BEFORE

THE OHIO POWER SITING BOARD

In the Matter of the Ohio Power Siting Board's Review of Ohio Adm.Code Chapters 4906-1, 4906-2, 4906-3, 4906-4, 4906-6, and 4906-7.	)))	Case No. 21-902-GE-BRO

INITIAL COMMENTS OF NATIONAL GRID RENEWABLES DEVELOPMENT, LLC

I. Introduction

Pursuant to the June 16, 2022 Entry issued in this proceeding, National Grid Renewables Development, LLC ("NG Renewables") is filing comments to the proposed revisions to Ohio Adm.Code Chapters 4906-1 through 4906-7. NG Renewables is a leading North American renewable energy company based in Minneapolis, Minnesota, with satellite offices located in the regions where it develops, constructs, and operates renewable energy projects. NG Renewables has received certificates for three utility-scale projects[1] from the Ohio Power Siting Board ("Board") and, at the time of the filing of these comments, has one pending certificate application.[2]

NG Renewables appreciates the opportunity to present comments on the proposed changes to Ohio Adm.Code Chapters 4906-01 through 4906-7. Overall, as explained in detail below, NG Renewables believes that the draft rules, as proposed, are not in compliance with R.C. 121.95 which requires the Board to simultaneously eliminate two regulatory restrictions for every new regulatory restriction. As a result, NG Renewables recommends the Board suspend the receipt of reply comments until its Staff demonstrates compliance with R.C. 121.95. NG Renewables also

[1] *In re Yellowbud Solar, LLC*, Case No. 20-972-EL-BGN, Opinion, Order, and Certificate (Feb. 18, 2021); *In re Ross County Solar, LLC*, Case No. 20-1380-EL-BGN, Opinion, Order, and Certificate (Oct. 21, 2021); and *In re Sycamore Creek Solar, LLC*, Case No. 20-1762-EL-BGN, Opinion, Order, and Certificate (Nov. 18, 2021).
[2] *In re Dodson Creek Solar, LLC*, Case No. 20-1814-EL-BGN, Application (May 27, 2021).

opposes the insertion of certificate conditions into the proposed rules because no statutory authority in Chapter 4906 authorizes the Board to impose conditions through rulemaking. For example, proposed Ohio Adm.Code 4906-4-09 contains a host of requirements that are clearly conditions on certificates such as mandating annual proof of weed control for the first four years of operation of a renewable energy facility. In addition to the lack of compliance with R.C. 121.95 and the issue of inserting conditions in the rules, NG Renewables has identified certain revisions to the proposed rules that warrant consideration.

While its comments are focused on certain issues, NG Renewables appreciates the difficult job the Board's Staff faces in trying to develop rules for power siting given the varying viewpoints presented in the original rule workshops. It is important, however, that governing statutes be followed. Those statutes include R.C. 121.95, which requires the Board to comply with the two for one elimination of regulatory restrictions, and R.C. 4906.10, which only allows conditions to be imposed through a certificate decision.

II. The drafted rules are not in compliance with R.C. 121.95

The Ohio Power Siting Board's ("Board") draft rules for Ohio Adm.Code Chapters 4906-01 through 4906-7, as proposed, do not comply with R.C. 121.95. Specifically, R.C. 121.95(F) states:

> Beginning on October 17, 2019, and ending on June 30, 2025, a state agency may not adopt a new regulatory restriction unless it simultaneously removes two or more other existing regulatory restrictions. The state agency may not satisfy this section by merging two or more existing regulatory restrictions into a single surviving regulatory restriction.

R.C. 121.95(F). Rules that "require or prohibit an action" are considered regulatory restrictions and include the words "shall," "must," "require," "shall not," "may not," and "prohibit". R.C. 121.95(B). Therefore, when an agency initiates a new requirement including restrictive language,

the agency must at the same time remove a least two other restrictions. As the statute states, an agency **cannot merge** two restrictions into a surviving restriction.

Here, the proposed revisions are replete with new regulatory restrictions that "require or prohibit an action", including rules comprised of the restrictive words identified in R.C. 121.95(F). For example:

- Ohio Adm.Code 4906-2-04(C)(7): a new restriction is introduced to require maps to include a representation of scale ("[m]aps shall include a representation of the map scale and the date upon which the map was produced"). The drafted rule does not remove any restrictions already present in the rule.

