, no operating personnel will be present." Applic., p. 75. Alamo does not

plan to have security personnel in the Project Area at night to deter crime. Herling, Tr. I 163:24 to 164:4.

Mr. Herling testified that "it's likely there will be security cameras" and that personnel will do security checks "[p]robably multiple times a week." Herling, Tr. I 127:21 to 128:1. However, these security measures are not laid out in the Application. Mr. Herling could not say how frequently the security checks would occur. Herling, Tr. I 128:2-5. He said: "I can't speak to that exactly, no." Herling, Tr. I 128:5.

Mr. Herling testified that each solar field will be fenced with locked gates. Herling, Tr. I 40:8-10. The type of locks has not been decided; Alamo will let the operator decide what type of lock to use. Herling Tr. 40:14-17. They typically have a keypad or padlock. Herling, Tr. I 40:10-13. Mr. Herling does not know if a thief can cut off the locks, because he does not know what kind of lock will be used. Herling, Tr. I 40:18-22.

Mr. Herling thought the solar fields would be surrounded by chain-link fence. Herling, Tr. I 41:11-21. The Application states that "[f]encing is expected largely to be standard, chain-link material." Applic., p. 13. But Mr. Herling testified that the Application does not commit to the type of fence that will be used, because Alamo wants to preserve the option to use wood and other materials. Herling, Tr. I 41:11 to 42:1. He does not know whether thieves could cut through a chain link fence with a blowtorch, but presumes that they can. Herling, Tr. I 42:2-5.

Evidently, Alamo has given little thought to how it will prevent criminal access to its Facility. Certainly, the Application lacks the detail necessary to assure the public that the Facility will be designed and operated to prevent an increase in neighborhood crime. By attracting criminals to the community, the Facility will increase crime against the neighborhoods as criminals see and seize opportunities to commit crimes against other persons and their

property. The Application provides no analysis of crime threats to its Facility, nor does it identify design features or operational practices to reduce criminal threats. As with many other potential problems for this Facility, the Application deprives the Board and the public of the information necessary to determine whether and/or to what degree the Facility will harm the public and what measures should be taken to address these threats. A certificate should not be issued without adding a thorough evaluation of this issue in the Application.

G. The Application Fails to Evaluate The Impact To Groundwater From Contaminants That Might Be Released From Solar Panels By Vandals And Disasters As Required By OAC 4906-4-08(A)(4).

OAC 4906-4-08(A)(4) provides:

> (4) Water impacts. The applicant shall provide information regarding water impacts.
>
> (a) Provide an evaluation of the impact to public and private water supplies due to construction and operation of the proposed facility.
>
> ****
>
> (c) Provide existing maps of aquifers, water wells, and drinking water source protection areas that may be directly affected by the proposed facility.

The Application does not adequately evaluate the impact to underground water supplies from contaminants that could be released from the solar panels by natural disasters or human destruction.

Consequently, the Concerned Citizens request that the Board require Alamo to perform a complete risk assessment (chemicals, weather, fire, theft, etc.) and review of the solar company's risk mitigation plans including training of fire and emergency personnel, etc. to ensure the risk mitigation plans adequately address all of the risks. Clippinger Testimony, p. 15, A.28. Alamo also should conduct an analysis of what wind speeds the solar panels can withstand including an assessment of how the panels are attached to the pilings. *Id*. These studies should be performed

before the Board acts on the Application, so that the certificate, if issued, can include any protective conditions found by the studies to be necessary. Drafts of the consultant(s)' studies should be made available for public comment prior to finalization.

The Concerned Citizens are concerned that the Stipulation does not adequately protect soil and water from contamination that could occur if severe weather arises such as high winds, hail, and the recent tornadoes that hit Preble County and Montgomery County, a fire starts in the solar field, lightning strikes the field, or thieves break or damage the solar panels. Clippinger Testimony, p. 11, A.23. All of these events can release contaminants onto the ground and consequently into the ground water and into the surface water run-off. *Id*. Since literature from Open Road Renewables states the solar panels contain "some chemicals," water and soil contamination are a major concern. *Id*. To ensure a safe water quality throughout the entire project duration, the Concerned Citizens request that the company managing the solar facility fund and jointly select with the Concerned Citizens an independent, third party company to analyze the entire chemical composition of the well water on farms adjacent to the solar farm and in Gasper and Washington Townships. *Id*. The testing should be conducted (1) prior to the start of any construction, (2) annually during every year of facility operation, (3) annually during decommissioning, site clearance, and the return of the land to productive farm use, and (4) at the end of all activity on the site. *Id*. The Stipulation should require the facility to immediate remediate any abnormalities in the chemical composition of the water and to supply replacement water to all impacted individuals so long as the water quality is impacted. *Id*.

The Board also should require the Applicant to provide an accurate and complete listing of all water wells and their locations in the vicinity of the Project Area as part of the Application. *Id*. Joanna Clippinger's water well was not included in Figure 8 entitled "Map of Drinking

Water Resources" in the supplement to the Application. *Id*. This failure violates the requirement in OAC 4906-4-08(A)(4) for maps of water wells that may be directly affected by the Facility.

H. The Application Does Not Contain Adequate Provision For Emergency Services As Required by OAC 4906-4-08(A)(1)(e).

OAC 4906-4-08(A)(1)(e) provides:

> (e) Describe the fire protection, safety, and medical emergency plan(s) to be used during construction and operation of the facility, and how such plan(s) will be developed in consultation with local emergency responders.

The Application contains only a terse statement that Alamo will develop an emergency response plan for law enforcement, fire, medical and ambulance, with a brief list of the types of information that the plan will contain. Applic., p. 55. This is insufficient to safeguard the neighbors from crime, fires, and other emergencies. The Stipulation attempts to fill some of the gaps in the Application, but the Stipulation also fails to adequately protect the public.

The Application fails to provide for protection against criminals who will be attracted to steal the Facility's recyclable materials. The county sheriff's office provides law enforcement services to Gasper Township, but its deputies do not regularly patrol the township. Clippinger Testimony, p. 10, A.21. The county sheriff's office has only two deputies available to patrol the entire county at any given time. *Id*. Their responses to potential thefts or break-ins at the Project could detract from the deputies' needed presence in other areas of the township and county. *Id*. Because the county lacks the funding necessary to hire the deputies necessary to patrol the Project Area, Alamo should be required to provide the county with the funding necessary to hire a deputy for that purpose. *Id*. at p. 15, A.27.

Proposed Stipulation Condition 27 requires Alamo to pay for any specialized equipment necessary to fight fires or respond to emergencies at the Facility. However, the Application also should commit to funding any additional fire and/or emergency response personnel necessary to

adequately service the Facility. The Application contains no analysis of the personnel needs that will result from the presence of the Facility, and without this information, the Application provides no assurance of the Facility's safety.

The proposed condition also fails to provide sufficient training for fire and emergency response personnel on how to deal with the particular hazards for the Facility. Although the condition provides for training sessions prior to Facility construction, it requires only periodic safety meetings thereafter. This arrangement fails to provide for adequate training. The volunteer firefighters and emergency responders serving the area have a high turnover rate. Clippinger Testimony, p. 14, A.27; Clippinger, Tr. III 472:8-21. Mr. Herling, based on his own experience in a volunteer EMS, acknowledges that "there's certainly turnover." Herling, Tr. I 150:16-21. So the new personnel would not receive the safety training, but would only hear the information by word-of-mouth. Herling, Tr. I 159:22 to 160:3. Herling cannot say what information will be included in the periodic safety meetings, because Alamo has not developed the training plan yet. Herling, Tr. I 158:13-18. Therefore, emergency training for local fire and EMS service providers should be held annually during the Project's construction and operation.

