BEFORE THE OHIO POWER SITING BOARD

In the Matter of the Application of of Angelina Solar I, LLC, for a Certificate of Environmental Compatibility and Public Need	))))	Case No. 18-1579-EL-BGN

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

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I. Angelina 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.

The Application of Angelina Solar I, LLC ("Angelina") is so short of commitments on how to prevent its industrial solar facility ("Project") from harming the surrounding community that Angelina took the extraordinary step of requesting that the hearing be reopened so it could present damage mitigation plans and other information missing from the Application. But Angelina's belated introduction of evidence at the supplemental hearing was "too little, too late." The information was "too late," because Angelina was required to provide well-studied analyses of harm and mitigation plans in the Application, where they could have been subjected to an orderly process for Staff investigation, public hearing, and discovery. Springing this information on the intervenors only 16 days before the supplemental hearing prejudiced everyone who is entitled to a fair proceeding to test the data. The information introduced at the supplemental hearing also was "too little," because the additional testimony and exhibits did little to fill the Application's gaps.

As described in the initial brief (at 2-4) of the Concerned Citizens of Preble County and its members (collectively, "Concerned Citizens"), Angelina from the beginning has employed secrecy in its lease negotiations and facility development as a weapon against the community to conceal the threats from and quell opposition to its planned facility. The community's testimony at the public hearing repeatedly criticized this lack of transparency. This strategy was carried over into the Application, which lacks the rudimentary data and mitigation studies necessary to accurately inform the Board and the public about the Project's threats. Even where the expected injuries to the community are so obvious that Angelina cannot deny them, Angelina repeatedly characterizes its analyses of the potential extent of the damage as "conservative" in an attempt to persuade everyone that the damage will not actually occur. Even now, Angelina is collaborating with the Staff to persuade the Ohio Power Siting Board ("Board" or "OPSB") to allow them to work out most of the mitigation measures through post-certificate studies that will be conducted and approved in secrecy. From start to finish, these tactics have left the community with a sense of distrust for Angelina and the power siting process.

Angelina has employed these tactics of secrecy in attempt to portray the solar facility as benign, environmentally beneficial, and community-friendly. But a very different image emerged during the hearing. One after another, Angelina's paid witnesses revealed under cross-examination that they had failed to study or reveal the true extent of the facility's potential threats to the public.

Angelina has attempted to deflect attention from its misconduct by attacking the persons victimized by it. Angelina's initial brief opens (at 3) by disparaging the Concerned Citizens of Preble County and its membership as "a small number of residents and private entities, oppose[d] to the Project." This statement is symbolic of Angelina's attitude towards its

prospective neighbors, *i.e.*, Angelina is a wealthy developer attempting to run roughshod over the community's families. But nine of these citizens are participating in this case as intervenors, while the Concerned Citizens have 67 members who are understandably opposed to this mammoth, poorly designed Project due to the harm it would cause to them and the community. And even if only one intervenor had sought protection from the Project's hazards, the Board has the statutory duty to conscientiously evaluate those hazards, to require mitigation of the hazards to limit them to the minimum adverse environmental impact, and if failing to accomplish that goal, to deny the certificate.

Angelina repeatedly touts its support from local officials. Angelina solicited and obtained the support of local officials by meeting secretly with them, even while keeping the public in the dark, so that Angelina could solidify the officials' support before the public weighed in. Having succeeded in this strategy, Angelina devotes much of its brief to boasting about the amount of money that the Project will make for Angelina and Preble County's local governments. This money and the local governments' support for the Project are undoubtedly linked: the local governments' misgivings about the Project's adverse impacts have been muted by their expectations of a financial windfall. Nevertheless, the Board is mandated to make sure that the Project's environmental impacts are not overlooked in the enthusiasm over profits, whether this protection is needed for just one person or many persons.

Angelina also contends (at 4) that the Concerned Citizens are determined to keep the Project out of Preble County regardless of "whether the Project causes any actual impact." As evidence of this accusation, Angelina quotes the testimony of Rachael Vonderhaar that she would not oppose a large residential development in the area, but she is opposed to the Project. But the Concerned Citizens would not undergo the expense of intervention if the Project was not

harmful. Angelina's industrial facility is substantially more harmful than a new residential community. Just as importantly, the Concerned Citizens' objections are not opposed to solar facilities *per se*, but they do object to Angelina's persistent refusals to provide the community with the necessary assurances that this Project will be designed and constructed so as to minimize its harmful impacts. Thus, for example, unlike Angelina, a new residential community is unlikely to construct a sea of ugly industrial structures within 25 feet of a neighbor's yard. And a residential developer typically shows considerably more consideration for its new neighbors than putting in some short "pollinator" plants along the perimeter of its development. Unlike Angelina's determination to keep the public in the dark about the important details of its project until after approval, a residential developer typically provides government authorities with detailed plans prior to approval of its project so that the public can weigh in on how the project should be developed. In contrast, Angelina can hardly be surprised that the community opposes a project that Angelina has done such a poor job of defining.

Angelina also contends (at 4) that the Concerned Citizens are determined to keep the Project out of Preble County notwithstanding "Angelina's genuine efforts to address all of CCPC's concerns." However, Angelina has been anything but cooperative in addressing the Citizens' concerns. First, Angelina discussed its plans for the Facility early, often, and secretly with local officials and participating landowners while keeping non-participating residents in the dark. Then Angelina submitted an Application that is so utterly devoid of meaningful detail that even Angelina realized it had to submit an Amended Stipulation in an attempt to fill some of the holes. Subsequently, at the original hearing and its post-hearing briefs, Angelina repeatedly rebuffed the Citizens' reasonable requests for opportunities to provide input into the Facility's design. Now Angelina is pushing an Amended Stipulation that would allow Angelina and the

Staff to collaborate in secret, without public input, on numerous studies to be submitted after certification. Angelina's behavior in this process has left the surrounding community justifiably angered and distrustful of Angelina, its Project, and the Staff's acquiescence to Angelina's attempts to evade meaningful public input into the Facility's design.

II. Angelina Solar's Application Is Incomplete And Lacks The Information Required By Statute And The Board's Rules, And The Project Does Not Represent The Minimum Adverse Environmental Impact Or Serve the Public Interest, Convenience, And Necessity.

As discussed in the Concerned Citizens' initial brief and below, Angelina's Application lacks the information necessary to comply with the Board's rules and its statutory mandates in R.C. Chapter 4906. The Concerned Citizens are not asking OPSB to require Angelina to do more than the Board's rules require. They just want Angelina, and the Staff, to comply with what the Board's rules require.

As explained in the Concerned Citizens' initial brief, 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." A "study" is "a careful examination or analysis of a phenomenon, development, or question" and "the published report of such a study." Merriam-Webster Dictionary, found online at https://www.merriam-webster.com/dictionary/study. The 12 post-certificate plans and designs required by the Amended Stipulation's proposed conditions are studies, as they entail the examination, analysis, and reports on issues raised in the certification process. For example, the landscape and lighting plan proposed by Condition 11 requires Angelina to examine and analyze the vegetative screening designs and other mitigation measures that will be proposed to minimize the Project's unsightly features. To devise this plan, Angelina has hired a consultant to figure out which neighbors will be exposed to solar facility views, identify the locations of those views, identify the plants that will screen these views, and figure

out how to design these vegetation screens. This is a study. Similarly, the vegetation management plan under Condition 18 requires Angelina to figure out how to protect the plants in the Project Area. The cultural resources mitigation plan under Condition 9 requires Angelina to figure out how to avoid cultural resources or minimize the impacts on them. The traffic plan under Condition 25 and the transportation management plan under Condition 26 involve a study of traffic patterns and an evaluation of measures to minimize impacts on local traffic. The pre- and post-construction stormwater calculations under Condition 30 require a quantification of stormwater flows. These exercises, and all other post-certificate plans, are studies.