- Ohio Adm.Code 4906-4-04(C): the subpart of this rule introduces several new requirements for electric power transmission line and gas pipeline applications, all with the restrictive term "shall." At least 10 new restrictions are added to the rule; however only two appear to be removed from this subpart.

- Ohio Adm.Code 4906-4-06(F)(8): the subpart of this rule introduces at least 12 new restrictions, mainly using the restrictive term "shall," but no restrictions are removed from this subpart.

- Ohio Adm.Code 4906-4-08(C): the subpart of this rule introduces at least three new regulatory restrictions, using the terms "shall" and "must," while none appear to be removed in this subpart.

- Ohio Adm. Code 4906-7-04, 05 and 06: all require that a certificate holder take specific actions including filing annual reports, self-reporting certificate violations and reporting incidents including shutting down facilities.

While new regulatory restrictions are being added, it does not appear that any restrictions are being deleted. The only restrictions being deleted are a result of the merger of application requirements for transmission facilities, pipelines and generation facilities into one primary section. *See* Entry at ¶ 6 (listing Staff's recommended changes, first bullet point). But, as emphasized above, an administrative agency cannot merge restrictions as a way to delete restrictions. R.C. 121.95(F).

Further, in the Entry inviting comments on the proposed rules, the Board does not identify how many new restrictions are introduced, how many existing restrictions are removed, and how the proposed rules are in compliance with R.C. 121.95. In other, similar Public Utilities Commission of Ohio proceedings, the Commission has identified the number of new restrictions being introduced and the restrictions being removed pursuant to R.C. 121.95(F). I*n re Commission's Review of Ohio Adm.Code 4901:1-10*, Case No. 17-1842-EL-ORD, Finding and Order (Feb. 26, 2020), at ¶ 5; Entry on Rehearing (Jan. 27, 2021), at ¶¶ 58-59 ("the existing rule restriction inventory for Ohio Adm.Code 4901:1-10 identified 2,147 restrictions, and, after these amendments, Chapter 10 now consists of 2,135 restrictions, adding 12 restrictions while removing 24 restrictions); *In re Commission's Review of Ohio Adm.Code Chapter 4901-7*, Case No. 19-2103-AU-ORD, Finding and Order (Oct. 20, 2021), at ¶ 5. Here, the Board's Entry is silent on R.C. 121.95 even though the Board previously submitted an inventory of regulatory restrictions to the Joint Committee on Agency Rule Review ("JCARR") at the end of 2019 pursuant to R.C. 121.95(D).[3] At this juncture, it remains unknown if the Board plans to remove at least double the number of restrictions as it newly imposes. On the other hand, it is clear that the drafted rule provisions introduce new restrictions without eliminating enough restrictions to comply with the statute.

Because the proposed rules are currently noncompliant with R.C. 121.95, NG Renewables recommends that the Board stay this rule review process. The Board should instruct its Staff to demonstrate compliance with R.C. 121.95 by updating the inventory previously conducted without taking into account the merging of the transmission line, gas pipeline and generation application requirements. If the inventory shows that the statute has not been met (which is the likely result),

[3] https://opsb.ohio.gov/rules/restrictions.

then the Board should prepare and issue new rules for comment. Once this is accomplished, the rule review process may resume its normal course. Otherwise, the Board's lack of compliance with R.C. 121.95 will lead to regulatory uncertainty and a return of the rules by JCARR.

III. The Board does not have the authority to codify previously issued certificate conditions in its rules

The proposed rules should not include certificate conditions. Having received three certificates for Ohio utility-scale solar projects, NG Renewables is very familiar with certificate conditions, including negotiating certificate conditions unique to each NG Renewables project. The proposed rules, however, would essentially eliminate the use of stipulations for certificate conditions and instead impose certificate conditions by rule. That is outside the Board's statutory authority because the General Assembly has only authorized the Board to impose conditions when issuing a certificate. *See* R.C. 4906.10(A).

It is well established that the Board can only exercise the authority granted to it by statute. *In re Application of Black Fork Wind Energy, L.L.C.*, 156 Ohio St.3d 181, 2018-Ohio-5206 ("[b]ecause the board is a creature of statute, it can exercise only those powers the legislature confers on it") *citing Disc. Cellular, Inc. v. PUC*, 112 Ohio St.3d 360, 2007-Ohio-53; R.C. 4906.02(A). Here, the General Assembly has authorized the Board to implement certain rules to assist with the evaluation of and processing of applications (R.C. 4906.03) in addition to authorizing the Board to impose conditions on certificates (R.C. 4906.10(A)). Neither statute authorizes the Board to impose conditions on certificates via rule.