I. The Application Fails To Determine Whether Solar Equipment Will Obstruct Motorist Visibility at Intersections.

The Application provides for a 25-foot setback between the Facility fence and the public roads. Applic., p. 54. Condition 3 of the original Stipulation expanded the setback by applying it to the roads' rights-of-way instead of the edges of the roads. Herling, Tr. I 132:21 to 133:1. Amended Stipulation Condition 3 adds language to make this expansion more explicit.

Mr. Herling did not know how much additional distance this added to the setback. Herling, Tr. I 132:2 to 133:23. Although Mr. Robinson stated in his written testimony that the original and expanded setbacks provided enough distance for motorist visibility, he offered no

rationale or evidence to support that statement. Co. Exh. 13, Robinson Testimony, p. 10, lines 6-9. He did not even know how much distance was added by the expansion of the setback. Tr. 360:21-24. Nor did the Staff's lead reviewer, James O'Dell. O'Dell, Tr. II 420:8-11. Alamo could have provided this information during the supplemental hearing, but failed to do so.

Without knowing the distance between the solar fences and the public roads, the Board has no way of determining whether the solar project will obstruct motorists' views of the crossroads at intersections. Alamo has the burden of proof to demonstrate that its solar facility will not cause this problem, but has not sustained this burden. The Application must be supplemented to supply this information.

J. <u>The Application Does Not Provide For The Control Of Noxious and Invasive Weeds, Contrary To OAC 4906-4-08(E)</u>.

OAC 4906-4-08(E) provides:

> (E) The applicant shall provide information regarding agricultural districts and potential impacts to agricultural land.
>
> ****
>
> (1) Agricultural information. The applicant shall provide, for all agricultural land, and separately for agricultural uses and agricultural districts identified under paragraph (E)(1) of this rule, the following:
>
> ****
>
> (c) A description of mitigation procedures to be utilized by the applicant during construction, operation, and maintenance to reduce impacts to agricultural land, structures, and practices.

Although OAC 4906-4-08(E)(2)(c) requires the Application to contain mitigation procedures to prevent damage to agricultural land, the Application contains no procedures for preventing noxious or invasive weed species from spreading from the Facility to the neighbors' farmland.

Crop farmers continually have to fight against weeds that damage their crops by competing with the crops for water, nutrients, and space. Clippinger Testimony, p. 7, A.14. Noxious and invasive plant species, if allowed to grow on the Project Area, will spread to the

farmers' land, damage their crops, and increase their work to eliminate these weeds. *Id*. Some of these weeds, such as honeysuckle, send down roots that clog drainage tiles. *Id*. at p. 8, A.16. The Concerned Citizens already experience these problems with noxious plant species: thistle, johnson grass, honeysuckle, horse weed, giant ragweed, and especially pig weed. *Id*. at p. 7, A.14. The Project should be required to use only native seeds and plants that are certified to be free of noxious and invasive plant species and should be required to promptly eliminate any noxious and or invasive plants that appear in the Project Area so that they do not spread to nearby farm land. *Id*. at pp. 7-8, A.14.

The Application states that Alamo plans to plant vegetation inside and outside of the solar fields. Applic., pp. 12, 76. However, the Application provides no procedures for ensuring that its plant seeds do not include weeds that can invade surrounding farm fields and natural areas. Nor does it provide for eradicating honeysuckle and other invasive or noxious plant species that may sprout in the Facility. Instead, it only states that operating personnel "may" use herbicides to control noxious weeds, without any enforceable commitment to do so. Applic., p. 76. Thus, the Application is deficient under OAC 4906-4-08(E)(2)(c).

Stipulation Condition 18 attempts to compensate for the Application's deficiency, but the proposed condition itself is deficient. The proposed condition would require Alamo to consult with the Ohio Seed Improvement Association to identify vendors who sell seeds certified to be free of seeds of noxious or invasive weeds. Herling, Tr. I 150:10-16. But Alamo has to plant seeds from these certified vendors only if "practicable", *i.e*., if this seed is available for the type of ground cover Alamo wants to plant. Herling, Tr. I 149:5-24. If it is not available, Alamo would seek another source of seeds without noxious or invasive weed species seed. Herling, Tr.

I 151:9-18. However, Alamo is not willing to agree to a condition requiring the company to do this, so its promise is unenforceable. Herling, Tr. I 151:19 to 152:18.

The Stipulation contains no procedures for controlling invasive and noxious weeds at the Facility. Proposed Condition 18 only requires Alamo to submit a post-certificate vegetation plan outlining "the steps to be taken to prevent establishment and/or further propagation of noxious weed identified in OAC 901:5-37 during implementation of pollinator-friendly plantings." This approach has two failings. First, the weed controls required in the vegetation plan appear to be limited to the area in which pollinators are planted. Second, submitting a post-certificate vegetation plan to the Staff without scrutiny and public comment during the Application process does not satisfy Alamo's responsibility to include these procedures in the Application as mandated in OAC 4906-4-08(E)(2)(c). The preliminary vegetation plan attached to Mr. Robinson's supplemental testimony does not cure this defect, since it is not included in the Application (Herling, Tr. IV 602:21-25) or made enforceable by the Amended Stipulation (Conway, Tr. IV 682:7-12).

K. The Application Does Not Provide The Data Required By OAC 4906-4-08(B)(2) To Evaluate The Project's Potential Adverse Impacts on Wildlife.

OAC 4906-4-08(B) provides:

(B) The applicant shall provide information on ecological resources.

(2) Ecological information. The applicant shall provide information regarding ecological resources in the project area.

****

(c) Provide the results of a literature survey of the plant and animal life within at least one-fourth mile of the project area boundary. The literature survey shall include aquatic and terrestrial plant and animal species that are of commercial or recreational value, or species designated as endangered or threatened.

(d) Conduct and provide the results of field surveys of the plant and animal species identified in the literature survey.

Emphasis added. Alamo performed only a partial literature search for animal life in the vicinity of the Project Area as required by OAC 4906-4-08(B)(1)(c), and did not conduct and provide the results of any field surveys for the animal species identified in the literature survey as mandated by OAC 4906-4-08(B)(1)(d). Providing a full list of species is not a burdensome requirement. These lists are readily available online from government agencies and nature organizations. All Alamo needed to do was to copy the lists and append them to its Application, as hundreds of other applicants have routinely done in other OPSB applications.

Alamo provided a literature survey for only plant and animal species that are endangered, threatened, of concern, or of special interest. Applic., Exh. G, Appx. C. It did not provide a literature survey for all plant and animal life within at least one-fourth mile of the Project Area as required by the first sentence of OAC 4906-4-08(B)(1)(c). The second sentence of this provision, requiring species of commercial and recreational value and endangered or threatened species to be included in the literature survey, does not limit the scope of the first sentence. The failure to catalogue and evaluate all other species in the area would leave a huge gap in the Application's "information regarding ecological resources in the project area" contrary to OAC 4906-4-08(B)(1).

Even though Alamo's literature survey was incomplete, it still contains hundreds of species for which Alamo failed to search in field surveys. The Alamo representations on Pages 69 and 71 of the Application that it conducted these fields surveys in accordance with OAC 4906-4-08(B)(1)(d) are false. Applic., pp. 69, 71. In fact, the report from Alamo's ecology consultant, Cardno, Inc., expressly states that "[a]t this time, no species-specific surveys have been conducted for the Alamo Solar Project." Applic., Exh. G, p. viii.