R.C. Chapter 4906 and the Board's implementing rules require Angelina to provide enough detail about facility design to demonstrate compliance with the statutory criteria in R.C. 4906.10(A). Contrary to Angelina's exaggerated misrepresentations, the Concerned Citizens do not expect the Application to include every infinite detail about facility design. For example, they do not expect the Application to contain such details as scripts of emergency service training meetings or maps of all drainage tiles. Even the 12 post-certificate studies required by the Staff's proposed conditions will not include that degree of detail. However, it is not too much to ask that these 12 studies be included in the Application so that they can be properly vetted. If Angelina and the Staff were devoted to the public's interest, they would welcome public input to improve the facility's design and mitigation.

The studies introduced into evidence during the supplemental hearing prove that such studies can be included in the Application rather than submitted after certification. For example, the preliminary landscape plan attached to Matthew Robinson's supplemental testimony contains maps and drawings showing the locations and species of plants for screening three affected residences. Co. Exh. 24, Robinson Suppl. Testimony, Attachment 1, pp. 14-22. There is no

reason why these maps and drawings could not have been prepared for all affected neighboring properties and included in the Application for public input. The same is true of the other studies that the Staff wants to be submitted after certification.

There was no reason for the Concerned Citizens to object to the introduction of the preliminary landscape plan, the preliminary site plan, or any other studies during the supplemental hearing. After all, these studies proved the Concerned Citizens' point that including such studies in the Application is practical. Nor was there any reason for the Concerned Citizens to test the acceptability of these studies during the supplemental hearing, because they were not submitted as enforceable requirements of the Application or the Amended Stipulation. It would have been futile to cross-examine Angelina's witnesses on studies that can be discarded or changed at any time. However, although the supplemental exhibits are useful to expose the weakness of Angelina's and the Staff's position, they did not supplement the inadequate Application or undo the failures to comply with R.C. Chapter 4906 or the Board's rules.

Nor did the Concerned Citizens have any reason to object to Angelina's request to reopen the hearing for submitting additional information. If anything, the supplemental hearing supports the Concerned Citizens' positions by exposing, even more, the Application's inadequacy. Nevertheless, the supplemental hearing does not rescue the inadequate Application or undo the failures to comply with R.C. Chapter 4906 or the Board's rules. Only supplementing the deficient Application and reopening the adjudicatory and public hearing process to consider the supplemented Application can do that.

Even if the Concerned Citizens had any reason to object to the supplemental hearing and exhibits, OAC 4906-2-29(F) provides that such an objection is timely if raised in the parties' post-hearing briefs:

> Any party that is adversely affected by a ruling issued under rule 4906-2-28 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference and that (1) elects not to take an interlocutory appeal from the ruling or (2) files an interlocutory appeal that is not certified by the administrative law judge may still raise the propriety of that ruling as an issue for the board's consideration by discussing the matter as a distinct issue in its initial brief or in any other appropriate filing prior to the issuance of the board's order in the case.

Nor can Angelina or the Staff complain about the timeliness of the Concerned Citizens' arguments that the Application is deficient. The Concerned Citizens previously laid out their objections to the adequacy of the Application in their Petition for Intervention and their List of Issues filed on March 29, 2019 and April 24, 2019, respectively. Thus, the Concerned Citizens' recorded their objections to the Application's deficiencies in their very first filing in this case. Angelina and the Staff have had ample time to correct these deficiencies, but have chosen not to do so. Nor did the Concerned Citizens have any obligation to object to the admission of the Application into evidence. After all, without admitting the Application into the record, there would be no evidence of its inadequacy.

The Concerned Citizens have raised their objections to the process followed in this case by fully explaining their concerns in their initial post-hearing brief. This brief points out that the Board has not required supplementation of the Application to include the information required by rule, held a public hearing on such a supplemented Application, or followed the normal adjudicatory process that would enable discovery pertaining to such a supplemented Application. The Citizens' brief noted that disclosing Angelina's written supplemental testimony to the other parties only 16 days before the supplemental hearing is an inadequate substitute for the Board's

mandatory procedures. Sixteen days does not provide time for meaningful discovery, especially when that brief period is occupied with hearing preparation. Nor could anyone have conducted discovery between the filing of the Amended Stipulation and the supplemental written testimony, since Angelina provided the Concerned Citizens with no indication that additional studies would be submitted during the supplemental hearing. Those exhibits came as a complete surprise to the Concerned Citizens as attachments to the written supplemental testimony. Angelina provided the Concerned Citizens with no information prior to that time that there was any new information on which to conduct discovery. However, the Board still has jurisdiction over this case that enables it to correct these errors prior to any appeal.

The discussion below demonstrates that Angelina has failed to prove that its Facility complies with the criteria in R.C. 4906.10(A)(3) and (6). R.C. 4906.10(A)(3) prohibits OPSB from issuing a certificate, unless "the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations." Emphasis added. The dictionary meaning of "minimum" is "the least quantity assignable, admissible, or possible." See the Merriam-Webster Dictionary, found online at https://www.merriam-webster.com/dictionary/minimum (emphasis added). Thus, Angelina does not satisfy its obligations by just somewhat reducing the adverse impacts of its facility. Angelina must reduce the impacts to the least amount possible.

Much of the testimony cited in Angelina's brief consists of its expert witnesses' bare-bones opinions without data or other objective evidence to support them. Angelina boasts about all of the experts whose opinions it is able to buy, while denigrating the Concerned Citizens for supposedly not producing any expert witnesses.[1] This is the hallmark of a wealthy developer

[1] This statement by Angelina is false. CCPC witness Rachael Vonderhaar utilized her farming experience to express expert testimony about field drainage, farm drainage tiles, and noxious weeds. CCPC Exh. 2, Vonderhaar

that believes it can ride roughshod over the rights of the less affluent simply by buying its way through the process. However, without supporting data or evidence, the opinions of Angelina's experts are meaningless or, even worse, misleading. For example, Mr. Hessler opined in the original hearing that solar inverters cannot be heard beyond 150 feet, but he had no noise data or personal observations on which to base this opinion. The data he finally produced in the supplemental hearing exposed the falsity of his prior unsupported opinion. Similarly, Mr. Waterhouse stated that the Project will not cause drainage, flooding, or pollution from sediment, but he did not conduct the hydrology study necessary to support this opinion. These opinions, and others like them, are pure speculation. The Board's rules on the contents of applications are designed to avoid the reliance on such untrustworthy testimony by requiring actual data and objective evidence that the Board and the public can weigh and evaluate during an adjudication. Angelina's incomplete Application violates these rules.

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

This lack of data is compounded by the absence of details in the Application about how Angelina plans to mitigate the impacts of the Project, with most mitigation plans being delayed

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Testimony, p. 1, lines 20-26 & p. 7, lines 9-20, & p. 9, line 17 – p. 11, line 21. Walter Mast, an engineer for Proctor and Gamble for over 31 years, testified about flooding impacts. CCPC Exh. 5, Mast Testimony, p. 1, lines 22-25 & p.3, line 14 – p. 5, line 9. He also testified about crime threats based on his experience as a co-leader of the community's Neighborhood Watch Team. CCPC Exh. 5, Mast Testimony, p. 6, line 3 – p. 13, line 18.

until after certification. This has left the Concerned Citizens, and the Board, in the dark as to the facility's actual impacts and the effectiveness of the promised mitigation measures.

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

Angelina, recognizing the devastating visual impact of its plans to surround its nearby neighbors with solar panels and chain-link/barbed wire fences, resorts to sleight of hand tactics to disguise these impacts and proclaim them (at 18-20) to be "minimal." As predicted in the Concerned Citizens' initial brief (at 10-14), Angelina attempts (at 18) to divert the Board's attention from these severe views by focusing instead on more distant views. Angelina emphasizes (at 18) that its viewshed analysis forecasts that solar equipment will be visible from 16.79% of the area within five miles while ignoring the much greater impacts on nearby residents.

Angelina also grasps at straws by arguing (at 18-19) that its "conservative" viewshed analysis of visibility includes locations from which only partial views of the panels could be seen due to vegetative obstructions, but it does not quantify how many of the viewpoints have only partial views. Without such a quantification of this point, the Board should not rely on it as a factual matter. Moreover, even as to this point, Angelina's brief focuses on distant views of the solar project, not the nearby areas of primary concern. As a legal matter, the Board cannot rely on this argument, because OAC 4906-4-08(D)(4)(a) states that "[t]he viewshed analysis shall not incorporate deciduous vegetation, agricultural crops, or other seasonal land cover as viewing obstacles."