Nowhere in R.C. 4906.03 or 4906.10 is the Board authorized to impose conditions through rulemaking. Under R.C. 4906.03, the Board has the authority to:

> Adopt rules establishing criteria for **evaluating the effects on environmental values of proposed and alternative sites**, and projected needs for electric power, and such other rules **as are necessary and convenient to implement this chapter**,

> including rules governing application fees, supplemental application fees, and other reasonable fees to be paid by persons subject to the board's jurisdiction.

R.C. 4906.03(C) (emphasis added). This statute explicitly allows the Board to establish rules for environmental evaluations of and the needs for proposed projects. The statute also authorizes the Board to promulgate other rules, but these rules must be **necessary and convenient** to implement Chapter 4906. Nowhere in R.C. 4906.03 is the Board authorized to sidestep R.C. 4906.10(A) by imposing conditions on certificates through rule.

Likewise, R.C. 4906.10(A) does not provide the Board the authority to impose conditions on certificates through rule. R.C. 4906.10(A) authorizes the Board to "… render a decision upon the record either granting or denying the application as filed, or **granting it upon such terms, conditions**, or modifications of the construction, operation, or maintenance of the major utility facility as the board considers appropriate." R.C. 4906.10(A). Notably the General Assembly wrote R.C. 4906.10(A) to allow an applicant to withdraw an application if the certificate conditions vary from what was proposed in the application. R.C. 4906.10(A). Nowhere in this statute is the Board authorized to take away that right by imposing certificate conditions through rulemaking. In other words, imposing certificate conditions through rulemaking eliminates the statutory due process rights created by 4906.10(A) for an applicant and every other party in the proceeding to challenge certificate conditions.

In the proposed rules, however, that is exactly what the Board has done. The Board recycles language from conditions which have been previously attached to issued certificates. Some of these proposed rules (and these are just a few of many examples throughout the proposed rules), which have previously been issued as certificate conditions, include:

- Ohio Adm.Code 4906-4-06(F)(8): Mandating the filing of a complaint resolution program 30 days prior to the start of construction and mandating that various notifications to be

provided, including to affected property owners and local officials and agencies in a section requiring an application to provide information regarding public interaction.

- Ohio Adm.Code 4906-4-08(B)(5): Requiring applicant to prevent establishment of noxious weeds and comply with public orders concerning noxious weed abatement in a rule section requiring an application to include information on ecological resources.

- Ohio Adm.Code 4906-4-08(E)(2)-(3): Mandating the process by which affected drain tile must be repaired, and time within which the applicant must repair main drain tile during construction and operation/maintenance of the facility in a rule section requiring the application to include information about potential impacts to agricultural land.

These "new" rules are not necessary for the Board to accomplish its duty of evaluating the environmental impacts of a project. As the content of these rules indicate, the proposed rules do not evaluate the impact of a project. Instead, the rules dictate how a proposed project must be constructed and operated or how the project owner must communicate with local officials and neighbors in the future. These are all certificate conditions that do not belong in the Board's rules that are supposed to govern the contents of an application. Simply put, the practice of putting certificate conditions in rules should never have started and must stop. The certificate process works best for all parties involved if conditions are subject to the "give and take" dynamic that is part of the negotiation process. That is why NG Renewables requests the Board revise or eliminate the rules that presently contain certificate conditions (listed in the attached table as Exhibit A) because it cannot codify conditions into its rules.

Moreover, removing the conditions from the rules will allow conditions to be applied on a project by project basis. As the Board is aware, conditions that attach to certificates are usually negotiated during the settlement process between parties. Conditions can address aesthetic preferences, the manner of communication a project owner/operator must maintain with a community, and operation and maintenance protocols. In other words, certificate conditions are established on a case-by-case basis depending on the individual characteristics of the application,

the interests of the parties in the proceeding, and the Board's determination on the evidentiary record. Therefore, it would be impractical as well as unlawful to apply the exact same conditions to all projects moving forward.