Cardno's employees visited the Project Area only to conduct surface water delineation surveys and habitat evaluations. Rupprecht, Tr. II 289:17-23. This field work was done for the purpose of looking at the surface waters in the area. Rupprecht, Tr. II 289:21-23. While Cardno's report states that its employees saw no eagle and raptor nests or rare, threatened, and endangered (RTE) species of plants and animals while they were conducting their surface water surveys, the employees did not specifically look for those species or any other wildlife. Applic., p. 71; Applic., Exh. G, pp. 4-6, 4-7, 4.8, and 6-2, §§ 4.4.2.1, 4.4.2.2, 4.4.2.3, 4.4.3.2, and 6.1.2. For example, while the Application states (at p. 71) that Cardno observed no evidence of bat activity, Cardno's reporting on bat activity acknowledges that "the actual utilization of available habitat could not be determined by Cardno field staff as surveys were conducted during the day." Applic., Exh. G, p. 4-7, § 4.4.2.3. Cardno stated that it did not find RTE plant species during its surface water survey, "however, Cardno did not conduct species-specific surveys for these plants." Applic., Exh. G, p. 4-8, § 4.4.3.2. Consequently, the Application's narrative admits that "these field observations did not constitute formal presence/absence surveys for specific species." Applic., p. 71. And Ryan Rupprecht, the Cardno witness who testified for Alamo, admitted that Cardno performed no bird or mammal surveys. Rupprecht, Tr. II 278:11-18. Nor did Cardno record the species of birds or mammals seen in the Project Area. Rupprecht, Tr. II 280:8-21. The Cardno employees who visited the Project Area were not even experts on bird identification. Rupprecht, Tr. II 276:24 to 277:6, 277:13-18.

Cardno found species of trees in the Project Area that are used by bats, including the endangered Indiana bat. Rupprecht, Tr. II 284:13-17, 287:2-10. Five bat species are native to the area. Rupprecht, Tr. II 287:18-22. The U.S. Fish and Wildlife Service recommended a bat survey to look for Indiana bats, but Cardno did not do one. Rupprecht, Tr. II 284:8-10, 286:7-16;

also see the U.S. Fish and Wildlife email of July 30, 2018 in Exhibit G of the Application.[5] The Application contains no such survey. See Applic., Exh. G. Cardno did not visit the Project Area at dark, so it would not have expected to see bats during its visits. Rupprecht, Tr. II 287:11-17; Applic., Exh. G, p. 4-7, § 4.4.2.3.

Accordingly, the Application does not contain the complete literature survey on plant and animal species required by OAC 4906-4-08(B)(1)(c). It fails to include any of the field surveys required by OAC 4906-4-08(B)(1)(d). While Alamo contends its Facility will not seriously harm wildlife, it has no data to support that claim. A certificate cannot be granted without the information necessary to determine the Facility's effects on wildlife and to identify mitigation measures necessary to address those effects.

K. 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.

OAC 4906-4-08(B)(3) provides:

> Operational ecological impacts. The applicant shall provide information regarding potential impacts to ecological resources during operation and maintenance of the facility.
>
> ****
>
> (b) Describe the procedures to be utilized to avoid, minimize, and mitigate both the short- and long-term impacts of operation and maintenance.…
>
> (c) Describe any plans for post-construction monitoring of wildlife impacts.

Emphasis added. Because Alamo did not conduct the literature search and fields surveys necessary to identify the plant and animal species in the area, the Application also fails to

[5] Page 2 of this email states that "we do not anticipate adverse effects to any other federally endangered, threatened, proposed, or candidate species," i.e., any species other than the Indiana bat and northern long-eared bat referenced earlier in the letter. During the hearing, Alamo attempted to misrepresent this statement as stating that no effects on any endangered species were expected. Rupprecht, Tr. II 304:17 to 305:5, 309:20 to 311:6.

evaluate the Facility's potential impacts on these species during operation and the mitigation measures necessary to minimize that harm. These failures violate OAC 4906-4-08(B)(3).

In addition, the Application fails to evaluate the potential impacts on deer, raccoon, and coyote populations excluded from the Project Area by fencing the solar fields. Deer, coyotes, and other wildlife frequent the farm fields in and near the Project Area. Clippinger Testimony, p. 9, A.18. Ms. Clippinger testified that she often sees deer and other animals in these fields, including the fields in the Project Area. *Id*. She produced photographs of a deer in her corn field, and damage caused by deer eating the corn in her field. *Id*., Exhs. B and C. The Project will be surrounded by fences that keep deer, coyotes, and other animals out of the Project Area. Clippinger Testimony, p. 9, A.18. This will reduce the area available for these animals to roam and forage, which will force them to roam on surrounding lands where they will eat the Concerned Citizens' crops, and on public roads, where they will be prone to vehicle collisions. *Id*. The Concerned Citizens already experience substantial crop damage from wildlife, and the Project is expected to increase these losses. *Id*. If the coyotes' range is reduced by the fences, they are more likely to congregate near Ms. Clippinger's farm and attack her calves. *Id*. Deer and other animals from the Woodland Trails facility already enter her land to eat the crops, and decreasing their foraging area by fencing off the Project Area will increase her crop damage. *Id*.

The reduction of space for deer to occupy will pack them closer together, making the spread of disease easier among them. Clippinger Testimony, p. 9, A.19. Lepto and Tuberculosis are two diseases common in deer that also infects cattle. *Id*.

Alamo's wildlife witness, Ryan Rupprecht, did not dispute that deer, raccoons, and coyotes may be present in and around the Project Area. Rupprecht, Tr. II 278:24 to 279:6,

282:2-7. He agreed that deer will not be able to use the Project Area for foraging once the project is fenced. Rupprecht, Tr. II 281:8-13.

The Application contains no data on the size of the deer, raccoon, and coyote populations that use the Project Area for foraging and hunting. Cardno saw deer during its surface water survey, but Rupprecht did not know how many deer were seen. Rupprecht, Tr. II 278:24 to 279:6. Cardno did not ask the area residents about their observations of deer in the area. Rupprecht, Tr. II 311:25 to 312:6. Consequently, the Application lacks the data necessary to determine whether wildlife displacement from the Project Area will damage the Concerned Citizens' crops or endanger their calves. Lacking this data, the Application also fails to determine what mitigation may be necessary to address this problem pursuant to OAC 4906-4-08(B)(3)(b). The Application also fails to provide for the post-construction monitoring of wildlife impacts to determine what damage the displaced animals are wreaking on the neighbors' crops and calves as required by OAC 4906-4-08(B)(3)(c). No certificate can be issued until these corrections are made to the Application to comply with OAC 4906-4-08(B)(3).

M. The Application Provides No Data On The Quantity Of And Mitigation Measures For The Surface Water Draining From The Facility, Thus Violating OAC 4906-4-07(C).

OAC 4906-4-07(C) provides:

> (C) The applicant shall provide information on compliance with water quality regulations.
>
> ****
>
> (2) The applicant shall provide information regarding water quality during construction.
>
> ****
>
> (b) Provide an estimate of the quality and quantity of aquatic discharges from the site clearing and construction operations, including runoff and siltation from dredging, filling, and construction of shoreside facilities.

(c) Describe any plans to mitigate the above effects in accordance with current federal and Ohio regulations.

(d) Describe any changes in flow patterns and erosion due to site clearing and grading operations.

****

(3) The applicant shall provide information on water quality during operation of the facility.

****

(d) Provide a quantitative flow diagram or description for water and water-borne wastes through the proposed facility, showing the following potential sources of pollution, including:

****

(vii) Run-off from soil and other surfaces.

Emphasis added. The underlined language requires the Application to quantify the amount of water that will flow off the Project Area during construction and operation. The Application contains none of this information. Noah Waterhouse, Alamo's hydrology expert, admitted that no efforts have been made to model or otherwise quantify the amount of water that will flow from the Project Area. Waterhouse, Tr. I 203:19-22, 204:14-20.

Instead, Alamo shrugs off these requirements. The Application claims, without support from any data, that Alamo does not have to comply with this rule because Alamo does not anticipate "changes in flow patterns and erosion." Applic., p. 46. The Application asserts that the Project Area "already is level and very little, if any, grading will be needed." Applic., p. 46. That is, Alamo asserts that its activities will not increase the amount of stormwater flow from the Project Area.