The neighborhood views of the solar project will be anything but "minimal" as proclaimed (at 18-20) in Angelina's brief. Figure 7, Sheets 1 and 2 of the viewshed analysis in

the Application disprove that characterization, showing that the solar equipment will be potentially visible for most of the area surrounding the Project Area. *See* the green colored area around the Project Area in this figure. Applic., Exh. I; Robinson, Tr. 187:16-21.

Angelina ignores the fact that the solar equipment will be visible in 82.26 % of the area within a half mile. Robinson Testimony, p. 4, A.8. Even in response to the questions of Angelina's counsel, Mr. Robinson admitted that the solar equipment will be highly visible to neighbors living within a half mile. Robinson, Tr. 206:6-11.

Angelina emphasizes (at 19) that its visual resources assessment demonstrates that the solar equipment blends into the distant background, particularly at long distances. Indeed, Angelina's visual resources consultant attempted, falsely, to portray that impression in the visual resources assessment, particularly in the simulations. In particular, the visual simulations are designed to conceal, not reveal, the actual extent of the adverse visual impact on the most-impacted citizens -- those who live the closest to the Project Area.

Angelina's first technique for using the simulations to conceal the Project's visual impact on the closest neighbors was to simulate the appearance of eight-foot high solar panels, even though the Application seeks Board approval for panels as high as 15 feet. Obviously, 15-foot high equipment is more visible than eight-foot high structures. Angelina cannot honestly claim it is likely to select eight-foot panels when even its preliminary design plan introduced during the supplemental hearing contemplated 15-foot panels. If it has no intent to use 15-foot panels, it should have restricted the panel height to eight feet in the Application or the Amended Stipulation. At any rate, as long as Angelina is requesting approval for 15-foot panels, it must reveal the visual impact of 15-foot panels. Otherwise, it could construct 15-foot panels after the Board approves the Project based on an analysis of the visual impact of eight-foot panels.

Angelina implicitly acknowledged the necessity of analyzing 15-foot panels by basing its viewshed analysis on the taller panels instead of the shorter panels.[2]

Similarly, Angelina's second technique for concealing the Project's visual impact on the most severely impacted neighbors was simply to not include their views of the Project in the simulations. By doing so, Angelina violated OAC 4906-4-08(D)(4)(e), which provides that Angelina must:

> (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.

Emphasis added. As stated in this rule, Angelina's Application had to provide simulations of public vantage points "that cover the range of" of landscapes, viewer groups, and types of scenic resources. This language requires Angelina to cover "the" range, *i.e.*, the entire range, of landscapes, viewer groups, and scenic resources. The rule does not give Angelina leave to skip the landscapes, viewer groups, and scenic resources that will suffer the greatest visual impacts from the Project. To allow Angelina to simulate only the least impacted views would defeat the rule's purpose of enabling the Board to evaluate the extent of the Project's impacts. Yet, Angelina's Application attempts to circumvent this purpose by providing just four simulations: Simulations 1 and 2 show solar panels along public roads from the vantage point of motorists driving on the roads; Simulation 3 depicts a distant solar field across a large corn field from the vantage point of a public road; and Simulation 4 displays a distant view of a substation from the vantage point of motorists driving on the road. Applic., Exh. I, pp. 27-34 & Fig. 11, pdf pp. 63-70. The simulations include no views from nearby residences located within 150 feet of solar

[2] The Concerned Citizens do not argue or believe that it is necessary or required to simulate the appearance of every intervening panel height between eight feet and 15-feet, since the 15-foot height is the worst-case scenario for which Board approval is sought. Angelina impliedly acknowledged that principle by modeling the tallest height for its viewshed analysis and not all other potential heights between eight feet and 15 feet.

fences or people's yards located 25 feet from solar fences. The simulations omit the most impacted viewer group (residents living nearby) and the most impaired landscape and scenic resources (these residents' views from their houses and yards). These simulations ignore the plight of the persons who will be the most impacted by the negative visual views.

These omissions are even the more egregious in light of the Application's repeated admissions that the Project will have severe adverse impacts on nearby residents, stating:

> Foreground: 0 to 0.5 mile. At these distances, 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. The Project will be most visible and recognizable in the foreground distance zone.

Co. Exh. 1, Application, at Exh. I, p. 19. The Application also admitted:

> Local Residents: Local residents include those who live and work within the visual study area. They generally view the landscape from their yards, homes, local roads and places of employment. . . . Except when involved in local travel, residents are likely to be stationary and have frequent or prolonged views of the landscape. Local residents may view the landscape from ground level or elevated viewpoints (typically upper floors/stories of homes). Residents' sensitivity to visual quality is variable, however, it is assumed that residents may be more sensitive to changes in particular views that are important to them.

Co. Exh. 1, Application, at Exh. I, p. 19. The Application further acknowledged:

> The proposed Project will introduce a new utilitarian feature to the landscape, which may adversely impact the agrarian character of the area, particularly when viewed from roads and residential areas that are situated directly adjacent to the Project.

Co. Exh. 1, Application, at Exh. I, p. 37. Not surprisingly, Angelina's initial brief does not quote or cite any of the foregoing admissions.

The absurdly short setbacks for the Project, including a 25-foot setback for solar fences from nonparticipating neighbors' land and a mere 150 feet between solar fences and neighbors' houses proposed by the Amended Stipulation, guarantee that the Project will be highly and

annoyingly visible. Applic., p. 54; Amd. Stip., Condition 3. Pages 10-16 of the Citizens' Post-Hearing Brief discuss the overbearing visibility of the Project in more detail, including its visibility to Concerned Citizens living on the edges of the Project (see Page 12). At these short distances, the Project's neighbors will have no respite from the solar panels and fences. Angelina's position that the neighbors should be happy with the expansion of the setback between solar fences and non-participants' yards/land from 10 feet in the Application to 25 feet in the Amended Stipulation is contrary to common sense. No one can seriously believe that a family with currently open, scenic views from its yard will not be adversely and depressedly affected by chain-link/barbed wire fences located only a garage's length away on one, two or even three sides of its yard.

Angelina knows full well that the Concerned Citizens are most concerned about the views being forced on them in areas immediately surrounding the Project. Yet Angelina's initial brief pretends that this impact will not occur. Instead, Angelina unconvincingly argues that being subjected to views of solar facilities within 25 feet of a neighbor's yard will not reduce the community's aesthetic appeal.

After trying, unsuccessfully, to disguise the intrusive appearance of the solar equipment, Angelina promises (at 18-19) to mitigate this visual disaster. Tellingly, these pages do not include a single citation to the Application, because the Application contains no enforceable commitments to mitigate, as explained in the Concerned Citizens' opening brief (at 9-12). Nor does the Amended Stipulation compensate for the Application's deficiencies, because it leaves all mitigation details to a future landscaping plan that has not yet been written and is not subject to adjudicatory review in the hearing process.

Angelina contends that expanding its mini-setback from yards/land from 10 feet to 25 feet (the length of a typical homeowner's garage) will provide more room for planting screening vegetation. This is hardly reassuring when one realizes that Angelina does not even intend to provide a complete screen, but plans only to use a limited number of plants with gaps between them to "soften" the view of the hideous chain-link/barbed wire fence and, behind it, a seemingly endless sea of industrial solar panels and inverters that can be seen through the fence. While Angelina and Mr. Robinson might argue that some neighbors might prefer a gapped row of vegetation rather than a complete screen, neither of them consulted with the Project's neighbors to find out, and the Amended Stipulation remarkably does not require such consultation even after certification. Moreover, the limited number of shrubs and trees grudgingly promised by Angelina will take many years to grow wide enough to provide even the partial screen envisioned by the developer. And that partial screen will not help with the views from neighbors' "elevated viewpoints (typically upper floors/stories of homes)" noted by the Application to exist. Applic., Exh. I, p. 19. Contrary to Angelina's representation (at 19), this is not "robust visual screening." Angelina's plan to "soften" the neighbors' views with an incomplete screen is just being cheap, even while Angelina greedily crams as much solar equipment and structures into the fields as it can almost to the fields' edges within a garage's length of the neighbors' land.