The Board does not have statutory authority under R.C. 4906.03 or R.C. 4906.10 to codify conditions into its rules and apply them on a universal basis to all generation projects. Consequently, NG Renewables requests the Board revise the proposed rules to ensure certificate conditions are not included in its rules and to ensure compliance with the Board's statutory authority.

IV. Comments addressing specific rules

A. Ohio Adm.Code Chapter 4901-1-5 (Site visits)

NG Renewables believes the original language of this rule should be retained because, depending on the time of the Staff visit, a project owner may not have land control over the entire site which could preclude Staff or the project owner from having access to a particular part of a site. If the Board still wishes to modify the rule, then the rule should be changed to note that Staff and its representatives will report to a designated location, make themselves known to on-site management personnel and articulate the reason for the visit, and agree to follow all rules and procedures of the site, including agreeing to the presence of a company escort. Finally, as suggested below in response to Ohio Adm.Code 4906-7-07, NG Renewables also recommends that Staff provide a two-week notice for site visits to the project owner/operator.

B. Ohio Adm.Code Chapter 4906-3

1. Ohio Adm.Code 4906-3-03 (Public notification requirements)

Ohio Adm.Code 4906-3-03(B)

NG Renewables contends that two public information meetings are unnecessary as proposed under Ohio Adm.Code 4906-3-03(B). First, one additional meeting is already required for projects not grandfathered under Senate Bill 52. R.C. 303.61(A). Introducing an additional public information meeting (total of three) will increase project costs by adding unnecessary labor and travel expenses and be redundant. Second, an additional meeting to solicit input from the general public on the scope of a project is not necessary. The general public does not have the general or technical expertise necessary to adequately determine the scope of a project, especially regarding a project's location or feasibility. Instead, the applicant is responsible for determining the feasibility and scope of a proposed project and in doing so will rely on system studies conducted by PJM Interconnection, LLC ("PJM").

Finally, holding two public information meetings (in addition to the third meeting required under R.C. 303.61(A)) within 90 days of certificate submission is overly burdensome and does not give enough time to incorporate feedback between the meetings. While NG Renewables does not believe a second public information meeting within 90 days is necessary, NG Renewables supports the Clean Energy Industry's position that it is possible to hold two public information meetings within 180 days of application submission so that public feedback can be adequately incorporated and addressed. However, as mentioned above, the scope of these meetings should not be overly broad (e.g. soliciting the public's input on the project scope) due to the public's lack of expertise in determining the feasibility of solar projects.

Ohio Adm.Code 4906-3-03(B)(1)

Turning to proposed Ohio Adm.Code 4906-3-03(B)(1), NG Renewables requests clarification on the term "proposed location of facility." NG Renewables is supportive of providing a generalized map of the proposed location of the project. However, NG Renewables is

opposed to providing specific information which could potentially identify landowners who are leasing property for a proposed project out of concern for their privacy, safety, and continued ability to perform daily activities. The permitting process, as it stands, can take months or even over a year, and landowners should be able to continue their day-to-day activities without fear of harassment or intrusions on their privacy during this process.

Ohio Adm.Code 4906-3-03(B)(2)

NG Renewables requests the Board revise the rule to require that the notice of compliance with this rule include a copy of the "form" letter rather than a copy of every letter sent. That can lead to a voluminous filing. The rule requires a list of landowners, so a copy of the form letter with the mailing list should suffice.

Ohio Adm.Code 4906-3-03(B)(5)

NG Renewables requests clarification on this rule. Initially, there are privacy and safety concerns, as mentioned above, with regard to an interactive address search. Further, the proposed rule is not clear as to which entity (the project owner or the Board Staff) will be supplying the hardware necessary to make such an interactive map accessible during a public meeting. NG Renewables proposes two solutions. Aerial imagery of the project area, along with layers representing facility components, could be made available on the project website. Second, quick response ("QR") technology could also allow attendees to access an interactive map on their mobile device through a QR code made available during the public meeting.

2. Ohio Adm.Code 4906-3-05 (Fully developed site or route information)

NG Renewables does not believe this rule should be applicable to generation facilities. Instead, the rule should remain applicable to transmission lines and gas pipelines. NG Renewables agrees with the Clean Energy Industry in that the proposal to identify and present fully developed

information on alternate sites would create great uncertainty for solar and wind developers because land acquisition costs for such projects are high. Developers would also accrue additional costs in the form of creating duplicate studies to gauge ecological, historical, and cultural impacts for two separate project areas. In addition, the creation of two project sites could easily result "not in my backyard" arguments between community members, which could lead to contentious disputes within the community as to which project location should be selected. Moreover, the PJM interconnect process requires identification of a specific point of interconnect which further limits the ability of generation projects to provide fully developed alternatives. That is why the original rule was limited to transmission lines and gas pipelines. The rule should not be changed.