The Application presents no evidence that its activities will not increase the flows from the site. While Alamo contends that it will plant vegetation in the solar fields to absorb more precipitation and decrease runoff, this does not address potentially increased flows during construction. Alamo's Route Evaluation Study reveals that "[c]onstruction equipment such as excavators, bull dozers, and wheel tractor-scrapers will be transported to the site." Applic., Exh.

D, p. 2, § 1.4. Since these machines are used only to move dirt, their planned use contradicts Alamo's representation that little or no grading will occur. Alamo has done no work to find out whether grading will be necessary. Herling, Tr. I 65:19 to 66:20. So the Application lacks the information necessary to ascertain how much grading actually occur. The Application does not contain a grading plan to show where grading will occur; that plan will be discussed with the Staff and submitted after the certificate is issued. Herling, Tr. I 64:24 to 66:20.

Moreover, Alamo admitted that soil compaction will occur during construction, especially in access road areas. Herling, Tr. I 71:23 to 72:1. Traffic has the potential to compact the roads. Herling, Tr. I 76:20 to 77:2. The project will contain 12.19 acres of permanent roads with gravel on them. Herling, Tr. I 76:5-14. There may be an additional 6.88 acres of temporary roads during construction. Herling, Tr. I 76:8-11. After construction is finished, the access roads inside the Facility will still be compacted during Facility operation. Waterhouse, Tr. I 198:5-8. Some compaction also is likely in the solar fields. Herling, Tr. I 72:7-10.

The compacted roads will increase the amount of flow into the existing ditches. Waterhouse, Tr. I 200:8-13. Moreover, Alamo has not yet determined whether it will slope the land in the Project Area. Herling, Tr. I, 70:10-19. Thus, stormwater flows could increase during construction and operation. Certainly, Alamo has not conducted the study necessary to determine whether flows will increase or not.

Alamo's Application also reveals that Alamo will likely increase the amount and speed of surface water flows during construction and operation. This information is contained in a report by Alamo's contractor, Hull & Associates, Inc., that is included in the Application. Applic., Exh. F. The report makes the following recommendations:

> Adequate surface water run-off drainage should be established at each solar array, access road, and the switchyard location to minimize any increase in the

> moisture content of the subgrade material. Positive drainage of each solar array site and access road location should be created by gently sloping the surface toward existing or proposed drainage swales. Surface water runoff should be properly controlled and drained away from the work area.

These recommendations indicate that Alamo will alter the Project Area's terrain to more quickly and thoroughly drain the land surface. This could increase the water burden on downgradient landowners.

In addition, Alamo's position disregards the language of OAC 4906-4-07(C). Only one of these regulatory requirements requests information about changes in flow. OAC 4906-4-07(C)(2)(d) (stating that an application must "[d]escribe any changes in flow patterns and erosion due to site clearing and grading operations") (emphasis added). The other cited provisions require applicants to quantify stormwater flow whether or not an increase is anticipated. OAC 4906-4-07(C)(2)(b) (requiring "an estimate of the … quantity of aquatic discharges from the site clearing and construction operations") (emphasis added); OAC 4906-4-07(C)(3)(d)(vii) (requiring 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). The Application fails to comply with these requirements, because it does not quantify the stormwater flowing from the Project Area during construction or operation.

Although the Application, without citing any evidence, asserts that Facility construction "will not cause any aquatic discharges" (Applic., p. 46), the falsity of this statement is betrayed by the requirement in Amended Stipulation Condition 29 that Alamo must obtain a "General Permit Authorization for Storm Water Discharges … Associated with Construction Activities"[6]

[6] The condition contains two typographical errors in the permit's title. The word "construction" appears only once in the title, not twice as stated in the condition. "Activities" at the end of the title should be "activity."

if construction disturbs one acre or more of ground. Alamo will disturb much more than one acre. Application Figure 17 reveals that 969.1 acres of land will be disturbed, including 898 acres of solar fields, 28.6 acres for the AC collector system, 19.1 acres of roads, and three acres for the substation. The foundation for the substation alone, at 50,000 square feet in size, will occupy more than one acre of ground that will be disturbed during construction. Applic., p. 9.

The Ohio EPA storm water permit, as its name suggests, governs storm water discharges from construction activities. The fact that Alamo is required to obtain such a permit is proof that its construction activities will discharge storm water into waters of the state. Matt Marquis' supplemental testimony admits this fact. Co. Exh. 18, p. 3, line 19 to p. 4, line 3. These construction activities include road building that increases runoff into streams, as noted in the transcript quotation below. Waterhouse, Tr. I 200:11-20.

To comply with OAC 4906-4-07(C), Alamo needed to perform a hydrology study to quantify the flows from the Project Area. A hydrology study is a common requirement in projects of this nature, as revealed in Noah Waterhouse's testimony:

> Q. Okay. Will the compaction of that road increase the amount of flow into that – into that ditch?
>
> A. Yes, the runoff from the road, from the area of the roads would increase compared to the existing or pre-project conditions, but we do a full site-wide hydrology analysis and we will compare existing conditions pre-project to post-conditions for the single purpose of being able to show that we're not increasing any rate or any volume of runoff after the Project is completed. That's a typical requirement of most permitting agencies at state or local levels.

Waterhouse, Tr. I 200:8-20. Thus, Alamo plans to perform a hydrology study to determine the amount of the surface water flows from the Project Area will increase after the solar project is built and to determine whether government drainage requirements are met. Waterhouse, Tr. I 200:13-20, 201:15-23, 202:3-23. "[T]he purpose would typically be to show how the Project

itself impacts runoff from the site to where the runoff is going." Waterhouse, Tr. I 202:15-17. "[O]ne of the goals is to figure out how it impacts and if it was going to be increased or decreased." Waterhouse, Tr. I 202:21-23.

Despite the necessity of this study, Alamo has no plans to conduct it before the certificate is issued. Waterhouse, Tr. I 200:21-23. And even then, Mr. Waterhouse was not sure whether Alamo would share the study's results with the Board. Waterhouse, Tr. I 201:5-9. The Amended Stipulation Condition 29 requires a hydrology study, but this does not cure Alamo's failure to quantify surface water flows in the Application.

Without a hydrology study in the Application, OPSB has no way of knowing whether the Facility's construction and/or operation will cause drainage and flooding problems in neighboring properties. Drainage swales are common in fields to be used for solar panels in the Project Area, and they flow onto neighboring land. Rupprecht, Tr. II 292:16-19, 293:6-9; Waterhouse, Tr. I 205:2-5; DeLuca Testimony, pp. 2-3, A.7.

Alamo's Application violates OAC 4906-4-07(C)(2)(by failing to quantify surface water flows during construction and operation of the Facility. Alamo has the burden of proof to demonstrate in the Application whether flows will increase and, if so, by how much. Without this data, the Application does not and cannot identify any mitigation measures that may be necessary to protect neighbors from flooding and drainage problems caused by Alamo's activities as required by OAC 4906-4-07(C)(2)(c) (requiring the Application to "[d]escribe any plans to mitigate the above effects in accordance with current federal and Ohio regulations"). The Board cannot issue a certificate based on such a deficient application.

N. The Application Provides No Data On The Quality Of And Mitigation Measures For The Surface Water Draining From The Facility, Contrary To OAC 4906-4-07(C).

OAC 4906-4-07(C) provides:

(C) The applicant shall provide information on compliance with water quality regulations.

(1) The applicant shall provide information regarding preconstruction water quality and permits.

(a) Provide a list of all permits required to install and operate the facility, including water pollution control equipment and treatment processes.

****

(d) Describe the existing water quality of the receiving stream based on at least one year of monitoring data, using appropriate Ohio environmental protection agency reporting requirements.

(e) Provide available data necessary for completion of any application required for a water discharge permit from any state or federal agency for this project. Comparable information shall be provided for the proposed site and any proposed alternative site(s).

(2) The applicant shall provide information regarding water quality during construction.