Angelina also claims (at 20) that "failed plantings will be replaced so that after 5 years at least 90 percent of the vegetation has survived in order to 'further ensure that the visual impact remains mitigated and does not degenerate over time.'" But while Angelina cites the Amended Stipulation and Mr. Robinson's testimony for this proposition, it is important to note that neither the Application nor the Amended Stipulation makes this commitment. The Application, as

explained in the Concerned Citizens' initial brief (at 16-17), makes no commitments for mitigation whatsoever. Condition 11 of the Amended Stipulation states only that 90% of the plants must be alive five years after project initiation, and thereafter "Applicant shall maintain vegetative screening for the life of the facility." This language begs the question about how much of the vegetative screening must survive for the life of the facility. Contrary to Angelina's representation (at 20), the condition does not make sure that the vegetation "does not degenerate over time." Moreover, why maintain only 90% of the vegetation, when this allows spaces in 10% of the row of vegetation? This sloppy language could be easily tightened by simply stating that Angelina must maintain all of the vegetation for the life of the facility. If Angelina and the Staff actually intend that the vegetation will be effectively maintained, then they should have written the amended condition to accomplish that purpose.

While the Application states that Angelina will "work closely with nearby residents and local officials to identify those locations that may be best suited for landscaping treatments," the Application does not commit Angelina to accepting any landscaping requests from them or even asking them about their preferences. Applic., p. 89. The Amended Stipulation does not correct this unfriendly, arrogant approach. Nor does the employment of a licensed landscape architect to design the vegetation plan provide any assurance, since the landscaper will be beholden to its customer, Angelina. Allowing Angelina and the Staff to collaborate on a landscape plan in secret after certification may give Angelina considerable flexibility to design the landscaping as it pleases, but that just gives Angelina the opportunity to skimp on the landscaping just as it has skimped on the Application's contents. The landscaping plan should have been included in the Application as required by OAC 4906-4-08(D)(4)(f) to provide the neighbors with a meaningful voice in addressing the Facility's visual impacts.

Most importantly, the Application and Amended Stipulation fail to provide for the only mitigation measure that would make the Project represent the minimum adverse visual environmental impact: place the Project's fences and equipment far enough away from people's residences and public roads so that they blend into the background. These setbacks would make the Project actually comport with the Project's appearance portrayed in Angelina's initial brief and Mr. Robinson's testimony. Simulation 3 in the visual resource assessment is a good example of how the Project should appear to the community. Applic. Exh. I, p. 32 & Fig. 11, Sheet 6 of 8, pdf. p. 68.

R.C. 4906.10(A)(3) prohibits OPSB from issuing a certificate, unless "the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations." Emphasis added. The dictionary meaning of "minimum" is "the least quantity assignable, admissible, or possible." See the Merriam-Webster Dictionary, found online at https://www.merriam-webster.com/dictionary/minimum. Thus, Angelina does not satisfy its obligations by just somewhat reducing the adverse impacts of its facility. Angelina must reduce the impacts to the least amount possible.

Angelina's Project does not satisfy R.C. 4906.10(A)(3), because Angelina has not provided a facility design that represents the minimum adverse environmental impact with regards to visual impairment. As explained above, "minimum" means the least possible. It is not enough for the facility design or the stipulated conditions to just somewhat reduce the visual impacts as Angelina and the Staff proposed to do. Cheap, half-hearted measures to "soften" the visual impairment by spacing trees and bushes with gaps between them and then not even requiring the company to keep all of that vegetation alive over the facility's lifetime does not

attain a "minimum" impact. Nor is this standard achieved by siting ugly fences and solar panels so close to neighboring yards, land, and residences.

The position of Angelina and the Staff that the visual mitigation need not be acceptable to the people being victimized by the Project is especially disturbing. The Staff and Angelina have done everything they can to prevent the impacted population from having a meaningful voice in influencing the design of the mitigation they will be forced to look at for the next 40 years. In that regard, the Application with the Staff's blessing makes only vague promises to plant vegetation rather than including a landscape plan for citizen input during the adjudicatory process. The preliminary landscape plan submitted during the supplemental hearing contains a suitable amount of detail on vegetation, but since it has not been incorporated into the Application or made enforceable in the Amended Stipulation, Angelina could just ignore it after receiving a certificate. Nothing in the Application or the Amended Stipulation requires Angelina to solicit the views of the impacted neighbors about the mitigation to be installed. The adjudicatory and public hearing process set up by R.C. Chapter 4906 was designed to provide the public with this input, and Angelina and the Staff are attempting to circumvent that process by formulating the landscape plan after certification instead of including it in the Application. This scheme leaves only Angelina and the Staff with a voice in these decisions, and they want to make those decisions in secret without public input.

Amended Stipulation Condition 11 offers only ambiguous, poorly worded parameters for mitigation, while the preliminary landscape plan is not part of the Application or enforceable under the Amended Stipulation. Without locking in more details for mitigation, the Board has no way of knowing what the visual impacts will be once the unfinished, promised landscaping

plan is prepared and implemented. The Board cannot make a determination of minimum adverse impact based on a vague promise that Angelina and the Staff will address these visual impacts.

B. 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).

Angelina's initial brief makes only one passing reference (at 52) to the need to prevent the Project's lights from bothering the neighbors, stating that the lights will be motion-activated and focus inwardly into the Facility. Amended Stipulation Condition 11 just provides that Alamo and the Staff will work out the details of mitigation in a future secret deal effectuated by a lighting plan submitted after certification. The preliminary site plan attached to Doug Herling's second supplemental testimony provides some lighting details, but it is not binding on Angelina. Without any information in the Application to identify the lights' locations or to provide additional mitigation measures (such as intervening vegetation) required by OAC 4906-4-08(D)(4), the Board has no information to find that the Facility represents the minimum adverse environmental impact with respect to lighting.

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

1. Contrary To Angelina's Original Position, Central Inverter Noise Does Not Fade To Background In 150 Feet.

After the original hearing, Angelina assured the Board, based on David Hessler's opinion at hearing, that inverter noise fades to background levels within 150 feet. Initial Post-Hearing Brief of Angelina Solar I, LLC, Oct. 18, 2019, pp. 34-35. Angelina doubled down on this misrepresentation in its first Post-Hearing Reply Brief, stating that "in the Massachusetts Study, noise from inverters at 150 feet from the inverter pad approached the measured background

levels." Initial Post-Hearing Reply Brief, p. 18. Thus, Angelina insisted that inverters would not be noticeable to non-participating neighbors at that distance. Based on Mr. Hessler's opinion, Angelina argued that siting central inverters no more than 150 feet from neighboring residences would be no problem.

During and after the supplemental hearing, the Concerned Citizens pointed out that Mr. Hessler's use of the Massachusetts Study was misleading, because the background sound levels at the sites studied therein were much higher than the ambient sound level in the Angelina Project Area. Angelina insisted that the Citizens were mistaken. In the supplemental hearing, Mr. Hessler proved the Concerned Citizens to be right. His modeling of the noise from central inverters using quantified sound data painted a very different picture. Upon finally using actual data, Mr. Hessler projected the noise from central inverters to be 38 dBA at a distance of 500 feet. Co. Exh. 23, p. 4, lines 5-6. This is far louder than the average L90 sound level of 31 dBA in the Project Area, and it exceeds the entire range of background sound levels from 20 dBA to 35 dBA. Applic., Exh. E, p. 5 & p. 6, Table 3.0.1. In a complete reversal of position, Angelina now opines that a 500-foot setback is necessary to accommodate the central inverters' noise.

Even with a 500-foot setback from neighboring residences, the central inverters' noise will not fade to background at the edge of the Project Area. If the central inverters are located at the sites identified in the map attached to Mr. Hessler's supplemental written testimony, the central inverter noise will reach 40 dBA or 45 dBA at and past the Project's boundaries. Co. Exh. 23, Hessler Suppl. Testimony, Attachment DMH-S1. These levels are far above the L90 ambient sound levels as explained in the Concerned Citizens' initial brief (at 30-31). Contrary to Angelina's and Mr. Hessler's prior assurances, the inverter noise does not fade to background at Project boundaries.