3. Ohio Adm.Code 4906-3-06 (Completeness of standard certification applications, staff investigation, and staff report)

Ohio Adm.Code 4906-3-06(A)(2)

NG Renewables suggests the last sentence of this rule be revised because only the applicant should be permitted to appeal for a redetermination by the Board. NG Renewables also questions whether the Board has the authority to implement an appeal process that would result in an order from an administrative law judge that could overturn a determination by the Chair. If adopted, though, no one, other than the applicant, should be able to appeal an incompleteness determination.

4. Ohio Adm.Code 4906-3-07(B) (Service and publication of accepted, completed applications)

NG Renewables suggests that the Board add a requirement in this rule directing that the Board's cover letter accompanying the application sent to each local official be filed in the case docket.

5. Ohio Adm.Code 4906-3-09(A)(1) (Public notice of accepted, complete applications)

NG Renewables notes that R.C. 4906.06(C) requires an applicant to publish a newspaper notice of the application within 15 days of filing the application. This rule should be revised to be in harmony with that statute. Currently the rule only requires a mailing when it should also require a newspaper publication as required by statute.

6. Ohio Adm.Code 4906-3-11(A)(6) (Amendments of accepted, completed applications and of certificates)

NG Renewables suggests revising the following sentence as follows (revision in red):

> Unless otherwise ordered by the board or administrative law judge, modifications to a proposed route that are introduced into the record by the applicant during review of the accepted, complete application and during the hearing process shall not be considered amendments if such modifications are within the two thousand foot study corridor and do not impact additional landowners by requiring easements for construction, operation, or maintenance or appear to not create ~~further~~ additional adverse impacts within the planned right-of-way of the proposed facility.

7. Ohio Adm.Code 4906-3-12 (Application fee and board expenses)

NG Renewables recommends retaining the current scheme of a set fee schedule. Periodic payments as described in the proposed rule creates unnecessary administrative burdens for applicants. NG Renewables also suggests not assessing fees for pre-application conferences. These conferences are helpful for both potential applicants and Staff, and assessing fees could create a disincentive for holding such conferences.

8. Ohio Adm.Code 4906-3-13 (Construction and operation)

Ohio Adm.Code 4906-3-13(C)

NG Renewables believes this rule should be stricken and agrees with the Clean Energy Industry that the language is legally problematic and prohibitive as a matter of project finance. R.C. 4906.13(B) makes clear that local government permits are not necessary to build utility-scale generation projects in Ohio. The proposed language is in direct contradiction with that state law. While included as a condition in many certificates, NG Renewables has consistently negotiated

revisions to this language in the stipulations that the Board has approved. Further, as the Clean Energy Industry notes, during financing, a developer must provide a list of all permits required to build the project. Adding this language would create uncertainty because it would seem to indicate the necessity of local permits to build the project. Lastly, the language is ambiguous and subject to multiple interpretations. The language of this rule also should not be codified in this rule chapter because doing so would exceed the Board's statutory authority.

Ohio Adm.Code 4906-3-13(E)

NG Renewables believes there are security issues inherent in making as-built drawings available on the public docket. Generation facilities are defined as critical infrastructure and are vulnerable to acts of terrorism, both physically[4] and through cyberattacks.[5] While NG Renewables has no issue with providing such as-built plans to Staff confidentially, they should not be available for public viewing. Finally, as noted above in Section II, the language of this rule is usually a condition that is attached to issued certificates and should not be codified in this rule chapter as doing so would exceed the Board's statutory authority.

9. Ohio Adm.Code 4906-3-14 (Preconstruction requirements)

Ohio Adm.Code 4906-3-14(C)(1)

NG Renewables reiterates its arguments made above about the impropriety of, and security risks associated with, filing sensitive information regarding critical infrastructure on the public docket with regard to this rule.

