

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Application of Firelands Wind, )  
LLC for a Certificate of Environmental Compatibility )  
and Public Need to Construct a Wind-Powered ) Case No. 18-1607-EL-BGN  
Electric Generation Facility in Huron and Erie )  
Counties, Ohio. )

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**FIRELANDS WIND, LLC MEMORANDUM CONTRA APPLICATION FOR  
REHEARING OF THE LOCAL RESIDENTS AND THE BLACK SWAMP BIRD  
OBSERVATORY**

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/s/ Christine M.T. Pirik

Christine M.T. Pirik (0029759)

(Counsel of Record)

Terrence O'Donnell (0074213)

William Vorys (0093479)

Jonathan R. Secrest (0075445)

Madeline Fleisher (0091862)

DICKINSON WRIGHT PLLC

150 East Gay Street, Suite 2400

Columbus, Ohio 43215

(614) 591-5461

[cpirik@dickinsonwright.com](mailto:cpirik@dickinsonwright.com)

[todonnell@dickinsonwright.com](mailto:todonnell@dickinsonwright.com)

[wvorys@dickinsonwright.com](mailto:wvorys@dickinsonwright.com)

[jsecrest@dickinsonwright.com](mailto:jsecrest@dickinsonwright.com)

[mfleisher@dickinsonwright.com](mailto:mfleisher@dickinsonwright.com)

Adam N. Tabor (PHV 21870-2020)

Brian Knox (PHV 22157-2020)

K&L Gates LLP

925 Fourth Avenue, Suite 2900

Seattle, Washington 98104

(206) 370-7652

[adam.tabor@klgates.com](mailto:adam.tabor@klgates.com)

[brian.knox@klgates.com](mailto:brian.knox@klgates.com)

*Attorneys for Firelands Wind, LLC*

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## I. INTRODUCTION

Pursuant to Ohio Administrative Code (“O.A.C.”) 4906-2-32, Firelands Wind, LLC (“Applicant” or “Firelands”) submits this memorandum contra to the July 23, 2021 Application for Rehearing filed by intervenor residents Patricia Didion, Jane Fox, Marvin Hay, Theresa Hay, Patricia Olsen, Sheila Poffenbaugh, Walt Poffenbaugh, Christina Popa, John Popa, Lori Riedy, Charles Rogers, Kenn Rospert, Dennis Schreiner, Sharon Schreiner, Donna Seaman, William Seaman, Deborah Weisenauer, Kenneth Weisenauer, and Gerard Wensink, along with the Black Swamp Bird Observatory (collectively, “Residents and BSBO”).

On June 24, 2021, the Ohio Power Siting Board (“Board” or “OPSB”) issued its Opinion, Order, and Certificate (“Order”) in the above-captioned matter adopting the Joint Stipulation and Recommendation (“Stipulation”) filed by Firelands, the Board’s Staff (“Staff”), and intervenors the City of Willard, the Board of Commissioners of Huron County, the Board of Trustees of Richmond Township of Huron County, the Board of Trustees of Norwich Township of Huron County, and local residents Tom Yingling and Kevin Erf,<sup>1</sup> with modification.<sup>2</sup> The Order authorizes Firelands to construct a wind farm in Erie County and Huron County (“Project”) consistent with the Stipulation as modified. On July 23, 2021, the Residents and BSBO filed an Application for Rehearing contending that the Board acted unreasonably and unlawfully by failing to thoroughly address a litany of issues in determining that Firelands’ construction of the proposed generation project, consistent with the modified Stipulation, would meet the requisite statutory criteria under Ohio Revised Code (“R.C.”) 4906.10.<sup>3</sup>

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<sup>1</sup> Jt. Ex. 1.

<sup>2</sup> Order at 34-35, ¶¶ 83, 85.

<sup>3</sup> Residents and BSBO Application for Rehearing (July 23, 2021) (“Rehearing App.”). Although the Application for Rehearing states that some grounds for rehearing are asserted by the Residents alone and some are asserted by the Residents and BSBO jointly (Rehearing App. at

The Residents and BSBO claim the Board committed a full 28 separate errors of fact and law in reaching its decision to issue a certificate for construction of the Project. Each of the issues on this laundry list has something in common: they were all thoroughly and appropriately addressed in the Board's Order, based on a detailed evidentiary record. The Residents and BSBO simply seek to rehash their failed arguments on each of these fronts on rehearing. Firelands respectfully requests that the Board deny the Residents' and BSBO's Application for Rehearing on the same robust grounds that justified granting a certificate for the Project in the first place.

## II. ARGUMENT

### A. The Board Correctly Determined that the Project Will Serve the Public Interest, Convenience, and Necessity Under R.C. 4906.10(A)(6).

The Residents and BSBO strain – and exceed – the limits of the evidentiary record in arguing that “the people actually affected by the Project are substantially opposed to the Project,” therefore meriting its rejection under R.C. 4906.10(A)(6) because it would not serve the public interest, convenience, and necessity.<sup>4</sup>

As the Board summarized, there is significant local backing for the Project, evidenced by affirmative local government support from the City of Willard, Huron County, Richmond Township, and Norwich Township (all signatories to the Stipulation) as well as a lack of local government opposition.<sup>5</sup> Furthermore, this local support was substantiated by credible and wide-ranging evidence, including testimony from the Applicant's experts and the Board's Staff, describing the significant local economic benefits of the Project and the safeguards in place to

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1), for ease of reference this Memorandum Contra does not distinguish between the two sets of arguments.

<sup>4</sup> Rehearing App. at 7.

<sup>5</sup> Order at 63-64, ¶ 168.

avoid or mitigate any negative effects.<sup>6</sup> This evidence draws a coherent picture of a Project that will deliver tax revenues and jobs, and provide a sustainable contribution to community prosperity for decades to come, while including appropriate measures to manage potential impacts.