****

(b) Provide an estimate of the quality and quantity of aquatic discharges from the site clearing and construction operations, including runoff and siltation from dredging, filling, and construction of shoreside facilities.

(c) Describe any plans to mitigate the above effects in accordance with current federal and Ohio regulations.

(d) Describe any changes in flow patterns and erosion due to site clearing and grading operations.

(e) Describe the equipment proposed for control of effluents discharged into bodies of water and receiving streams.

****

(d) Provide a quantitative flow diagram or description for water and water-borne wastes through the proposed facility, showing the following potential sources of pollution, including:

****

(vii) Run-off from soil and other surfaces.

Emphasis added. The emphasized language above requires the Application to submit information about the quality of surface water flows from the Project Area during construction and operation, such as sediment from erosion carried into the streams. The Application contains none of this information.

As explained in the previous section of this brief, the requirement in Amended Stipulation Condition 29 proves that Facility construction will discharge storm water into waters of the state. The Ohio EPA guidance on storm water controls for solar panel arrays marked as CCPC Exhibit 9 states that solar panels "alter the volume, velocity and discharge pattern of storm water runoff." CCPC Exh. 9, p. 1. Mr. Marquis agreed with this statement. Marquis, Tr. IV 669:16 – 700:1. Although he said that the vegetation beneath the solar panels manages the storm water, he also agreed that storm water discharges occur from solar fields. Marquis, Tr. IV 669:16 – 700:20. The drainage tiles that inhabit the Project Area will continue to discharge water from the solar Facility after construction. See Co. Exh. 17, Waterhouse Suppl. Testimony, p. 2, lines 8-9 (stating that Amended Stipulation Condition 16 will ensure the protection of drain tile and "existing drainage" in the Project Area). The operating Facility will discharge storm water from rainfall over the land and through the tiles. Waterhouse, Tr. I 197:7-25. Since solar facility construction and operating solar facilities both discharge storm water, Alamo's Application was required to contain water quality data about both under OAC 4906-4-07(C)(1).

Rather than providing the required data, Alamo defies these requirements. The Application claims, without support from any data, that Alamo does not have to comply with this rule because Alamo does not anticipate "changes in flow patterns and erosion." Applic., p. 46. The Application asserts that the Project Area "already is level and very little, if any, grading will

be needed." Applic., p. 46. As discussed above relative to Alamo's failure to quantify its surface water discharges, Alamo's claim that little or no grading will occur is suspect.

As with its attempt to evade the water quantification requirements of this rule, Alamo's position on water quality also disregards the language of this rule. Only one of these regulatory requirements requests information about changes in flow. OAC 4906-4-07(C)(2)(d) (stating that an application must "[d]escribe any changes in flow patterns and erosion due to site clearing and grading operations") (emphasis added). The other cited provisions require applicants to qualify stormwater flow whether or not an increase is anticipated.

Pursuant to OAC 4906-4-07(C)(1), Alamo acknowledges that its project construction necessitates an Ohio EPA construction stormwater permit that "requires development of a proposed storm-water pollution prevention plan ("SWPPP") for erosion control and storm-water management." Applic., p. 45. The purpose of this plan is to minimize the runoff of erosion and silt from land into surface waters. Herling, Tr. I 147:2-8.

Stipulation Condition 16 requires Alamo to submit the required SWPPP, but only after a certificate is issued. This plan has not yet been prepared. Herling, Tr. I 146:20-21. For this reason, the Application is missing much of the information required by OAC 4906-4-07(C).

A SWPPP describes the best management practices (BMPs) that will be followed to mitigate the runoff of sediment into streams. Waterhouse, Tr. I 207:22 to 208:1. The BMPs can include silt fences or retention basins. Waterhouse, Tr. I 208:17-25. The plan would show the locations of the BMPs. Waterhouse, Tr. I 208:2-4. However, the Application does not identify the BMPs, equipment, or any other measure that will be taken to mitigate the effects from the quality of aquatic discharges from site clearing and construction operations, in violation of the mandate in OAC 4906-4-07(C)(2)(c) and (e).

According to Mr. Waterhouse, "[t]here's some calculations involved" in preparing the SWPPP. Waterhouse, Tr. I 208:2. The SWPPP contains "water-quality data" or other "data that provides the basis for the design of the BMPs." Waterhouse, Tr. I 208:7-10. This data usually includes a hydrology study. Waterhouse, Tr. I 208:11-16. However, the Application contains none of this data, even though OAC 4906-4-07(C)(1)(e) requires the Application to "[p]rovide available data necessary for completion of any application required for a water discharge permit from any state or federal agency for this project."

OAC 4906-4-07(C)(1)(e) requires the Application to "[p]rovide an estimate of the quality … of aquatic discharges from the site clearing and construction operations." The Application contains no information about the quality of these discharges.

Contrary to OAC 4906-4-07(C)(2)(d), the Application contains no information to "[d]escribe any changes in flow patterns and erosion due to site clearing and grading operations." Contrary to OAC 4906-4-07(C)(2)(a), the Application does not contain a map indicating the locations of water monitoring and gauging stations to be utilized during construction.

Because the Application lacks the information required by rule to evaluate the quality of water from the Facility during construction, OPSB cannot issue the certificate based on this Application. Without this data, the Application does not and cannot identify any mitigation measures that may be necessary to protect neighbors' and the public's surface waters as required by OAC 4906-4-07(C)(2)(c) and (e). The Board cannot issue a certificate based on such a deficient application.

O. 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).

OAC 4906-4-07(D) provides:

> The applicant shall provide information on compliance with solid waste regulations.
>
> ****
>
> (2) The applicant shall provide information regarding solid waste during construction.
>
> (a) Provide an estimate of the nature and amounts of debris and other solid waste generated during construction.
>
> (b) Describe the proposed method of storage and disposal of these wastes.

Emphasis added. The Application does not provide an estimate of the amounts of debris and solid waste that will be generated during construction, or its destination of disposal.

The Application acknowledges that project construction will generate package-related materials, such as crates, nails, boxes, containers, and packing materials, damaged or otherwise unusable parts or materials, and occasional litter and miscellaneous debris generated by workers. Applic., p. 49. These wastes are "solid wastes" as defined by R.C. 3734.01(E) and as contemplated in OAC 4906-4-07(D)(2)(a). The Application also states that one or more old buildings may be demolished. Herling, Tr. I 162:8-10; Applic., p. 78. These wastes are "construction and demolition debris" as defined by R.C. 3714.01 and thus are "debris" as contemplated in OAC 4906-4-07(D)(2)(a).

The Application fails to comply with OAC 4906-4-07(D)(2) in two respects. First, as Mr. Herling admitted, the Application does not estimate the amount of solid waste that the Project will generate. Herling, Tr. I 162:4-7 (admitting that "I don't believe that's estimated in the Application"). Mr. Herling also admitted that the Application does not estimate the amount of demolition waste that the Project will generate. Herling, Tr. I 162:20-24 ("admitting: "No, there's not an estimate in the Application"). Second, although the Application states that the types of solid wastes listed on Page 49 of the Application will be dumped at a municipal landfill,

the Application does not explain what will be done with the demolition waste from the old building(s). Herling, Tr. I 162:14-19; see Page 78 of the Application.

P. <u>The Application Does Not Provide The Information Required by OAC 4906-4-06(F)(3) For Improving Or Repairing Public Roads and Bridges To Address Damage By Alamo's Construction Traffic</u>.

OAC 4906-4-06(F)(3) provides:

> (3) The applicant shall evaluate and describe the anticipated impact to roads and bridges associated with construction vehicles and equipment delivery. <u>Describe measures that will be taken to improve inadequate roads and repair roads and bridges to at least the condition present prior to the project</u>.

Emphasis added. Contrary to this rule, the Application does not describe measures that will be taken to improve inadequate roads and repair roads and bridges to at least the condition present prior to the project.