Ohio Adm.Code 4906-3-14(C)(2)

[4] https://www.npr.org/sections/thetwo-way/2014/02/05/272015606/sniper-attack-on-calif-power-station-raises-terrorism-fears.
[5] https://www.cisa.gov/energy-sector.

As noted above in Section II, the language of this rule is usually a condition that is attached to issued certificates and should not be codified in this rule chapter as doing so would exceed the Board's statutory authority. This rule also appears to be missing a closing parenthesis after the word "geodatabases." Additionally, if the Board still elects to pursue this rule, then it should be revised to state "final design is in compliance with the certificate" rather than the "final design would be sited as certificated." That edit would ensure consistency between parts (C)(1) and (C)(2).

Ohio Adm.Code 4906-3-14(E)

As noted above in Section II, the language of this rule is usually a condition that is attached to issued certificates and should not be codified in this rule chapter.

10. Ohio Adm.Code 4906-3-15 (Change in corporate structure)

As written, the rule exceeds the Board's authority because R.C. Chapter 4906 does not authorize the Board to review and approve upstream corporate structures. The only authority the Board has as to who holds the certificate is to authorize the transfer of a certificate pursuant to R.C. 4906.04. Moreover, upstream corporate structures can change often and a general requirement to provide notices of changes would lead to an unnecessary regulatory burden on the certificate holder. Further, while corporate structuring changes are a common occurrence, the original owner (e.g. the project company holding the certificate) in most situations stays the same. The Board's statutory authority extends to the entity holding the certificate, not to any entity that is upstream in a corporate structure. Also, as the Clean Energy Industry indicates, requiring Board approval for upstream corporate structure changes will create a material risk for lenders and equity providers and will lead to project financing issues.

C. Ohio Adm.Code Chapter 4906-4

1. Ohio Adm.Code 4906-4-03(B)(3)(b)

Renewable energy technology changes constantly. For example, panel technology changes as do panel models. This rule should require representative examples of the equipment to be used but not the exact models. Otherwise, renewable energy projects will enter an endless cycle of equipment change amendments.

2. Ohio Adm.Code 4906-4-06 (Economic impact and public interaction)

Ohio Adm.Code 4906-4-06(F)(8)

As further explained in Section II, this rule is a condition that can only be imposed through the issuance of a certificate. As written, the rule exceeds the Board's authority. Further, if the Board chooses to approve this rule, then NG Renewables suggests the rule be revised to reflect that complaint summaries should be scrubbed of any personally identifiable information.

3. Ohio Adm.Code 4906-4-07(E)(3) (Compliance with air, water, solid waste, and aviation regulations)

NG Renewables suggests revising this rule to the following as FAA filing statuses may not be necessary for solar projects (revision in red):

> Provide the FAA filing status of each ~~airport~~ structure for which a filing is required, and describe any potential conflicts with air navigation or air traffic communications that may be caused by the proposed facility.

4. Ohio Adm.Code 4906-4-08

Ohio Adm.Code 4906-4-08(A)(3)(a)

NG Renewables recommends deleting the phrase "or particularly annoying" or, at the very least, requests clarification to better understand what is meant by this phrase.

Ohio Adm.Code 4906-4-08(A)(4)

NG Renewables requests clarification as to the purpose of the one-mile buffer around the project area. The one-mile buffer area seems excessive versus the prior rule which requested information on aquifers, water wells, and drinking water source protection areas that may be affected.

Ohio Adm.Code 4906-4-08(A)(5)

NG Renewables suggests revising this rule because, in certain cases, this data is not available from the Ohio Department of Natural Resources (revision in red):

> The applicant shall provide a map of suitable scale showing the proposed facility, geological features of the proposed facility site, topographic contours, existing gas and oil wells, ~~and~~ injection wells, and to the best of their ability, known underground abandoned mines.

Ohio Adm.Code 4906-4-08(A)(5)(b)

NG Renewables recommends removing the requirement to provide a grading plan in an application because a grading plan is contingent upon and cannot be created until final engineering is complete. Requiring a plan to be part of an application well before final engineering has occurred would be costly and would not result in accurate data being provided to the Board.

Ohio Adm.Code 4906-4-08(A)(14)

NG Renewables asks that subsections (b), (c), and (d) of this rule be removed or revised. Board Staff is well-educated about electric and magnetic fields ("EMFs") due to various proceedings involving electric distribution utilities and the deployment of smart meters in their service areas. Further, subsections (c) and (d) are extremely subjective and open to interpretation. EMF risk is minimal at solar facilities and consequently this rule is not necessary.