Angelina's proposed setback of 500 feet between central inverters and non-participants' residences is inadequate to protect the neighbors from central inverter noise. Angelina's inverters will be operating in an "extremely quiet" rural area in which the existing average daytime L90 noise level is only 31 dBA, with a range of 20 to 35 L90 dBA. Hessler, Tr. II 260:8-19; Applic., Exh. E, p. 5 & p. 6, Table 3.0.1. In contrast, Mr. Hessler projected the noise from central inverters to be 38 dBA at a distance of 500 feet. Co. Exh. 23, Hessler Suppl. Testimony, p. 4, lines 5-6. Thus, the 500-foot setback between central inverters and neighboring residences provided by the Amended Stipulation is too small to avoid discomfort, not to mention being unprotective of neighboring yards and land for which only a 25-foot setback is proposed. Providing even more contrast to background sound levels is the contour map of noise levels in Mr. Hessler's supplemental testimony, which shows that noise from the central inverters will be as high as 40 dBA and 45 dBA at the property lines of nonparticipating neighbors. Hessler, Tr. V 636:17-22; Co. Exh. 23, Attachment DMH-S1. And, while Mr. Hessler's modeling shows that central inverter noise will not exceed 35 dBA at neighboring homes that are located more than 500 feet from the central inverter locations depicted in the map of central inverter locations attached to Mr. Hessler's supplemental testimony, those central inverter locations are not incorporated into the Application or the Amended Stipulation to make them enforceable. Thus, Angelina can move the central inverters as close as 500 feet to neighboring houses, subjecting the houses to 38 dBA of noise in a very quiet area with an ambient sound level of 31 dBA.

Angelina has argued that a library or empty theater produces 40 dBA of sound and a dishwater in the next room produces 50 dBA. To put these levels in perspective, the Massachusetts Report recounts that a faint inverter hum could be heard even where the sound level was 42.2. dBA at the "North East Boundary area" of Site No. 1 above highway traffic,

construction equipment, and dump trucks. CCPC Exh. 1, pp. 7, 9. So 40 dBA is not quiet at all. Moreover, the inverters' noise is a hum. Applic., Exh. E, pp. 12-13. No one can stand being exposed to a humming noise of any decibel level all day long, especially if it is as loud as a noisy dishwasher. [3]

Importantly, an important consideration in determining the amount of annoyance that a new source will create is the variation between the new source's noise level and the existing sound levels available to mask that noise. A large variation makes the new sound noticeable and annoying. This community has a background level of only 31 dBA.

In summary, the 500-foot setback between central inverters and non-participants' houses is inadequate and needs to be expanded so that the inverters' humming cannot be heard by the neighbors. A setback also needs to be established between the central inverters and non-participants' property lines.

2. <u>The L90 Metric Is The Correct Metric To Use For Comparing The Project's Noises To The Background Sound Level</u>.

Angelina asserts (at 30) that Mr. Hessler's noise modeling for the transformer at the substation is conservative, because he compares the transformer's noise to the L90 metric for background sound. The Concerned Citizens have not raised any concern about noise from the substation, so this discussion about the substation is not pertinent to their positions.

However, the L90 metric is the most useful barometer for comparing the inverters' noise to the background sound level of the Project Area. Hessler's Report on the Project's anticipated

[3] Angelina's prior Post-Hearing Reply Brief of November 1, 2019 urged the Board to treat the noise limits decided in other Board cases as evidence that the noise level proposed herein is acceptable. This request was inappropriate, since the decisions in the other cases have not been admitted into evidence in Angelina's case, and the witnesses in Angelina's hearings have not testified about or been subject to cross-examination in Angelina's hearings about the noise limits in the other cases. The noise limits in the other cases are based on the evidence in the records for those cases, not Angelina's case, and may be influenced by evidentiary factors not present in Angelina's case. If Angelina tries the same ploy in its new Post-Hearing Reply Brief, the Board should decline Angelina's invitation to base its decision herein on information outside of the record.

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." Applic., Exh. E, p. 4. This metric identifies the sound level exceeded during 90% of time. *Id*.

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. Applic., Exh. E, 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.

3. Angelina Violated The Board's Regulatory Requirements By Failing To Quantify The Potential Noise Impacts From Operating String Inverters.

As explained (at 31) in the Concerned Citizens' initial brief, Angelina may use string inverters, which may be sited in groups, in addition to central inverters. Nonetheless, the 500-foot setback in the Amended Stipulation is carefully limited to "central inverters" instead of including all inverters. This appears to be a conscious decision by the stipulating parties to exempt string inverters from the setback. Apparently, Angelina did not think that anyone else would figure out that string inverters also may be used in the Project, since Angelina hid that fact until Doug Herling's cross-examination exposed it. Angelina even concealed this information from Mr. Hessler.

OAC 4906-4-08(A)(3)(b) and (c) require applicants to provide the "operational noise levels" at adjoining property boundaries and residences. Angelina's Application contains no such data for the central inverters or the string inverters, and even now, Angelina has not submitted any such data for string inverters.

After being forced to admit that string inverters may be used, and even though Mr. Hessler possesses manufacturer's sound statistics for string inverters, Angelina has argued that it does not need to produce modeled sound data for the string inverters because they are quiet. Instead of proving such a statement with noise data, Angelina again falls back on blanket statements of opinion from Mr. Hessler that string inverters are unlikely to be heard above background sound levels just as it falsely testified about central inverters in the original hearing.

Nevertheless, Angelina still argues that, because Mr. Hessler is an expert, the Board should trust everything Mr. Hessler says. But Mr. Hessler misled the Board in the original hearing, and his testimony about string inverters cannot be trusted now, either.

At both hearings, Mr. Hessler was prone to making dramatical declarations of opinion about how little noise is produced by inverters, notwithstanding his lack of quantitative sound data to support these opinions. Angelina is fond of quoting these declarations, as it does in its brief (at 29-30). But his confident opinions in the original hearing, offered without the benefit of actual sound data, proved to be very wrong. In the supplemental hearing, Mr. Hessler again threw out dogmatic statements about how string inverters produce little noise, but those opinions lack quantitative data, too, and the Board should not trust them, either.

The inaccuracy of opinions not based on data is why the Board's rules require data. For noise, OAC 4906-4-08(A)(3)(b) and (c) require applicants to provide the "operational noise levels" at adjoining property boundaries and residences. Angelina's Application contains no

such data for the central inverters or the string inverters. Angelina belatedly provided noise data for its central inverters at the supplemental hearing, but this does not cure its failure to provide the data in the Application as required by the Board's rules. Even at the supplemental hearing, Angelina inexplicably failed to provide sound data for its string inverters notwithstanding Doug Herling's testimony that string inverters may be sited in clusters that would concentrate their combined noise. Angelina also failed to model the combined noise from central inverters and string inverters to provide the "operational noise levels" at adjoining property boundaries and residences as required by OAC 4906-4-08(A)(3)(b) and (c). Dogmatic opinions from experts paid to offer them are unreliable substitutes for the data required by the Board's rules, and the Board should not trust Mr. Hessler's unproven declarations. If Angelina wants anyone to believe its opinion that string inverters produce little noise, it should have produced, and was required to produce, data to approve that assertion.

4. Conclusion

Angelina's introduction of modeled sound data at the supplemental hearing was "too little, too late." The data was "too late," because Angelina was required to provide sound data in the Application, where it could have been subjected to an orderly process for Staff investigation, public hearing, and discovery. Springing this data on the Concerned Citizens and the Staff only 16 days before the supplemental hearing prejudices everyone who is entitled to a fair proceeding to test the data. The inverter sound data introduced at the supplemental hearing also was "too little," because Angelina did not bother to produce noise data for the string inverters it may use in the solar fields. Angelina failed to produce noise data for solo string inverters, grouped string inverters, and string inverter noise combined with central inverter noise.

Angelina offers (at 31-32) to install noise mitigation features on the inverters such as cabinet damping and ventilation silencers if they prove to be too loud. This tacitly admits that the Application did not produce the sound data required by OAC 4906-4-08(A)(3) necessary to determine whether the inverters will be too noisy.