The Residents and BSBO contend that the Board erred in discounting local opposition to the Project. They first assert that “the Erie County Board of Commissioners and the Boards of Trustees of Groton, Ridgefield, Lyme, Oxford, and Sherman Townships have declined to sign the stipulation, thus signaling that they do not support the Project.”<sup>7</sup> This line of argument misrepresents the facts, given that most of those local governments did not seek to intervene as parties in this proceeding and thus could not have signed the Stipulation, and the Board of Commissioners for Erie County, who is an intervenor in the case, did not take a position for or against the Stipulation. According to the Residents and BSBO, silence equates to opposition. But, if anything, the decision of these townships not to actively participate in the Board’s consideration of Firelands’ Application suggests that they did **not** have any significant reason to oppose the Project. Similarly, the Board of Commissioners for Erie County did not express any specific concerns regarding the Project or the Stipulation on the record in this case. The facts show that the townships that did intervene in the proceeding (Richmond and Norwich Townships) did sign the Stipulation, along with the Board of Commissioners for Huron County and the City of Willard.

The Rehearing Application also undertakes a purported headcount of individuals who have registered opposition to the Project in various manners.<sup>8</sup> This exercise is both invalid as an evidentiary matter and likely misleading as a substantive assessment of public support or opposition.

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<sup>6</sup> *Id.*

<sup>7</sup> Rehearing App. at 7-8.

<sup>8</sup> *Id.* at 8-12.

First, it is important to note that the public comments, comment cards, and informal petitions cited by the Residents and BSBO, which were docketed with the Board but not introduced as exhibits at the evidentiary hearing, cannot provide a basis for rehearing since their authenticity and relevance was not tested through the litigation process necessary to produce a reliable record. The Residents and BSBO assert that these comments should be added up to gauge local opposition, yet admit that they do not know whether they represent overlapping, duplicative engagement by a vocal minority.<sup>9</sup> The Rehearing Application also does not provide any indication as to whether the tallied comments are from individuals residing in the Project area; whether they include repeated comments by single individuals;<sup>10</sup> or whether the commenters' concerns might have been addressed through the Stipulation and associated certificate conditions imposed by the Board in authorizing the Project's construction. The Board should therefore disregard this extra-record evidence from the outset.

Furthermore, the Residents' and BSBO's approach to gauging local support or opposition is fundamentally flawed in concept. It fails to account for the multiple factors that may affect who weighs in regarding an application before the Board and how. For example, the Residents and BSBO make much of the fact that nineteen individual residents intervened as parties to oppose the Project, but only two individual residents intervened in support.<sup>11</sup> However, the Residents and BSBO fail to note the fact that many of those "individual" resident intervenors share the same residence. Moreover, the Residents and BSBO neglect to account for the fact that those supporting the Project would have no reason to formally intervene simply to voice their general support to the

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<sup>9</sup> Rehearing App. at 8 (noting that "there may be some overlap among the various petitions").

<sup>10</sup> To illustrate this concern, it is worth noting that a brief review of the public comments docketed in this proceeding shows that they include at least: four from Chris Popa, three from Deborah Weisenauer, six from Krista Beck, six from William Seaman, and nine from Diane Hudok.

<sup>11</sup> Rehearing App. at 9.

Board, especially with several of the local governments already participating as parties to provide local input. Similarly, residents might not choose to participate in a public hearing about a proposed project if they have no complaints about it, even though they actively support it.

If anything, the nose-counting by the Residents and BSBO illustrates the perils of a one-dimensional approach to the “public interest, convenience, and necessity” criterion under R.C. 4906.10(A)(6). The Board appropriately considered the Project on its substantive merits as borne out by the evidentiary record. The Board should therefore reject this ground for rehearing.

**B. The Board Properly Issued a Certificate to the Project Subject to Conditions Requiring Certain Studies and Plans to be Completed Prior to Construction.**

The Residents and BSBO argue that the Stipulation as approved by the Board’s Order is invalid because it provides for the following items to be completed: (1) a final delivery route plan and traffic studies under Condition 9; (2) a post-construction avian and bat monitoring plan under Condition 22; (3) an eagle conservation plan under Condition 31; (4) a shadow flicker study under Condition 34; (5) a microwave path study under Condition 37; and (6) karst geological information.<sup>12</sup> Throughout the Rehearing Application, they assert that the overall framework of the Stipulation, which provides for Firelands to show compliance with certain conditions through post-certificate submissions, is legally invalid.<sup>13</sup> This argument mischaracterizes the Board’s approval process and the Stipulation requirements.

The Board’s rules under O.A.C. Chapter 4906-4 do require the submission of certain information regarding a proposed generation project, and the Applicant did submit all of that information, including information regarding traffic impacts; avian and bat impacts; shadow

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<sup>12</sup> Rehearing App. at 12-13.

<sup>13</sup> Rehearing App. at 89-92, 148-154.

flicker; microwave effects; and geotechnical considerations.<sup>14</sup> Both Firelands and Staff witnesses offered additional testimony as to how each of these issues would be adequately addressed under the Stipulation through the certificate conditions as needed to satisfy R.C. 4906.10.<sup>15</sup> The additional information that the Residents and BSBO suggest must also be provided before issuance of a certificate will simply confirm compliance with the applicable certificate conditions.

This approach is reasonable and consistent with applicable legal requirements. As the Ohio Supreme Court has recognized with respect to other wind facilities, the Ohio siting statutes:

authorize a dynamic process that does not end with the issuance of a construction certificate. The General Assembly vested the board with authority to allow its staff to monitor . . . compliance with conditions that the board has set, conditions upon which the [project opponents] already had the chance to be heard.<sup>16</sup>

Thus, the Board does not “improperly defer[]” issues where it leaves them for review at a preconstruction conference or otherwise “allow[s] for further fleshing out of certain conditions of the certificate” under the oversight of OPSB Staff as a project is constructed and operated.<sup>17</sup> This flexibility is vital given that many project developers cannot justify the investments necessary to plan out every final detail of a project without knowing whether its construction will even be authorized by the Board. It is also reflected in the Board’s implementing regulations, which in several places lay out a process where certain implementation details will be left until after issuance of a facility certificate.<sup>18</sup> This is a process that the Board has utilized to address the

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<sup>14</sup> See Applicant Exs. 1-17.