The Application acknowledges that Alamo's construction traffic may damage the public roads and bridges. The Application states that the volume and/or weight of construction traffic may accelerate pavement deterioration or stress on drainage structures. Applic., Exh. D, p. 10.

The testimony of Alamo's transportation consultant, Mark Bonifas, cautioned that construction traffic should avoid Antioch Road between U.S. Route 127 and just west of Camden Road due to steep road grades and bridges in poor condition. Testimony of Mark Bonifas ("Bonifas Test."), p. 3, Answer 7. One of these bridges is leaning and has a cracked retaining wall, indicating it needs repair. Bonifas, Tr. I 214:19-24. The edge of the road also suffers from "severe erosion." Bonifas, Tr. I 214:22-24. Nevertheless, the Application and Stipulation do not prohibit the use of this road by Alamo's construction traffic. Bonifas, Tr. I 213:9-12.

Mr. Bonifas cautioned in his testimony that three roads besides Antioch Road should not be used for construction traffic due to their poor condition, because they are single lane roads, and because they have some culverts at a shallow depth. Bonifas, Tr. I 214:25 to 215:19;

Applic., Exh. D, p. 12. If these roads are used for construction traffic, they would need repairs or upgrades before use. Bonifas, Tr. I 215:9-13. The Application fails to state whether or not Alamo will use these vulnerable roads and bridges for construction traffic, but leaves these questions for later determination. The Application also lacks information about how road damage from project construction will be addressed.

An Application without this information does not satisfy OAC 4906-4-06(F)(3). The Amended Stipulation recites that Alamo and local officials have drafted a Road Use and Maintenance Agreement, but the agreement was not included in the Application. This information should have been included in the Application and tested by the public hearing and the entire adjudicatory process. The rule requires the Application to "[d]escribe measures that will be taken to improve inadequate roads and repair roads and bridges to at least the condition present prior to the project." OPSB cannot issue a certificate in response to an application that lacks this information.

Q. <u>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</u>.

OAC 4906-4-06(F)(4) provides:

> The applicant shall list all transportation permits required for construction and operation of the project, and <u>describe any necessary coordination with appropriate authorities for temporary or permanent road closures, lane closures, road access restrictions, and traffic control</u> necessary for construction and operation of the proposed facility.

Emphasis added. The Applicant has failed to comply with this rule.

The anticipated interference by Alamo's construction traffic with farming activities is a major concern for the Concerned Citizens. Alamo seeks to site its solar fields in the midst of a rural farming community. The community's farmers use the public roads near the Project Area

to move their machinery to and from their fields. Clippinger Testimony, p. 10, A.20. The farmers' machinery is large, and the rural roads near the Project Area are typically narrow. *Id*. Some of the farmers' machinery, including the trailers for transporting grain, cannot safely leave the pavement of a road. *Id*. The Concerned Citizens fear that large solar construction equipment, if on the same roads simultaneously, would make the roads unsafe for moving farm machinery. *Id*. This is especially of concern from April to June during spring planting and from September through October during harvest season, when farm equipment is common on the local roads. *Id*.

About 1,190 to 1,260 loads of equipment and construction materials will be brought in during Facility construction. Hearing testimony of Mark Bonifas ("Bonifas, Tr.") 216:24 to 217:3, 218:7-11. Semi-trailers will transport construction equipment such as excavators, bulldozers, and wheel tractor-scrapers to the Facility on local roads. Applic., Exh. D, p. 2. Flatbed or tractor-trailer vehicles will bring in construction components. *Id*.

Alamo realizes that its use of the public roads for construction traffic will be a problem for the local farmers. In that regard, Doug Herling acknowledged that project construction may occur during the farmers' planting and harvest seasons. Herling, Tr. I 156:9-12. He knows that the farmers in the area use the public roads to move their farm equipment during spring planting and fall harvesting and that the equipment moves slowly. Herling, Tr. I 92:3-21. He often sees that the farm equipment extends beyond the centerline. Herling, Tr. I 92:15-21. He knows that some farm machinery cannot be taken off the road to let another vehicle pass. Herling, Tr. I 93:13-18. Mark Bonifas advised that grain delivery wagons should not be driven off the road where the shoulder is lower than the road. Bonifas, Tr. I 227:7-12. Mr. Herling also realizes that, in most areas near the Project Area, a delivery truck cannot leave the road to let another

vehicle pass by. Herling, Tr. I 94:3-7. If an Alamo delivery truck meets a farm machine going the opposite direction, and neither of them can leave the roadway, one of them may have to back up to the nearest turnoff. Herling, Tr. I 94:14-24. For this reason, oversized solar construction equipment should not be allowed on the roads during planting and harvest seasons when the farmers cannot afford delays in these activities occasioned by road blockage.

A road needs to be 22 feet wide to accommodate normal two-way traffic. Bonifas, Tr. I 219:5-8. In recognition of this fact, Alamo will construct the access roads inside the Project Area to be 25 feet wide during construction to allow for two-way traffic for deliveries and personnel movement. Herling, Tr. I 134:15 to 135:16. Some farming equipment can occupy 1 ½ lanes of a public road. Bonifas, Tr. I 221:7-11. An oversized delivery load for Alamo would occupy both lanes. Bonifas, Tr. I 220:12-17.

None of the eight public roads to be used for the project's deliveries are 22 feet wide. Bonifas, Tr. I 219:16-20. One road is only 11 feet wide (Bonifas, Tr. I 219:21-23), with the rest of them ranging between 13 and 18 feet (Applic., Exh. D, p. 3, Table 1).

The Application observes that some loads will be oversized, and Alamo admitted this fact during the hearing. Applic., Exh. D, pp. 8, 12; Herling, Tr. I 90:17 to 91:3. Some loads will be oversized and/or overweight. Applic., Exh. D, p. 12. Oversized loads typically need an escort vehicle and a flagger to restrict the road to one-way traffic. Bonifas, Tr. I 224:20 To 225:4. Alamo's deliveries of transformer components and other substation parts will require wide-load designations from ODOT. Herling, Tr. I 90:17 to 91:3.

While the transportation problem has been defined, the Application does not explain how the problem will be addressed. The Application and Stipulation do not explain how Alamo will protect the farmers' access to the public roads during planting and harvesting seasons. Herling,

Tr. I 156:13-18. Alamo has not even done an assessment to determine whether farm machinery and Alamo's trucks can occupy the roads simultaneously. Herling, Tr. I 93:4-12.

Thus, the Application does not contain the information required by OAC 4906-4-06(F)(4), which mandates the Application to "describe any necessary coordination with appropriate authorities for temporary or permanent road closures, lane closures, road access restrictions, and traffic control necessary for construction and operation of the proposed facility." Instead, proposed Stipulation Condition 24 allows Alamo to study these issues later and report back to the Staff in the form of a Transportation Plan and Traffic Management Plan. That plan would determine whether farm machinery and Alamo's trucks can occupy the roads simultaneously. Herling, Tr. I 93:4-12. Mr. Herling stated that such a plan typically explains how the farmers' access to the public roads during planting and harvesting seasons would be protected. Herling, Tr. I 156:13-21. The plan also would figure out how accommodate school buses. Bonifas, Tr. I 222:15 to 223:5.

However, the Transportation Plan and Traffic Management Plan has not yet been prepared. Herling, Tr. I 94:25 to 95:6, 154:10-14; Bonifas, Tr. I 223:6-8. To prepare it, Alamo needs to have a road use agreement with the county and to know where it will access the Project Area from the public roads. Herling, Tr. I 154:15-22. Alamo failed to complete these tasks before filing the Application. As a result, the Application lacks the information mandated by OAC 4906-4-06(F)(4).

R. The Setbacks Proposed For This Project Have Not Been Included In The Application, Nor Do They Represent The Minimum Adverse Environmental Impact Or Serve The Public Interest.