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 entire record on the Project's noise impacts is deficient, and the Board should not issue a certificate based on that record.

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

Angelina's argument that construction noise is minimal in volume and duration ignores several facts elicited during the hearing. First, the noise from post installation is as loud as a bulldozer. Applic., Exh. E, p. 14, Table 6.0.1; Hessler, Tr. 257:16-24. Second, this grating noise will be repeated about 45,300 times during construction, as about 45,300 posts will be installed. Applic., Exh. G, p. 7-4. Even if each post is pounded for only one minute, the amount of pounding could consume 755 hours or 94 eight-hour days. Mr. Herling stated that a single crew could install 100 to 200 posts per day, and that multiple crews could be used. Herling, Tr. I 67:4-20. But even at these rates, post installation would take 226 to 452 eight-hour crew-days. Even Mr. Herling estimated that pile driving would take three to four months. Herling, Tr. I 63:14-20. While Angelina could use more than one pile driver simultaneously, the travel time

for the pile drivers to go from post location to post location will drag out this mind-numbing activity.

Two conclusions arise from these facts: (1) pile driving will be loud; and (2) pile driving will take a long time. Thus, the objective facts in the record demonstrate that Angelina's construction noise will be minimal in neither volume nor duration, which violates that criterion in R.C. 4906.10(A)(3) that the Project represent the minimum environmental impact.

The Application and Amended Stipulation do not provide mitigation that will enable construction noise to represent the minimum environmental impact. Simply requiring Angelina to warn the neighbors in advance of impending noisy activities and to stop pounding the metal posts at 7 pm, as suggested by proposed Condition 13 of the Stipulation, will not provide the Facility's neighbors with relief from pounding on 45,300 posts. Pursuant to OAC 4906-4-08(A)(3)(d), OPSB should not issue a certificate without first instructing Angelina to devise more effective mitigation measures to address this noise, or the Board should deny the certificate altogether.

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

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

First, Angelina discusses (at 36-37) its ongoing efforts to put together the report on benchmark conditions for drainage tiles required by Amended Stipulation Condition 16. These efforts should have been included in the Application as required by OAC 4906-4-08(E)(2), not performed afterwards, so that the Board and the public could determine during the hearing

process whether the Project will represent the minimum adverse environmental impact with regard to drainage tiles.

Angelina's second point (at 37-38) is that it is not always feasible or necessary to fix drainage tiles immediately. The Citizens do not disagree with this general statement, but Amended Condition 16 is so poorly worded that whoever ultimately operates the Facility could try to argue that a 30-day repair complies with the condition even if a 24-hour repair is necessary to prevent a neighbor's crop destruction. Curiously, Angelina is fighting the Citizens' efforts to close this potential loophole, even though Angelina does not and cannot dispute that immediate repairs must be performed where necessary to avoid damage. Under OAC 4906-4-08(E)(2)(c)(ii), the Application was required to describe the mitigation procedures to be utilized for the "[t]imely repair of damaged field tile systems to at least original conditions." Nevertheless, the Application does not describe those procedures, nor does it provide for timely repairs.

Compounding this problem is the fact that Angelina makes no commitment to consult with and work with the Project's neighbors whose drainage may be damaged by tiles broken by Angelina. During the original hearing and the ensuing post-hearing briefing, Angelina stated that consulting with nearby landowners to identify tile locations also would be unworkable and unnecessary, and Angelina refused to consider such a process. Now Angelina has reversed its position, finding that consultation is practical and useful after all and sending written requests to adjacent landowners seeking information about their tiles and drainageways.[4] Nevertheless, the

[4] During the supplemental hearing, Angelina blindsided the Concerned Citizens with supplemental direct testimony from Doug Herling that was not included in his written testimony, alleging that one Concerned Citizen had not provided the requested information about drainage tiles. Other than taking a cheap shot at the Project's neighbors, the purpose of this testimony is unclear. Mr. Herling acknowledged that Angelina's request for tile information did not provide a deadline for response and that a response might be forthcoming. Tr. V 557:12 – 558:10. What is evident, however, is that all other Concerned Citizens did provide the requested information, since Mr. Herling otherwise would have made note of their failure to do so.

Application and Amended Stipulation still do not require Angelina to consult with its neighbors about tile repair. Based on Angelina's intransigence, Angelina promises to be a bad neighbor that will not take proper care to prevent its property from flooding its neighbors' land. In fact, as long as Condition 16 can be interpreted to allow as much as 30 days to repair tiles, depending on the circumstances, it is critical for Angelina to consult with affected neighbors to find out how quickly it needs to repair the tiles in order to avoid damage to the neighbors' crops. Rachael Vonderhaar, who has had considerable experience as a farmer with tile replacements, testified that this neighborly consultation is vital to prevent harm, and the existing community follows this practice out of courtesy and necessity. Vonderhaar, Tr. 411:10-25. Angelina should be required to do the same. Noah Waterhouse's testimony that this consultation may be unworkable and unnecessary only reveals his inexperience with tile repairs. The certificate should require Angelina to consult with any neighboring landowners who may be affected by tile damage at the Facility.

Angelina's third point (at 38) is that Mr. Waterhouse has been not been involved in troubleshooting tile breakage from construction of a solar project. Actually, Mr. Waterhouse has been involved in drainage tile tasks at only one operating solar facility during his career. Waterhouse, Tr. 155:8-19. This points to Mr. Waterhouse's lack of experience with post-construction drainage conditions at solar projects, not the solar facilities' lack of drainage problems. Indeed, if post-construction problems did develop at solar facilities for which Mr. Waterhouse had prepared the strategy for avoiding drainage problems, the solar operators would be unlikely to again request his help to fix the problems he should have prevented in the first place.

As explained in the Concerned Citizens' opening brief (at 38-43), Angelina has not included the information in the Application required by OAC 4906-4-08(E)(2) for avoiding, mitigating, and repairing damage to drainage tiles. Instead, Angelina and the Staff seek the Board's leave to bypass the rule's requirements and substitute post-certification activities for them. Without including this information in the Application, the Board has no basis for determining that the Project represents the minimum adverse environmental impact as to drainage tiles.

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

OAC 4906-4-08(A)(1) requires the Application to "[d]escribe all proposed major public safety equipment," "[d]escribe the reliability of the equipment," and'[d]escribe the measures that will be taken to restrict public access to the facility." Angelina assures everyone (at 44-45) that its personnel will conduct some security checks and check the Facility's gates and fences. The problem is that none of these measures are included in the Application, in violation of the rule. The Stipulation does not contain them either. Thus, the unenforceable promises in Angelina's testimony merely highlight its failure to include measures for public safety in its Application.

Solar panels contain wire, and thieves love to steal wire. Nevertheless, Angelina shrugs off (at 45-46) the need for safeguarding its Facility against crime, asserting that the threat of crime is "conjecture." Marja Brandly's and Walter Mast's testimony establishes that the threat of theft by drug-addled thieves from Fairhaven and elsewhere is anything but conjecture. *See* Pages 43-46 of the Citizens' opening brief.

Angelina also tries (at 45-46) to deflect attention from its neglect to find out about the Fairhaven crime problem and its failure to plan for crime prevention in its Application by arguing that agriculture is dangerous. Angelina notes that farmers store diesel fuel, gasoline, herbicides, and pesticides. But most of these substances can be found in a typical residential garage. Angelina contends that grass fires can occur and farming accidents can happen. But fires and accidents occur everywhere. Essentially, Angelina is arguing that Israel Township is a dangerous place, so it does not matter if its Project makes it even more dangerous by luring crime there. However, rampant crime like that in Fairhaven does not occur everywhere, and Angelina's carelessness on safety will bring it to the Project Area.

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

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

Angelina has offered no data about the contaminants in solar panels or their ability to escape into the environment upon destruction of the solar panels. Simply having Mr. Herling say he does not think this is a problem does not satisfy Angelina's burden of proof on this issue. The Citizens have already addressed Angelina's argument on this issue at Pages 31-33 of their opening brief, except for one point. Mr. Herling stated that tornadoes are "vanishingly rare." Herling, Tr. 47. This statement betrays Mr. Herling's lack of familiarity with Preble County, which was hit by multiple tornadoes just this spring.