<sup>15</sup> See Applicant Exs. 31-35, 38-39, and 44, and Staff Exs. 2, 5, and 7-9.

<sup>16</sup> *In re Application of Buckeye Wind, LLC*, 131 Ohio St.3d 449, 2012–Ohio–878, 966 N.E.2d 869, ¶¶ 16-17.

<sup>17</sup> *Id.* ¶¶ 14, 18.

<sup>18</sup> *See, e.g.* O.A.C. Rules 4906-4-07(C)(3) (providing for certificate applicant to provide a schedule for receiving a National Pollution Discharge Elimination System permit under the federal Clean Water Act, but not the permit itself); 4906-4-09(D)(4) (requiring development and submission of a mitigation plan to address significant bird or bat mortality only if such an event occurs during the operation of a wind facility).



environmental impacts of a range of projects throughout its history, knowing that some granular details of implementing agreed-upon environmental safeguards will not be definitively resolved until closer to project construction and operation.

The existing litigation process is certainly adequate to ensure the details needed for the Board's analysis under R.C. 4906.10 are sufficiently "flesh[ed] out" ahead of time to justify certificate issuance. As detailed below, the Residents and BSBO had ample opportunity to raise and litigate objections to the sufficiency of the Stipulation and certificate conditions relating to avian and bat impacts, shadow flicker, microwave effects, and geotechnical considerations. In each case the Board clearly explained how the certificate conditions would address those objections. Firelands' subsequent steps to implement those conditions will be subject to the Board's enforcement process under O.A.C. Chapter 4906-7, and in many cases will involve the docketing of relevant reports and studies in the docket in this case. Both the Board's enforcement authority and public scrutiny will provide reasonable mechanisms to monitor certificate compliance. With regard to transportation, the Residents and BSBO chose to not raise any arguments on brief regarding potential traffic impacts from the Project, and therefore have not provided any basis for doubting the reasonableness of that aspect of the Stipulation.

Most importantly, the Board did not blindly entrust implementation of the certificate to its Staff without regard to the reasonableness of that approach. The Order specifically recognizes the "vast experience" of Staff and the Ohio Department of Natural Resources ("ODNR") in "overseeing Ohio's terrestrial wind energy projects" as a basis for finding "that Staff and ODNR have the requisite expertise to ensure compliance with the conditions of the Joint Stipulation," including through "subsequent modification of Board conditions subject to ODNR or [United

States Fish and Wildlife (“USFWS”)] approval.”<sup>19</sup> The Board thus articulated a reasonable basis for finding that it could credit the ability of agency staff to competently ensure the safeguards and protections commemorated in the stipulated certificate conditions are carried out as articulated in the Order.

This entire approach is within what the Ohio Supreme Court has recognized as the Board’s “broad discretion in deciding how to implement its duties” where its actions are not specifically prescribed by statute.<sup>20</sup> No matter their capability and expertise, the eleven members of the Board cannot on their own oversee every detail of a project’s construction and operation. Through the Stipulation and Order, they properly put in place a detailed framework for expert Staff and government personnel to ensure Firelands complies with all applicable safeguards and legal requirements, with transparency for key substantive issues like wildlife protection. In doing so, the Board acted reasonably and lawfully.

**C. The Board Reasonably and Lawfully Credited Expert Testimony Regarding Project Noise.**

The Residents and BSBO reiterate the same arguments regarding noise impacts that they raised in the initial briefing in this proceeding. In each case, the Board reasonably credited the expert testimony offered by the Applicant and Staff’s testimony supporting the adequacy of the Stipulation.

**1. The Applicant’s Ambient Sound Monitoring Methodology Was Valid.**

The Residents and BSBO contend that the Board should have excluded two of the nine monitoring sites for the Applicant’s ambient sound study because the sites were not located within

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<sup>19</sup> Order at 57, ¶ 147.

<sup>20</sup> *In re Application of Champaign Wind, LLC*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 36.

the Project Area, and that a third site should be excluded because it was overly noisy and therefore not representative of ambient noise in the Project Area.<sup>21</sup> The Board has already rejected both of these arguments, relying on the expert testimony of the Applicant’s witness Eddie Duncan.<sup>22</sup>

The Board’s decision to credit this testimony was reasonable. Mr. Duncan, an expert noise control engineer, explained that his monitoring site selection was in accordance with industry standard practices.<sup>23</sup> The Residents and BSBO offered no opposing expert who could undermine Mr. Duncan’s testimony and did not identify any inconsistency between his methodology and applicable industry standards.

**2. The Board Reasonably Determined that the Stipulation Conditions Would Sufficiently Minimize Noise Impacts from the Project.**

The Residents and BSBO also assert that the Board should have applied more restrictive noise limitations to the Project to adequately protect against annoyance or health impacts.<sup>24</sup> Again, the Board reasonably credited the testimony of the Applicant’s expert witness on this issue, in this case the testimony of Dr. Mundt, an expert epidemiologist and public health professional with a Doctorate in Epidemiology and over 30 years of experience working full time in the field of epidemiology. The Board specifically stated that “relying on the expert testimony of Dr. Mundt in support of the application, we reject the claim that the sound effects, including infrasound, preclude the project’s safe operation.”<sup>25</sup> This conclusion is solidly supported by Dr. Mundt’s

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<sup>21</sup> Rehearing App. at 15-20.

<sup>22</sup> Order at 36, ¶ 87 (citing Applicant Ex. 41 at 8).