Ordinarily, local zoning would prevent a person from building an industrial facility in a residential or agricultural area in order to preserve the residents' comfort in living and farming

there. R.C. 4906.13(B), with respect to certificated utilities, preempts local zoning meant to protect the populace from the destruction of their communities, but R.C. 4906.10 entrusts the OPSB with the authority and mandate to require regulated utilities to responsibly site their facilities. To implement this mandate, the Board should not accept the ridiculously short setbacks between Alamo's industrial facility and its neighbors' land and homes requested by the Application and Amended Stipulation Condition 3.

The most egregious of the setbacks in Condition 3 is the 25-foot setback between the Facility's seven-foot chain-link and barbed wire fences and nonparticipants' yards and land, which is approximately equivalent to the standard length of a homeowner's garage. Little better is the 150-foot setback between the 15-foot tall solar panels and neighboring homes, which is equivalent to half the length of a football field.

As explained above, Alamo's miserly plans for vegetative screening between its industrial facility and neighbors' homes, unless corrected by the Board, will expose the neighbors to unwanted and unpleasant views from their yards and houses. This will especially harm the seventeen Concerned Citizens who are located adjacent to the proposed Alamo Project Area, twelve of who would be bordered on two or three sides by Alamo's solar panels. Clippinger Testimony, p. 4, A.11, p. 3, A.10, and Exh. A (map of their locations); Clippinger, Tr. III 493:6-8. Nevertheless, Alamo insists that it will use deciduous plants and that there be gaps between them even when in summer when they have leaves. Alamo makes no commitment on what it will do after five years of facility operation to prevent the gaps from widening as plants die due to drought or other causes.

Alamo has no good reason to request such short setbacks. Alamo has about 1002.5 acres available for Facility construction and/or operation and needs up to 919 acres. Application, p. 6.

Alamo can accommodate longer, more reasonable setbacks by using the spare land it has available or reduce its panel acreage. Either way, building an industrial facility along the perimeters of other people's land in an agriculturally zoned area is inexcusable and the Board should not approve such behavior.

From a procedural standpoint, the setbacks proposed in the Amended Stipulation have not been lawfully adjudicated. The new setbacks in the Amended Stipulation have not been included on a constraint map in the Application as required by OAC 4906-4-04(B)(1). The new setbacks in the Amended Stipulation are not contained anywhere in the Application, were not provided to the public for comment through public notices and a public hearing, and were not subjected to discovery and other pre-hearing adjudicatory procedures. In order to use these setbacks, the Application must be revised to add them and the processes for public notices, public hearing, and adjudication must start over.

S. Summary

The Amended 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. With the lack of information in the Application and the record, OPSB also cannot find that the project complies with R.C. 4906.10(A)(2). As constituted, the Application does not provide the Board with a basis for issuing a certificate or for identifying and designing mitigation protections for the public. The Board should deny Alamo's application for a certificate.

IV. The Amended Stipulation Violates Important Regulatory Principles And Is Contrary To The Public Interest, Because The Application Is Incomplete, The Alamo Solar Project Does Not Constitute The Minimum Environmental Impact, And The Project Does Not Serve The Public Interest, Convenience, And Necessity.

Alamo does its best to "green-wash" this project, portraying it as benign and environmentally beneficial. The record in this case shows a very different project -- a major

industrial plant spread over a rural residential landscape on a vast scale that will harm the community as described in Section III above. Alamo must show that the Amended Stipulation does not violate important regulatory principles and practices and is not contrary to the public interest. Alamo cannot sustain this burden, due to the violations of the laws and rules as described in Section II above. In addition, Alamo cannot sustain this burden, because the project will not represent the minimum environmental impact as required by R.C. 4906.10(A)(3) and will not serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6). Alamo has the burden to prove the project's compliance with these criteria.

The Concerned Citizens do not have the burden to produce evidence that the Project will harm the public, although it has done so in many instances, including the following:

1. The solar equipment will spoil the neighborhood's scenic views.
2. The unsightly solar equipment will be located in close proximity to neighboring residences and land, and Alamo has not provided meaningful assurances that these views will be adequately mitigated through effective screening designs acceptable to neighbors who will be exposed to these views.
3. The Project lighting may be annoying and intrusive to neighbors, and the Alamo has failed to demonstrate how it will prevent this from occurring.
4. The inverters may produce annoying and intrusive noise that reaches neighboring homes and land.
5. Post installation will produce noise that is loud, bothersome, and long lasting.
6. The Project's provisions for preventing and replacing damaged field tiles are inadequate and could result in the flooding of neighboring land and damaged crops.

7. The unguarded recyclable materials in the solar equipment will attract criminals to the area to plunder them, and these criminals may also harm the neighbors while in the area.
8. Solar panels damaged by vandals or disasters may leak contaminants into the groundwater, thus polluting the neighbors' wells.
9. The Project may be a drain on emergency services that it may consume, thus depriving the residents of adequate emergency services.
10. The solar equipment may obstruct motorists' views of cross-roads at intersections.
11. The Project does not provide adequate controls for noxious and invasive weeds.
12. The Project will harm the area wildlife.
13. The Project will force deer, coyotes and other wildlife to congregate in the neighbors' fields and yards, and damage the neighbors' crops and livestock.
14. The Project may increase stormwater runoff and flood the neighbors' fields and homes.
15. Erosion from Project construction may pollute the streams.
16. The Application lacks sufficient detail about solid waste and debris generation and disposal to demonstrate that the waste and debris will be properly handled.
17. Project construction will clog the neighborhood roads and delay the movement of farm equipment.

Section III above describes these problems, as well as other harms and potential harms, in more detail. Alamo has the burden to demonstrate that these problems will not occur, but the company has failed to sustain that burden.

The Application and the rest of the evidentiary record do not contain the information required by the Board's rules, thus preventing the Board from determining "[t]he nature of the probable environmental impact" of the project as required by R.C. 4906.10(A)(2). Nor, based on the Application and the evidentiary record, can the Board find "[t]hat the facility represents the minimum adverse environmental impact" as required by R.C. 4906.10(A)(3) and "will serve the public interest, convenience, and necessity" as required by R.C. 4906.10(A)(6). For these reasons, the Amended Stipulation violates important regulatory principles and practices and is contrary to the public interest. Accordingly, OPSB should deny Alamo's request for a certificate.

V. The Board Cannot Delegate Its Authority And Responsibility For Certification Decisions To The Staff Or Other Governmental Entities.

A decision of the Supreme Court of Ohio allowed the Board, in that case, to issue a certificate requiring the applicant to make six submittals for Staff approval after issuance of the certificate. *In re Application of Buckeye Wind, L.L.C.,* 2012-Ohio-878, ¶¶ 28-30, 131 Ohio St.3d 449, 456–57. The lead opinion in that case opined that it may not be practical to hold a hearing on every infinite detail of construction, such as "whether white or gray screws are used in the control room." *Id*. at ¶ 30. This opinion stated that, "[i]n this case, we conclude that the board reasonably drew the line regarding the issuance of the certificate and the imposition of its conditions." *Id*.

Three justices joined in that portion of the decision, with another three justices dissenting. A fourth justice concurred only in the judgment. The dissent disagreed with the rationale and result of the lead opinion, on several grounds.

First, the dissent observed that the post-certificate conditions denied the appealing citizens of their only opportunity to be heard, and this violated the law:

> The law requires otherwise. The legislature has required the board to settle issues like this up front on a public record, and it specifically guarantees affected citizens the right to participate in the review process and to have their voices heard. *See* R.C. 4906.07 (requiring that the board hold public hearings), 4906.08(A)(3) (neighboring citizens are entitled both to party status and to call and examine witnesses), 4906.09 (requiring the board to keep a record of its proceedings), 4906.10(A) (requiring the board to make all substantive determinations before authorizing construction), and 4906.11 (requiring the board to issue a written opinion stating the reasons for its decisions). Issues are not to be settled *after* construction is approved, much less by unaccountable staff members without public scrutiny or judicial review. Yet that is precisely what the board, and now the lead opinion, has allowed.