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

As explained (at 49-51) in the Concerned Citizens' opening brief, Angelina's barebones promise to develop a post-certificate emergency response plan does not provide the necessary assurances that emergencies will be adequately handled. Without these assurances, the Board cannot find that the Project represents the minimum adverse environmental impact with respect to crime, fire, and medical emergencies.

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

Angelina represents (at 35) that measuring the setbacks from road rights-of-way instead of the roadway edges will provide enough visibility at the crossroads, "to the extent that this is a legitimate concern." This quote betrays the fact that Angelina did not perform the study necessary to determine whether its solar fences and panels will obstruct motorists' views. Nor did Angelina produce any information on the size of the setback necessary to preserve the motorists' line of sight at crossroads. Moreover, the record does not identify the extra room provided by the expansion of the setback from public roads.

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

Angelina should have anticipated this visibility problem when it submitted the Application. After all, the Application provides for only a 25-foot buffer between the Facility fences and the roads' edges. Applic., p. 54. Without knowing how much extra room is added by

the Stipulation and how much room is necessary for motorist visibility, the Board lacks the information necessary to determine whether this belated change will prevent traffic accidents or not.

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

Angelina attempts (at 24-25) to convey the impression that its Project will add a greater amount of beneficial vegetation than it will destroy. But exchanging crop fields and trees for 827 acres of mowed lawn and access roads is hardly a beneficial trade for wildlife or the environment in general. In addition, Angelina's vague promise to plant pollinator-friendly plants and hedgerows is meaningless without the details necessary to find out where and how much of these plants will be grown. For instance, rather than providing the public with an enforceable commitment to install a meaningful amount of vegetation, the Application states that pollinator-friendly plants will be used only "in selected locations along the perimeter." Applic., p. 75. The preliminary landscape plan introduced as an exhibit during the supplemental hearing does not cure this deficiency, since the plan was not made enforceable by incorporating it into the Application or the Amended Stipulation. Angelina and the Staff want the Board to let them make landscaping determinations in secret instead of the Board making those decisions in public.

Angelina also claims (at 25) that it will control noxious weeds primarily through mechanical means instead of herbicides. But that promise is not in the Application, nor required by the Stipulation. To the contrary, the Application emphasizes the use of herbicides without mentioning mechanical removal. Applic., p. 75.

Angelina contends (at 25) that Stipulation Condition 18 will prevent the area's infestation with noxious and invasive weeds. But Condition 18's loopholes make it ineffective, as explained

in the Concerned Citizens' opening brief (at 53-54). Even Angelina's opening brief admits (at 25) that Condition 18 requires the company to purchase its seed only "to the extent practical."

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

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

Angelina contends (at 21-22) that the Project's adverse impacts on wildlife will be minimal, stating that Cardno did not find much wildlife in the Project Area. Of course, a consultant is not likely to find wildlife if it does not look for wildlife. Cardno only made note of species it happened to casually notice while performing its wetlands and waterbody surveys. Ryan Rupprecht, the Cardno witness who testified for Angelina, admitted that Cardno performed no bird, bat, or mammal surveys:

> Q. Did Cardno's representatives, during any of those field visits, perform any bird surveys of the area?
>
> A. There was no direct species of bird surveys conducted by Cardno. It was not designed to, you know, evaluate birds in relation to the site directly.
>
> Q. Okay. And were any bat surveys conducted?
>
> A. There were no bat surveys conducted by Cardno. Again, no direct surveys were designed for identification of bats, no.

****

Q. Did Cardno perform any surveys of mammals in the Project Area?

A. Again, we did no surveys that were directly in line to count or enumerate mammals within the Project Area, no.

Rupprecht, Tr. 213:24 – 214:10, 217:20-24. As further evidence of this failure, Application Exhibit G contains no checklists of bird, bat, and mammal species and numbers found in the Project Area. Thus, unlike other energy projects that routinely conduct field surveys for wildlife, Angelina chose not to do them even though required by OAC 4906-4-08(B).

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

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

Angelina does not dispute that the Project Area contains habitat for endangered and threatened species of bats. Instead, Angelina promises (at 21) that it will cut down trees that may host rare bats only during the seasons when the bats are hibernating elsewhere. This is akin to stating that demolishing a family's house while they are away on vacation has no adverse impact on them, because the house did not fall down on them. Habitat loss has a serious negative impact on endangered species such as the Indiana bat.

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

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

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

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

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

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

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

As explained in the Concerned Citizens' initial brief (at 59-71), the Application lacks the information required by OAC 4906-4-07(C). The Application also does not contain the information required by OAC 4906-4-08(A)(4)(e) for analyzing the prospects of floods for the area, including the probability of occurrences and likely consequences of various flood stages. Nor does the Application contain any plans to mitigate any likely adverse consequences. Angelina's initial brief does not, even once, cite the Application for information germane to the Facility's effects on surface water drainage and runoff, because the Application contains none.

Instead, Angelina relies (at 34-36) solely on Noah Waterhouse's and Matt Marquis' statements that solar facilities generally do not cause drainage problems, citing only their general knowledge about other facilities. However, without meaningful data on this Facility, they have no basis to conclude that this Facility will not aggravate the flooding problem that already exists in the community. This is especially the case where, as here, water levels are commonly only an inch from endangering life and property. CCOPC Exh. 5, Mast Direct Testimony, pp. 3-4, A.11.

Angelina also cites (at 35) Rachael Vonderhaar's statement that grass and other plants can slow down runoff. That may be true at times. However, Mr. Mast has provided 13 reasons why the solar fields will increase, not decrease, surface water runoff. *See* Pages 67-69 of the Citizens' opening brief.

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

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

Lacking this data in the Application, Angelina promises (at 35-36) to provide that information, including pre- and post-construction stormwater calculations, after certification. Angelina states that it will obtain this data pursuant to Amended Stipulation Condition 30 in the course of obtaining a pollution control permit and preparing a stormwater pollution prevention plan ("SWPPP") for the discharges of eroded sediment from its construction activities. Condition 30 requires Angelina to submit this data to Preble County, but not to OPSB. Thus, after failing to include this data in the Application for Board and public review as required by rule, Angelina seeks to compound this error by failing to submit it to the Board even after certification.

If an applicant's general assurances that drainage will not be a problem were adequate to guard against drainage problems, OAC 4906-4-07(C) would not have been promulgated to require detailed water quantity data and mitigation measures in the applications. Neither Angelina nor the Board is free to bypass these requirements. If Angelina and its expert witnesses

want to argue that the Project will have no adverse impacts on flooding, it had the legal obligation to include data in the Application to prove that conclusion. And without this data, the Board has no basis to determine that the Project represents the minimum adverse environmental impact with regard to surface water issues.

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

Angelina admits (at 41) that it will be required to obtain a pollution control permit and SWPPP for the discharges of eroded sediment from its construction activities. Pursuant to this future process, Angelina promises to provide its study about the potential water quality impacts of its construction after certification. Angelina's opening brief does not point to any water quality data in the Application meant to satisfy the requirements in OAC 4906-4-07(C). The Application is entirely devoid of this required information.

Instead, Angelina dismissively states (at 21) that not much pollution is expected from its construction activities. This argument entirely misses the point of the mandates in this rule. This rule requires the Application to contain the water quality data so that the Board can determine whether polluted runoff will be a problem. If Angelina wishes to argue that its construction activities will cause no discharges, its Application must contain the data necessary to prove that point instead of asking the Board and the public to take Angelina's word for it. Angelina's ungrounded assertion that it will not be a problem does not enable the Board to independently evaluate this issue rather than deferring to Angelina's unsupported assertion. Without this data, the Board lacks the information necessary to determine whether the Project represents the minimum adverse environmental impact with regard to the water quality of its discharges.