<sup>23</sup> Applicant Ex. 41 at 9. It was also consistent with Board precedent in other cases where the Board has approved applications for wind facilities in Ohio. *See, e.g., In re Application of Northwest Ohio Wind Energy, LLC*, Case No. 13-197-EL-BGN, Opinion, Order, and Certificate (Dec. 16, 2013); *In re Application of Paulding Wind Farm IV, LLC*, Case No. 18-91-EL-BGN, Opinion, Order, and Certificate (Feb. 21, 2019).

<sup>24</sup> Rehearing App. at 20-24.

<sup>25</sup> Order at 36, ¶ 87 (citing Applicant Ex. 42 at 8-9).

testimony that, based on a thorough review of existing studies, “at or below the proposed noise levels for the Emerson Creek Wind Facility [49 dBA nighttime noise outside non-participating residences], the epidemiological evidence does not demonstrate that wind turbine emissions harm human health.”<sup>26</sup>

Finally, as noted by the Board, Stipulation Condition 33 requires Firelands to operate its facility to achieve specific limits on the cumulative nighttime sound level consistent with O.A.C. Rule 4906-4-09(F)(2).<sup>27</sup> If the noise from the Project’s operation does spur complaints, Board Staff has authority to oversee compliance with this condition under O.A.C. Chapter 4906-4-07.

**C. The Board Reasonably Addressed Potential Impacts of the Project with Respect to Water Supplies and Flooding Concerns in Areas that May Contain Karst.**

As noted by the Residents and BSBO, the Board did modify the Stipulation with regard construction of turbines at the current locations of T24, T25, T26, T42, T43, T73, T74, and T75 as sites where, “[a]ccording to Firelands’ geotechnical expert witness [Williams], . . . either (1) potential solution cavities within bedrock were encountered during drilling activities, (2) available geologic maps and literature document mapped karst features, or (3) boring logs, geological maps, and literature demonstrate a moderate to high probability of karst development,” in order to mitigate potential water supply impacts from construction in vulnerable geological areas.<sup>28</sup> The Residents and BSBO urge the Board to apply this ruling to bar turbine construction across a wide

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<sup>26</sup> Applicant Ex. 42 at 3, 8-9.

<sup>27</sup> Order at 36, ¶ 87; Joint Ex. 1 at 8.

<sup>28</sup> Order at 34, ¶ 83 (citing Applicant Ex. 38 at 6-8). We note that the inclusion of location T42 appears to be based on a typographical error – see Applicant Ex. 38 at 6, line 30, for the only location in the record where T42 was inadvertently referenced. This reference to T42 was incorrect, as T42 has low probability of karst development as supported in Applicant Ex. 1, Ex. E. See Applicant Ex. 38 at 7, lines 27-28 for the list of turbines with a moderate to high probability of karst development at their current locations.

swath of the Project area that is described as potentially “susceptible to karst features” and “identified by the ODNR” as including some field-verified and some non-field-verified karst.<sup>29</sup> However, this approach would baselessly expand the Board’s rationale, which explicitly relied on the expert determinations of the Applicant’s geotechnical witness as to likely areas of concern for karst.

As the Board explained in its Order, it concluded that turbine construction would be reasonable “outside of areas where karst is expected to be encountered at a moderate to high level,” and therefore required Firelands to avoid only locations “where initial review and testing confirm that karst is likely to be encountered at a level that is moderate or above.”<sup>30</sup> The amateur interpretation of the reports and testimony cited by the Residents and BSBO do not include any expert determination based on specific testing that the broad area in question is in fact “likely to be encountered at a level that is moderate or above.” Rather, the Board reasonably constrained its modification of the Stipulation based on the specific findings of a geotechnical expert with the qualifications necessary to assess the relevant evidence.

The Residents and BSBO also assert that the Board should not have authorized any turbine construction without “the necessary geological testing information for the presence of karst or hydrogeologic data on the risk to groundwater at” all turbine sites.<sup>31</sup> This argument, however, depends on their assertion that “Dr. Sasowsky’s review of the locale of these turbine sites shows that there is a high risk of karst there.”<sup>32</sup> The Board reasonably chose to rely on Fireland’s opposing testimony regarding locations with a moderate or high risk of karst, given that Mr.

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<sup>29</sup> Rehearing App. at 27 (quoting Applicant Ex. 38, Attachment AW-2 at 5-6; citing Tr. Vol. VI at 755:13-23).

<sup>30</sup> Order at 35, ¶ 83.

<sup>31</sup> Rehearing App. at 29.

<sup>32</sup> *Id.* at 30.

Williams has performed boring analyses throughout the Project area and is familiar with the Firelands Project, whereas Dr. Sasowsky based his opinion of the geological and hydrogeological configuration of the Project area on his personal observation that there are places in northwest Ohio where karst is present, not on any site specific testing and analysis.<sup>33</sup>

Finally, the Residents and BSBO argue that the Board should not allow any siting of turbines on potential karst areas, even with grouting of karst openings. They provide several asserted reasons for this blanket approach relating to protection of water supplies and flooding concerns.

With respect to grouting of karst openings, they contend that since none of the Staff members testifying in this case were geologists or hydrogeologists, allowing grouting at a handful of turbine sites means that those locations would be entrusted “to the Staff’s uninformed and unfettered discretion.”<sup>34</sup> Here, the Residents and BSBO unreasonably presume that Staff will not use its discretion to obtain the geotechnical expertise required to review the “detailed engineering drawings” which Firelands must publicly file in this docket to outline any intended use of grouting with respect to karst features.<sup>35</sup> That presumption runs counter to R.C. 4906.02(D), which broadly authorizes the chair of the Board to call for assistance from “any employee of the environmental protection agency, the department of natural resources, the department of agriculture, the department of health, or the department of development.” There is no reason to believe that the Board cannot obtain any technical assistance it needs utilizing this authority.

The Residents and BSBO more broadly rehash their assertions that any construction in the vicinity of any karst area poses high risks of contaminating or blocking water supplies, or

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<sup>33</sup> Tr. Vol. VIII at 1068.