Ohio Adm.Code 4906-4-08(D)(5)

NG Renewables believes the second sentence of this rule requiring that mitigation procedures be developed in consultation with the Ohio History Connection should be deleted. If

imposed, it is better suited as a condition on issued certificates. Any mitigation that results through consultation with the Ohio History Connection should occur as part of the review and resolution of cultural resource surveys.

Ohio Adm.Code 4906-4-08(E)(2)(b)(ii)

NG Renewables requests clarification on this rule because irrigation systems could also be removed as a result of landowner agreements. This clarification can be provided by adding the word "removed," prior to "avoided or mitigated ***."

Ohio Adm.Code 4906-4-08(E)(2)(b)(v)

NG Renewables suggests editing the proposed addition to avoid providing unnecessary details regarding avoidance of removal of structures if at the landowner's request (revision in red):

> Unless the removal is otherwise requested by the landowners, t~~T~~he applicant shall describe all agricultural structures that will be removed or repurposed, the impacts of removal or repurposing on agricultural operations, and how such impacts will be mitigated or avoided.

Ohio Adm.Code 4906-4-08(E)(3)

NG Renewables agrees with the Clean Energy Industry that this rule, as written, is overly burdensome, especially with regard to the replacement and repair of lateral drain tiles. At the very least, lateral drain tile mitigation should be assessed on a case-by-case basis. Project owner/operators should also not be responsible for drain tiles outside the project area. Further, as explained in Section II, NG Renewables believes this rule is a condition that can only be imposed through the issuance of a certificate. Moreover, the Board has no statutory authority to mandate that a project owner/operator **must compensate** nearby landowners for any crop damage due to field tile damage in a rule section requiring information about potential impacts to agricultural land. As written, NG Renewables believes the rule exceeds the Board's authority and should be deleted. Drain tile conditions are often negotiated through stipulations and imposed by the Board

as certificate conditions. That practice should remain rather than trying to put drain tile conditions in the Board's rules including an ambiguous requirement to compensate nearby landowners for crop damage.

5. Ohio Adm.Code 4906-4-09 (Regulations associated with renewable energy generation facilities)

Prior to discussing specific issues, NG Renewables believes that most of the parts of this rule are comprised of conditions usually included in issued certificates. As further explained in Section II, these types of conditions should not apply to all projects carte blanche and instead should be applied on a case-by-case basis, depending on the unique circumstances of each certificate application. Consequently, NG Renewables recommends that the provisions of this rule be revised to remove all conditions and only leave provisions that pertain to information about the project. If the Board elects to impose these rule requirements (which it cannot and should not), then NG Renewables has proposed specific revisions below.

Ohio Adm.Code 4906-4-09(A)(3)(e)

NG Renewables believes this rule is ambiguous as written. It is not clear how the project company can satisfy the evidentiary burden involving providing annual proof of weed control. The Board should revise this rule to make the requirements more clear.

Ohio Adm.Code 4906-4-09(D)(5)

For clarity, NG Renewables recommends that the following sentence be revised to make clear that the environmental specialist has authority to halt construction only in the affected area (revision in red):

> The environmental specialist shall have authority to stop construction in the affected area to assure that unforeseen environmental impacts do not progress and recommend procedures to resolve the impact.

Ohio Adm.Code 4906-4-09(E)(2)

The proposed restrictions on project operational noise are too low, ambiguous and would preclude renewable energy development in Ohio. First, a level of 40 dBA is very low and much lower than operational noise levels adopted for solar projects and wind projects. No rationale has been provided for a level of 40 dBA in the proposed rules, such as a statement that the Board has received excessive noise complaints about wind and solar projects. Second, in a departure from current precedent, the Board is defining the ambient daytime and nighttime noise level as the L50 or median sound level. The Board has previously utilized Leq to define background noise.[6] While Leq and L50 are two different ways to measure the ambient sound level, the L50 measurement could be much lower at rural sites. This is because Leq measures the **average** noise in an area at a given time while L50 measures the **median level** for the same area. As a result, if the Board now starts using the L50 measurement, developers will likely have to implement much greater project inverter setbacks than current industry practice.