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

Angelina's opening brief does not point to any information in the Application that satisfies the requirements of OAC 4906-4-07(D)(2)(a) to estimate the amount of solid waste, including demolition debris, that the Project will generate. Angelina cannot seriously contend that the Application provided these estimates, when its project manager admitted in his testimony that it did not. Herling, Tr. I 109:10-17. Nor does Angelina note any information in the Application that complies with the requirement of OAC 4906-4-07(D)(2)(b) to explain what will be done with the demolition waste from the old building(s). If Angelina or the Staff argues that this rule does not require information to demonstrate that Angelina will properly handle its demolition debris, then that interpretation would leave the Board without the information necessary to comply with R.C. 4906.10(A)(2), (3), and (6). Without this required information, the Board cannot determine whether the Project represents the minimum adverse environmental impact with respect to solid waste.

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

Angelina argues that it has the right to use the local roads for delivering construction materials, because they are public roads. That may be the case, but this principle works both ways: the farmers and local residents also have a right to use those roads. Angelina's Application and the Amended Stipulation provide no study to demonstrate that its oversized delivery vehicles will not prevent the local residents from using the local roads. Mark Bonifas'

testimony explains that a transportation management plan would typically provide for escort vehicles and flaggers to organize the traffic. Bonifas, Tr. I 167:1 -168:12. The problem is that this plan does not yet exist, so there is no commitment to use any of these measures. The road use and maintenance agreement submitted during the supplemental hearing does not address these traffic issues. Instead, Stipulation Condition 26 requires a transportation plan and a traffic plan to be submitted to the Staff after certification, and Angelina is not even required to obtain Staff approval for the plan.

Angelina states (at 28) that road blockage should not be a problem, since traffic delays will be short. The Staff goes so far as to inaccurately represent (at 9) that there is no evidence that traffic impacts "would be any greater than that created by current farming operations." To the contrary, Angelina intends to send about 1,700 to 1,800 loads of equipment and construction materials onto these narrow roads. Applic., Exh. D, p. 7. Since the Application contains no traffic plan to figure out how these loads can be accommodated without hindering the farmers' planting and harvesting activities, the Board has no basis to find that that the Project represents the minimum adverse environmental impact on the public's road usage. Mr. Bonifas' bare statement that delays will be short is hardly adequate to conclude that no problems will occur.

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

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

Angelina argues (at 46-47) that the Project will have a minimal impact on the viability of the 827 acres of agricultural land that will be converted into an industrial solar facility. The Staff remarks (at 1) that the Project Area is an ideal location for a solar facility. Angelina also contends (at 16) that the Project advances the goals of Preble County's comprehensive land use plan, citing its own self-serving Application as evidence. Co. Exh. 1, p. 81. That self-serving Application states that the county's land use plan seeks to "emphasiz[e] the agricultural economy, and preservation of agricultural land." *Id*.

The Project Area is hardly an ideal location for a solar facility, since the facility will destroy the land's capacity for food production for 40 years. Nor does turning 827 acres of fertile farmland into an industrial facility for 40 years promote the agricultural economy, preserve agricultural land, or represent a minimal impact. Removing farmland from food production also deprives young, beginning farmers of the land needed to initiate their own farming operations. Vonderhaar, Tr. 391:2-18. The Board cannot find that this impact is minimal just because there is a chance that it might return to agriculture in 40 years.

R. The New 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.

Procedurally, Angelina's proposal in the supplemental hearing to add new setbacks is asking the Board to bypass its mandatory procedures for establishing setbacks. 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.

Substantively, two of the three expansions of setback distances proposed in the Amended Stipulation are negligible or unknown. Angelina pretends that its expansion of the setback between solar fences and non-participants' yards/land is a big deal, but expanding a setback from miniscule 10 feet (~ 3 yards) to a mere 25 feet (~8 yards) makes little difference on the claustrophobic effect of planting tall, unsightly fences and solar panels right next to neighbors' properties. Angelina states (at 51) that this setback expansion will provide room for "greater screening" with vegetation. But an eight-yard sliver of land – about the length of a homeowner's garage – provides little room for trees and bushes. Angelina's stingy expansion simply highlights the woeful nature of the three-yard setback that it originally portrayed as suitable in the Application before the original hearing exposed its inadequacy.

Angelina also contends (at 51) that the 25-foot setback separates solar fences and the road rights-of-way, and this will allow motorists at intersections to see crossing traffic. But Angelina has not quantified the width of the rights-of-way so that the Board will know the distance between the fences and the roads themselves. Angelina has the burden to prove that the fences will not obstruct motorists' views, but it has made no effort to make such a demonstration.

Angelina also states (at 51) that corn in the fields can obstruct motorists' views, implying that this excuses any obstructions caused by Angelina. That is, Angelina says that it is free to cause traffic accidents as long as other people are causing them, too.

Angelina also treats its new 150-foot setback as significant. The Concerned Citizens' initial brief (at 80) refers to this setback as the distance between solar panels and non-participants' residences, while Amended Stipulation Condition 3 refers to this setback as the distance between the facility fences and non-participants' residences. However, this difference in terminology does not make the setback any more protective, since the solar panels are installed directly behind and in close proximity to the fences. See Applic. Exh. I, Fig. 11, Simulation 3, Sheet 4 of 8, pdf. p. 66. Angelina's proposed expansion of the setback between solar fences and non-participants' residences from 100 feet (~33 yards) to 150 feet (50 yards) falls far short of providing the non-participating neighbors with any relief from the unsightly solar fences and equipment.

Adding a 500-foot setback between central inverters and non-participants' residences is worthwhile, but it still falls short of protecting neighbors from inverter noise, for several reasons. First, as explained in Section III. C above, the noise from central inverters can reach 38 dBA at 500 feet. Second, the 500-foot setback does not apply to non-participants' yards or land. And third, the setback does not apply to string inverters, even if grouped in noisy clusters. This omission allows string inverters to be sited directly behind facility fences that can be as close as 25 feet from yards and 150 feet from residences.

Siting Angelina's unsightly fences, solar panels, and inverters so close to neighboring houses, yards, and land is irresponsible and entirely unnecessary. The participating landowners may have a right to use their land for profit, but only as long as those profit-making activities do not unduly infringe on their neighbors' use of their land and homes. Angelina and the participating landowners can make plenty of money without putting their structures right next to their neighbors' land. As designed, this Project does not represent the minimum environmental

impact under R.C. 4906.10(A)(3) or serve the public interest, convenience, and necessity under R.C. § 4906.10(A)(6).

S. Summary

The Application does not contain the information required by the Board's rules. As constituted, the incomplete Application does not provide the Board with a basis for issuing a certificate or for identifying and designing mitigation protections for the public. Angelina's Application is incomplete, as it fails to provide much of the information about the Project's impacts and proposed mitigation measures required by the Board's rules. Without this information, the Board lacks the authority to approve the Application and issue a certificate. A government agency cannot grant an approval based on an application that does not contain the information required by law. *Anderson v. Vandalia*, 159 Ohio App.3d 508 (2nd Dist. 2005).

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

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

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

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

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

The Staff argues (at 14) that a stipulation is entitled to "substantial weight." However, the Stipulation in this case is not a negotiated compromise of all parties. It is a deal among allied

parties who favor the Project because they want the money; it is not the product of arm's length negotiations. It is entitled to no weight or deference.

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

IV. Conclusion

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

But the Board is not free to ignore its own rules, and Angelina is compelled to comply with them. OPSB has no authority to issue a certificate based on an Application that does not

contain the information required by the Board's rules. Nor can OPSB issue a certificate to a Facility that has not presented the evidence necessary to determine that the Facility represents the minimum adverse environmental impact under R.C. 4906.10(A)(3) and serves the public interest, convenience, and necessity under R.C. § 4906.10(A)(6). Lacking this evidence, the Board must deny Angelina's application for a certificate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, I hereby certify that, on January 4, 2021, a copy of the foregoing document also is being served by electronic mail on the following: Michael Settineri at mjsettineri@vorys.com, Gretchen Petrucci at glpetrucci@vorys.com, Clifford Lauchlan at cwlauchan@vorys.com, Kathryn West at kwest@prebco.org, Chad Endsley at cendsley@ofbf.org, Thaddeus Boggs at tboggs@fbtlaw.com, and Jodi Barr at Jodi.barr@ohioattorneygeneral.gov.

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

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