<sup>34</sup> Rehearing App. at 30-31.

<sup>35</sup> Order at 35, ¶ 85.

exacerbating flooding.<sup>36</sup> These arguments rely principally on the testimony of Dr. Sasowsky, but the Board reasonably declined to adopt the blanket prohibition that he recommended. As the Board accounted for in its decision, the Applicant has committed to implement best management practices during construction and operation of the turbines and associated facilities that will protect against negative impacts to water resources and otherwise protect public safety on a location-specific basis.<sup>37</sup> In addition, the Applicant has committed that the geotechnical engineer will examine all foundation designs and compatibility with the supporting soil at each turbine site, and approve the work prior to placement of foundation components.<sup>38</sup> This commitment is reinforced with Stipulation Condition 7 that requires, in part, that 30 days prior to the preconstruction conference Firelands shall submit:

- (1) Detailed engineering drawing of the final Project design so that Staff can determine that the final design is in compliance with the Certificate.
- (2) The detailed engineering drawings for the final Project design and foundation design shall account for karst topography and include the identity of the registered professional engineer(s), structural engineer(s), or engineering firm(s), licensed to practice engineering in the state of Ohio who reviewed the approved designs.<sup>39</sup>

These engineering plans will draw from the extensive studies and analyses that Firelands and its expert consultants have already performed to characterize the geology and hydrological conditions across the Project area.<sup>40</sup>

Overall, the Board's preference for a tailored approach is reasonable given the supporting testimony from geotechnical experts like Mr. Williams who have specifically studied the Project

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<sup>36</sup> Rehearing App. at 31-59.

<sup>37</sup> Order at 34, ¶ 81; 35, ¶ 86 (citing Applicant Ex. 1 at 80, 82; Applicant Ex. 39 at 3-7).

<sup>38</sup> Applicant Ex. 1 at 81, Ex. E.

<sup>39</sup> Joint Ex. 1 at 3.

<sup>40</sup> See, e.g., Applicant. Ex. 1 at Ex. E; Applicant Ex. 39 at 3-4; Applicant Ex. 38 at 3-4, Att. AW-2; Applicant Br. at 27-28.

area to evaluate the safety of construction and the Applicant's commitment to ongoing precautions under the Stipulation. The modification of the Stipulation to eliminate turbine locations in certain high-risk karst areas represents a conservative precaution by the Board, but it reasonably relied on the expert analyses and safeguards presented by the Applicant and Staff in allowing construction to move forward in other areas.

**D. The Board's Order Reasonably Authorized Property Line Setbacks Between 1,355 and 1,384 Feet.**

The Board approved construction of Project turbines consistent with the requirements in R.C. 4906.201 and the Ohio Administrative Code, such that the distance from the turbine base to the property line of the wind farm property will be at least 1.1 times the total height of the turbine structure as measured from the tower's base to the tip of a blade at its highest point; and the turbine will be at least 1,125 feet in horizontal distance from the tip of the turbine's nearest blade at 90 degrees to the property line of the nearest adjacent property.<sup>41</sup> Thus, depending on the turbine model chosen, the setback to property lines will be between 1,355 and 1,384 feet.<sup>42</sup> The Residents and BSBO contend that a reasonable setback distance would be at least 1,640 feet to protect against impacts from a wind turbine blade or segment in the event of "blade shear" where the blade separates from the rotor, based on a manufacturer safety manual identifying 500 meters (1,640 feet) as a "safety distance" from the turbine in the event of a tower fire "due to falling turbine parts."<sup>43</sup>

The Board expressly and reasonably rejected this argument based on record evidence. This evidence included a letter provided by the turbine manufacturer and admitted into evidence,

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<sup>41</sup> Applicant Ex. 1 at 192.

<sup>42</sup> Applicant Ex. 31 at 12.

<sup>43</sup> Rehearing App. at 59.



explaining that the safety manual at issue is solely intended to address the emergency management response in case of a tower fire,<sup>44</sup> as well as testimony from Staff witness Bellamy that migration of blades in the five blade shear incidents he has investigated in Ohio has been limited to between 250 -765 feet.<sup>45</sup> It was certainly within the bounds of the Board’s reasonable discretion to give weight to these expert and informed sources in determining that the setback requirements in R.C. 4906.201 and O.A.C. Rule 4906-4-08(C)(2) would be sufficient to protect public safety in light of various protections and state-of-the-art technology to be employed at the Project to ensure safety in blade shear incidents, such as braking systems, speed controls, pitch controls, and ice-detection equipment.<sup>46</sup>

**E. The Order Provides Sufficient Measures to Ensure Minimum Adverse Environmental Impact from Shadow Flicker as Required Under R.C. 4906.10(A)(3).**

As with other issues, the Residents and BSBO object to the Board’s determination that the certificate and stipulated conditions are sufficient to minimize the impacts of shadow flicker because the Board assumes that Firelands will comply with its certificate.<sup>47</sup> That assumption is entirely reasonable. The Board reasonably made that assumption based on record evidence – specifically, a preliminary, conservatively designed study providing a worst-case analysis of shadow flicker impacts from the Project; the requirement in Stipulated Condition 34 for Firelands to submit a final study of shadow flicker impacts 30 days prior to construction; and information regarding “the ability of Firelands to employ post-construction techniques, including curtailment of operations, in order to maintain shadow flicker conditions within permissible tolerances.”<sup>48</sup> The

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<sup>44</sup> Applicant Ex. 31 at 8-9, NP-2.

<sup>45</sup> Tr. Vol. III at 454-456)

<sup>46</sup> Order at 34, ¶ 82 (citing Applicant Ex. 1 at 85-89).

<sup>47</sup> Rehearing App. at 61-66.

<sup>48</sup> Order at 36, ¶ 88 (citing Applicant Ex. 1 at 3, 91, 95; Applicant Ex. 31 at 5; Joint Ex. 1 at 8).