Id. at ¶ 53.

Second, the dissent found that the lead opinion did not offer any workable response to the denial of the citizens' right to a public hearing. The dissent found this situation objectionable, for several reasons. It noted that the Staff's post-certificate decisions are made in secret without input from the public and without subsequent review by the Board or the Ohio Supreme Court. *Id*. at ¶¶ 55-56. The affected citizens have no process or opportunity to provide input into the Staff's post-certificate approvals. *Id*. at ¶¶ 57-63. Even if they did have a mechanism to challenge the Staff's decisions, such a remedy would not justify disregarding their right to a hearing. *Id*. at ¶ 61. R.C. 4906.10(A) prohibits the Board from issuing a certificate unless the Board makes the required findings and determinations to resolve the issues. *Id*. at ¶ 64. The Board cannot delegate these issues to its Staff. *Id*. at ¶¶ 64-65.

Third, the dissent noted that the lead decision rendered ineffectual the laws designed to protect the interests of citizens living near proposed utility projects:

> The outcome of this decision is unfortunate for anyone living near the site of a proposed high-voltage transmission line, electric substation, high-pressure gas pipeline, or generation plant. If the board runs into an issue that for whatever reason it does not want to deal with—or if it simply prefers to resolve an issue without the discomfort of public participation and judicial review—it now has a broad off-ramp. Approve the project now; work out the details with the

> company later. The public retains a formal right to participate, but it is up to the board whether that right amounts to anything more than a formality.
>
> This is not alarmist but precisely what happened in this case. If, as it did in this case, the power siting board can delegate the very *siting* of facilities—its core duty, the duty from which the power siting board derives its name—it can delegate anything and everything. The lead opinion identifies no enforceable limits on the board's power to delegate but apparently trusts that the board will exercise its new discretion wisely. One can hope that the lead opinion's trust proves well founded, but in my view, the public's business should not be left to the unreviewable discretion of appointed staff members who are not accountable to the public. The board's decisions should have to see and bear the light of day.

Id. at ¶¶ 66-67 (emphasis in original). The Concerned Citizens incorporate by reference the statements of the dissent in *Buckeye Wind*.

In Alamo's case, the parties signing the Amended Stipulation are trying to fill the large and numerous information gaps in the Application with a multitude of post-certificate studies to be evaluated only by the Staff without public review and comment and without the Board members' participation. Alamo also submitted some studies at the supplemental hearing without including them in the Application. This is not the process envisioned by the General Assembly when it enacted R.C. Chapter 4906.

The Amended Stipulation would allow Alamo to submit 12 major studies to provide for mitigation of the Facility's impacts on the public. Rather than merely identifying the color of the screws in the control room as allowed in *Buckeye Wind*, these plans provide for design and operational procedures that go to the core of how the Facility will be constructed and operated. This goes well beyond the activities that the lead opinion in *Buckeye Wind* let pass.

The scarcity of the Amended Application's analysis of the hazards and damage threatened by the Alamo solar project has deprived the Concerned Citizens thus far of their right to comment on and test the project's impacts and the proposed certificate conditions. For the

same reason, the Staff and the Board have not had the information necessary to make informed decisions about issuing a certificate for this project. The Amended Stipulation does not seek to correct this situation. The Board should not issue a certificate based on this inadequate record, but instead should reopen the Application with instructions to supply the missing information to allow the Board to make an informed decision.

Any attempt to introduce new details for facility design by stipulation, instead of including them in the Application, deprives intervenors of their right to test these details through discovery and other steps of an orderly adjudicatory proceeding, and deprives other members of the public of their right to comment on these details in the public hearing. This true for both the Amended Stipulation and the original Stipulation. OAC 4906-3-09 requires an applicant to publish notice that the completed application is ready for the public's review, so the public can comment on it. The original Stipulation and Amended Stipulation were filed after the public comment session of the hearing was held on June 12, 2019. The public's rights, including the rights of CCOPC members who are not individual intervenors, were violated by this process.

The required studies should be added to the Application before the Board decides whether to issue a certificate, not afterwards. Otherwise, the Board will abdicate its duty to make the required findings and determinations to resolve the issues as required by R.C. 4906.10(A), and unlawfully delegate its responsibility to the Staff. This practice would deprive the Concerned Citizens of their statutory right to call and examine witnesses at the hearing under R.C. 4906.08 and otherwise participate in the adjudicatory process as noted in Paragraph 53 of the dissent in *Buckeye Wind*. And it would deprive the Concerned Citizens of their right to procedural due process under the Fourteenth Amendment of the Ohio State Constitution and Section 16, Article I of the Ohio Constitution, which require that administrative proceedings

comport with due process. *Mathews v. Eldridge* (1976), 424 U.S. 319; *LTV Steel Co. v. Indus. Comm'n* (2000), 140 Ohio App.3d 680; *Egbert v. Ohio Dep't of Agriculture* (2008), 2008-Ohio-5309. At its core, "due process insists upon fundamental fairness, and the requirement to conduct a hearing implies that a fair hearing must occur." *Lassiter v. Dep't of Social Serv.* (1981), 452 U.S. 18, 24; *Clayman v. State Med. Bd.* (1999), 133 Ohio App.3d 122, 127, *citing State ex rel. Ormet v. Ind. Comm'n* (1990), 54 Ohio St.3d 102, 104. *Also see Seitz v. All Creatures Animal Hosp.* (Nov. 15, 1985), Ashtabula App. No. 1192, 1985 WL 3679.

If the Board decides to follow this procedure, it should at least take steps to remove some of the secrecy from the Staff's decision-making on the post-certificate studies and the Staff's oversight of the Facility's operations. These steps should include the following:

1. Alamo should be required to post notices of and copies on its website of all permit applications, permits, plan submittals, and other correspondence to and from public agencies about the design, construction, and operation of the Project and provide the public with a mechanism by which the public can obtain more information about and comment on issues associated with these actions.
2. Any facility requests for permits and other governmental action should be posted on Alamo's website at least 15 days prior to submission to the government so that the public can provide Alamo and the pertinent government agency with comments on the proposals. These notices should identify a contact person and email address for Alamo and for the government official who is the contact person for Alamo, so that the public can submit comments to them.

3. Notice of the pre-construction meeting and other meetings between Alamo and the Staff about the Project should be posted on Alamo's website at least 14 days prior to the meetings and should be open to the public.

4. Alamo also be required to send all notices described above to the owners and occupants of land adjoining the Project Area.

5. Alamo's complaint summaries should be posted on the Applicant's website.

These actions will by no means compensate for the Board's failure to require the necessary information in the Application and subject it to hearing. But it at least would inject some transparency into the Staff's decision-making.

VI. Conclusion

For the reasons expressed above, the Board should deny Alamo's application for a certificate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On December 9, 2020, the docketing division's e-filing system will electronically serve notice of the filing of this document on the following parties: Michael Settineri at mjsettineri@vorys.com, MacDonald Taylor at mwtaylor@vorys.com, W. Joseph Scholler at jscholler@fbtlaw.com, Thaddeus Boggs at tboggs@fbtlaw.com, Amy Milam at amilam@ofbf.org, Leah Curtis at lcurtis@ofbf.org, Chad Endsley at cendsley@ofbf.org, Kathryn West at kwest@prebco.org, and Werner Margard at werner.margard@ohioattorneygeneral.gov. A courtesy copy of this document has also been sent to these persons by electronic mail.

/s/ Jack A. Van Kley
Jack A. Van Kley

Summary: Brief (Post-Hearing) electronically filed by Mr. Jack A Van Kley on behalf of Concerned Citizens of Preble County, LLC