Local Residents and BSBO offer no reason to doubt the competence of Board Staff to oversee implementation of this compliance framework to manage shadow flicker impacts from the Project, using their oversight authority under O.A.C. Chapter 4906-7.

**F. The Board’s Decision to Credit Mr. Rana’s Expert Testimony Over Mr. Schreiner’s Was Reasonable.**

As for grid reliability and cost considerations relevant to the public interest, convenience, and necessity determination under R.C. 4906.10(A)(6), the Board reasonably credited the expert testimony of Firelands witness Mr. Rana over that of the Residents’ witness Mr. Schreiner. This was a straightforward exercise of the Board’s own expertise, based on reasonable factors such as Mr. Rana’s direct expertise with wind energy projects and grid reliability.<sup>49</sup> The Board also reasonably took into account the existence of binding reliability standards through bodies such as North American Electric Reliability Corporation (“NERC”) and PJM Interconnection, Inc.<sup>50</sup> While the Residents and BSBO place significant weight on Mr. Schreiner’s role in nuclear plant operation,<sup>51</sup> the Board correctly noted that he provided “no credible evidence demonstrating that the project will increase generation costs, nor does his experience in nuclear plant operations directly relate to grid reliability expectations that might be expected from the Firelands wind project.”<sup>52</sup> The Board acted well within its discretion in making that reasoned determination.

**G. The Order Provides Sufficient Safeguards to Mitigate Disruption of Television Reception.**

On rehearing, the Residents and BSBO reiterate their argument that the Stipulation does not sufficiently commit the Applicant to mitigate impacts of the Project’s wind turbine blades on

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<sup>49</sup> Order at 64, ¶ 169.

<sup>50</sup> *Id.*

<sup>51</sup> Rehearing App. at 66-68.

<sup>52</sup> Order at 64, ¶ 169.

television reception or GPS-enabled farming equipment.<sup>53</sup> However, the Order plainly and reasonably addressed this issue by finding that the Stipulation and Firelands' testimony in support provide such a commitment:

The Board also finds that the language in the Joint Stipulation, as supplemented through sworn hearing testimony, is clear in requiring Firelands to mitigate TV and GPS signal disruptions that might arise from the project. Initially, we note that the language in Stipulated Condition 38 is broad, requiring that all licensed microwave paths and communications system disruptions must be avoided or mitigated. Where any disruption is anticipated, mitigation must occur prior to construction. And where any disruption occurs unexpectedly, Staff is empowered to ensure that Firelands takes timely and satisfactory mitigation action. In addition to the language in the Joint Stipulation, the record supports Firelands' obligation to remedy TV and GPS interference, as evidenced by the testimony of Nathan Pedder, the project's development manager.<sup>54</sup>

The Residents and BSBO do not identify any evidence undermining the Board's reasonable reliance on the language of the Stipulation, the testimony of Firelands witness Pedder, or Staff's enforcement authority. Accordingly, no additional changes to the certificate conditions are necessary.

**H. The Board Acted Reasonably in Approving the Stipulation in Light of Measures to Minimize the Visual Impact of the Project Turbines.**

There is no doubt that the Residents and BSBO believe the visual impact of the Project turbines will represent a "blight" on the local community.<sup>55</sup> However, R.C. 4906.10(A)(3) does not require the Board to respond to that view by *eliminating* all visual impact of the Project. Rather, the statute directs the Board to ensure the Project "represents the minimum adverse environmental impact, *considering the state of available technology and the nature and economics of the various alternatives, along with other pertinent considerations.*"<sup>56</sup> Consistent with this

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<sup>53</sup> Rehearing App. at 70-73.

<sup>54</sup> Order at 37, ¶ 90 (citing Tr. Vol. I at 41).

<sup>55</sup> Rehearing App. at 73-74.

<sup>56</sup> R.C. 4906.10(A)(3) (emphasis added).

provision, the Board's Order approves the reasonable steps taken to mitigate visual impacts such as significantly reducing the number of turbines and providing consistent design, speed, color, height and rotor diameter for the turbines.<sup>57</sup> The Rehearing Application does not propose any reasonable alternative measures for the Board's consideration.

**I. The Order Reasonably Provides for Safeguards to Minimize the Project's Impacts on Bats and Birds.**

With respect to the Project's environmental impacts on bats and birds, the Residents and BSBO generally restate the evidence they submitted at hearing and arguments they made on brief – but fail to identify any flaws in the Board's Order finding those arguments unpersuasive.

The Rehearing Application primarily focuses on casting the testimony of the Residents' and BSBO's witnesses Dr. Smallwood and Mr. Shieldcastle as more credible than that of Firelands' experts Dr. Rabie and Mr. Good, based on a range of critiques regarding the Applicant's estimates of the Project's avian and bat impacts.<sup>58</sup> While Firelands could articulate valid defenses on each of these points in tit-for-tat fashion, it has already done so in the original briefing in this case,<sup>59</sup> resulting in the Board's determination that the record provided "extensive evidence" allowing it "to evaluate the nature of the probable environmental impact of the project on birds and bats."<sup>60</sup> The Board specifically rejected the Residents' and BSBO's arguments as to the uncertainty of the bird and bat mortality estimates provided by Firelands' expert Mr. Good and the underlying survey data, explaining that R.C. 4906.10(A)(2) requires a determination of the probable, not actual, environmental impact of a project.<sup>61</sup> This ruling is consistent with the

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<sup>57</sup> Order at 57, ¶ 146 (citing Applicant Ex. 1 at 218-220; Applicant Ex. 46 at 3, 9-14, 15, 19).

<sup>58</sup> Rehearing App. at 75-139.

<sup>59</sup> See Reply Br. of Firelands Wind, LLC (Dec. 4, 2020) at 26-43.

<sup>60</sup> Order at 43, ¶ 105.

<sup>61</sup> Order at 44, ¶ 108.

language of the statute along with Ohio Supreme Court precedent recognizing that issuance of a certificate does not represent the conclusion of an effort to determine every exact detail of a project's environmental impact. Rather, it represents the authorization to commence a "dynamic process" of project construction coupled with mitigation of any environmental impacts beyond the parameters set in a Board certificate.<sup>62</sup> That process is specifically designed to allow Firelands to respond to any uncertainty in its avian and bat impact estimates by adopting operational measures to mitigate those impacts once the Project has actually been constructed.

Key to this dynamic process is the role of expert agency personnel in overseeing implementation of certificate conditions. Fundamentally, the Residents and BSBO disagree with the Board's conclusion that Board Staff along with experts from USFWS and ODNR are well able to fill that role when it comes to minimizing the avian and bat impacts of the Project through implementation of the relevant certificate conditions. As the Board stated in its Order:

We note that ODNR regularly reviews the impact on natural resources associated with wind energy projects, and that ODNR intends to collaborate with USFWS as to the protection of wildlife species under their collective jurisdiction. Further, we note that as proposed in Joint Stipulation Conditions 22-23, Applicant is required to conduct post-construction monitoring in compliance with oversight by Staff, ODNR, and USFWS. This monitoring will determine whether the project's impacts exceed those anticipated by the wildlife experts. If excess impacts are demonstrated, Applicant is required to develop and obtain ODNR approval for a management strategy to address the excess impact. Similarly, with respect to eagle conservation measures, as proposed in Joint Stipulation Condition 31, Applicant must work with USFWS....We find that these wildlife safeguards ensure that this project meets the requirements of R.C. 4906.10 and represents the minimum adverse environmental impact.<sup>63</sup>

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<sup>62</sup> *In re Application of Buckeye Wind, LLC*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, ¶¶ 16-17.

<sup>63</sup> Order at 55, ¶ 142.

The Board further observed that “[g]iven their vast experience with overseeing Ohio’s terrestrial wind energy projects, we find that Staff and ODNR have the requisite expertise to ensure compliance with the conditions of the Joint Stipulation.”<sup>64</sup>

The Board described in detail how this agency oversight process would work, noting that Stipulation Conditions 19 and 23 would require Firelands to cooperate with Staff, ODNR, and USFWS on appropriate responsive actions in the event of any significant bird or bat mortality event caused by the Project, or in the event of encountering any state or federal threatened or endangered species.<sup>65</sup> To ensure the public would be aware of and able to provide input on such matters, the Board modified the Stipulation to require relevant information about implementation of these conditions to be filed in the case docket.<sup>66</sup> Similarly, the Board recognized the eagle protections required to be developed through coordination between Firelands and USFWS under Stipulation Condition 31, and mandated public filing of the relevant correspondence.<sup>67</sup>

While the Residents and BSBO obviously disagree with the Board’s decision to rely on compliance oversight by expert agency personnel,<sup>68</sup> the Board’s choice to approve certificate conditions for implementation by Board Staff, ODNR, and USFWS was both legal and reasonable. As the Ohio Supreme Court has recognized, and as described above, the Board has “broad discretion in deciding how to implement its duties” where its actions are not specifically prescribed by statute.<sup>69</sup> The Board has long applied that discretion to approve certificates which establish an overall framework for minimizing environmental impacts of a generation facility while delegating

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<sup>64</sup> Order at 57, ¶ 147.

<sup>65</sup> *Id.* at 55-56, ¶¶ 143-144 (citing Joint Ex. 1 at 5).

<sup>66</sup> Order at 55-56, ¶¶ 143-144.

<sup>67</sup> Order at 56, ¶145.

<sup>68</sup> *See, e.g.*, Rehearing App. at 89-92.

<sup>69</sup> *In re Application of Champaign Wind, LLC*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 36.

certain details for implementation in the construction and facility operation process.<sup>70</sup> It permissibly adopted the same sensible approach here as a mechanism to minimize environmental impacts from the Project on bats and birds under R.C. 4906.10(A)(3).

**J. The Record Supports the Board’s Determination that the Project Will Not Adversely Impact Aviation in the Area.**

The Residents and BSBO suggest that the Board did not adequately address comments at the public hearing regarding potential emergency flight delays due to the need for helicopters to navigate around the Project.<sup>71</sup> On this issue, the Board reasonably relied on the review of the Federal Aviation Administration and Ohio Department of Transportation, given that Firelands coordinated with those expert agencies and neither of them raised any such concerns.<sup>72</sup> Additionally, Firelands witness Marcotte offered his own expert testimony that “helicopters can be safely operated within and near a wind farm in either daytime or nighttime conditions,” and that “a helicopter EMS flight in and around wind turbines . . . presents no greater difficulty than other existing obstacles or obstructions present.”<sup>73</sup> This expert testimony and record evidence is

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<sup>70</sup> See, e.g., *In re Application of South Field Energy LLC*, OPSB Case No. 19-638-EL-BGN, Order (May 16, 2019) (approving a certificate amendment for a natural gas combined cycle plant in May 2019 with a condition for the applicant to develop a Stormwater Pollution Prevention Plan for a new temporary laydown area under the auspices of the Ohio Environmental Protection Agency); *In re Application of AEP Ohio Transmission Co., Inc.*, OPSB Case No. 18-30-EL-BTX, Order (Feb. 21, 2019) (approving an overhead transmission line project with a condition providing that, post-approval, the applicant would retain a herpetologist approved by ODNR to determine if the project route included suitable habitat for the timber rattlesnake and, if so, develop an avoidance/minimization plan); *In re Application of Rolling Hills Generating, LLC*, OPSB Case No. 00-1616-EL-BGN, Order (June 18, 2001) (approving a certificate for a natural gas facility contained a condition requiring post-issuance design of a fire protection system and engagement of an independent consultant to survey for existence of the Indiana bat and the American burying beetle followed by avoidance/mitigation measures as directed by USFWS and Staff).

<sup>71</sup> Rehearing App. at 139-140.

<sup>72</sup> Order at 61, ¶ 160.

<sup>73</sup> Applicant Ex. 45 at 4.

sufficient to support the Board's conclusion that Firelands had sufficiently addressed potential aviation-related concerns.

**K. The Board Reasonably Determined the Probable Impact of the Project on Socioeconomic Conditions in the Area.**

The Residents and BSBO contend that the Board erred in evaluating the probable impact of the Project on socioeconomic conditions in the area with respect to property values, commercial and industrial activity, and the overall determination that the Project will serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6).<sup>74</sup> These arguments gloss over the significant evidentiary record supporting the Board's determination that the Project would provide significant socioeconomic benefits to local communities.<sup>75</sup>

First, the Residents and BSBO dispute the testimony of Firelands witness MaRous that concluded that proximity to a wind farm did not impact the price of the proximate sale of property in the rural areas studied.<sup>76</sup> This portion of the Rehearing Application introduces no new arguments beyond what the Residents and BSBO presented in their Initial and Reply Briefs. The Board properly acknowledged these arguments,<sup>77</sup> but did not find them persuasive. Instead, the Board "accept[ed] the testimony supportive of the project's favorable economic impact on the citizens served by the increased funding to local governments."<sup>78</sup> There is no requirement for the Board to address each of the Residents' and BSBO's individual points in detail in order to credit Mr. MaRous's expert testimony and reach the ultimate conclusion "that, overall, the project is economically beneficial to those in the project area."<sup>79</sup>

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<sup>74</sup> Rehearing App. at 140-148.

<sup>75</sup> Order at 28, ¶ 65.

<sup>76</sup> Rehearing App. at 140-145; App. Ex. 40 at 3-7, MM-2.

<sup>77</sup> Order at 27-28, ¶ 64.

<sup>78</sup> *Id.* at 28, ¶ 65.

<sup>79</sup> *Id.*



Second, the Residents and BSBO similarly reiterate their stale attacks on the testimony of Firelands witness Tauzer, who testified that the Project’s construction and operation will offer local communities significant economic benefits in terms of jobs and tax revenues representing millions of dollars.<sup>80</sup> Their primary critique is that Ms. Tauzer and other witnesses did not introduce evidence regarding negative economic impacts of the Project.<sup>81</sup> But it was the Applicant’s prerogative to focus on the most significant impacts of the Project, and the Residents and BSBO failed to demonstrate that Fireland’s analysis omitted any material items. The Board properly recognized the validity of the Applicant’s approach in expressly “accept[ing]” Ms. Tauzer’s testimony.<sup>82</sup> As the Board’s Order shows, there was sufficient evidence presented to determine that the overall economic effect of the Project in the area would be beneficial to local communities,<sup>83</sup> as demonstrated by the fact that local government parties in this proceeding were signatories to the Stipulation and supported issuance of a certificate to Firelands.

### **III. CONCLUSION**

The Board’s Order rests on a robust evidentiary record and sound legal authority. In approving the Stipulation with limited modifications, the Board correctly determined that the Project would meet the applicable requirements of R.C. 4906.10, including representing the minimum adverse environmental impact taking into account pertinent considerations and serving the public interest, convenience, and necessity. The Board considered each of the arguments made by the Residents and BSBO in their Initial and Reply Briefs, but ultimately rejected them based on extensive expert testimony from Firelands and other Stipulation signatories. Although the

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<sup>80</sup> Applicant Ex. 36 at 5-8, 19.

<sup>81</sup> Rehearing App. at 145-146.

<sup>82</sup> Order at 28, ¶ 65 (citing Applicant Ex. 36).

<sup>83</sup> Order at 28, ¶ 65.

Residents and BSBO now recapitulate those same arguments at length in a 155-page Rehearing Application, they have not identified any flaws in the Board's reasoning that would merit a grant of rehearing in this case.

## 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 these cases. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below this 2<sup>nd</sup> day of August, 2021.

/s/ Christine M.T. Pirik  
Christine M.T. Pirik (0029759)

Counsel/Intervenors via email:

[werner.margard@ohioattorneygeneral.gov](mailto:werner.margard@ohioattorneygeneral.gov)  
[brett.kravitz@ohioattorneygeneral.gov](mailto:brett.kravitz@ohioattorneygeneral.gov)  
[katherine.walker@ohioattorneygeneral.gov](mailto:katherine.walker@ohioattorneygeneral.gov)  
[norwichtwp1339@gmail.com](mailto:norwichtwp1339@gmail.com)  
[richardwiles@willard-oh.com](mailto:richardwiles@willard-oh.com)  
[rstrickler@huroncountyohprosecutor.com](mailto:rstrickler@huroncountyohprosecutor.com)  
[jstephens@huroncountyohprosecutor.com](mailto:jstephens@huroncountyohprosecutor.com)  
[ggross@eriecounty.oh.gov](mailto:ggross@eriecounty.oh.gov)  
[heather@hnattys.com](mailto:heather@hnattys.com)  
[jvankley@vankleywalker.com](mailto:jvankley@vankleywalker.com)  
[pjleppa@leplaw.com](mailto:pjleppa@leplaw.com)  
[michael.gerrard@arnoldporter.com](mailto:michael.gerrard@arnoldporter.com)  
[hwa2108@columbia.edu](mailto:hwa2108@columbia.edu)  
[missyeb3@gmail.com](mailto:missyeb3@gmail.com)  
[baanc@aol.com](mailto:baanc@aol.com)  
[r\\_ladd@frontier.com](mailto:r_ladd@frontier.com)

Administrative Law Judges via email:

[jay.agranoff@puco.ohio.gov](mailto:jay.agranoff@puco.ohio.gov)  
[michael.williams@puco.ohio.gov](mailto:michael.williams@puco.ohio.gov)

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