Third, the rule as written would apply a standard of either 40 dBA or the project area ambient daytime and nighttime median sound level (the L50). No clarification is provided on whether it is the lesser or greater of the two (which at a minimum should be the greater of the two). Fourth, the rule adopts the L50 as the metric for ambient, but it is not clear what metric would be applied to the operational noise source (e.g. the project). In other words, it is ambiguous if the applicant is to compare the projected Leq (average) of the project operational sound over a certain period of time to the L50 of background, or is to compare the projected L50 (median) of the project operational sound to the L50 of background. Finally, NG Renewables recommends the rule specify a time period during which the project area's ambient sound level should be measured.

[6]Ohio Adm.Code 4906-4-09(F)(2) (the Board's rule regarding wind farm noise which implements a 5 dBA above the average project area Leq standard).

For example, the rule does not state if sound should be measured over an hour, several hours, the entire daytime, the entire nighttime, etc.

Overall, if the Board wishes to adopt an absolute noise standard, then adopting a standard that has been approved previously of 5 dBA above the average project area ambient Leq is appropriate.[7] That is a workable standard.

Ohio Adm.Code 4906-4-09(G)(4)

NG Renewables agrees with the Clean Energy Industry's position in that setbacks should be set on a case-by-case basis because every project footprint is different and each project will require different levels of setbacks depending on the project's unique circumstances. Staff has presented no rationale for the proposed 150 and 300 feet setbacks. As proposed, a 150 feet setback from a project's solar modules to public roads and non-participating parcel boundaries is too far and would render land useless and deprive a landowner of rent from a solar farm. Likewise, a 300 feet panel setback from non-participating residences is longer than necessary given the screening that will be installed and the fact that for solar facilities, the only impact is viewshed.

If the Board would like to codify a distance into the rule, then NG Renewables suggests a 50 feet setback from the edge of the public roads to the nearest solar panels which provides sufficient distance to install screening, project fencing and separation between the panels and fencing. NG Renewables suggests no more than a 300 feet setback from the nearest solar panels to a non-participating residence, again given that the only issue is viewshed. Overall, NG Renewables notes that setbacks should be utilized on a project specific basis and not mandated by rule.

[7] *See, e.g.*, *In re AEUG Union Solar, LLC*, Case No. 20-1405-EL-BGN, Opinion, Order, and Certificate (Feb. 17, 2022), at ¶ 91(16) and *In re Sycamore Creek Solar, LLC*, Case No. 20-1762-EL-BGN, Opinion, Order, and Certificate (Nov. 18, 2021), at ¶ 95(19).

Ohio Adm.Code 4906-4-09(G)(5)

The rule as written is ambiguous because it could be interpreted to mean that projects should be entirely screened. Such an interpretation could lead to a major cost factor for project owners/operators in terms of establishing and maintaining the excessive screening. Additionally, screening for the traveling public is not necessary in most cases, as most projects are sited in rural areas with small communities and minimal traffic. Further, the travelers on these public highways are mainly motorists who will travel at higher speeds on public roads. NG Renewables requests that the rule be clarified so that screening for the traveling public can be evaluated on a case-by-case basis. In addition, the requirement that vegetative screening is to be maintained for the life of the facility is a condition that, as described in Section II above, should not be codified in the rules.

CSI Document Comment (#16c)

The Board's response for this question is inaccurate in that it states there will be no material increase in the cost of compliance with these proposed changes. In fact, the proposed changes in Ohio Adm.Code Chapter 4906-4 will lead to a host of new costs. For example, developers will have to obtain more land to comply with increased setbacks, evaluate the impacts of an alternative site, and propose additional vegetation screening to screen the majority of the project from traveling motorists. Because these new requirements will significantly increase costs of projects, project developers will likely look to site projects in other states with more favorable renewable energy structures.

Losing renewable energy projects to other states would be detrimental to Ohio. As the Board is aware, Intel recently announced that it will make more than a $20 billion investment to construct two chip factories in Ohio. Importantly, Intel's press release on the investment included

a goal for the new factories to be powered by 100% renewable electricity to support its 2030 sustainability goals.[8] Intel's investment shows that supporting renewable energy in Ohio is critical to attracting new businesses in Ohio as many industry sectors are making voluntary renewable energy goals. In sum, NG Renewables asks the Board to modify this Common Sense Initiative response if the rules in this chapter are not revised.

D. Ohio Adm.Code Chapter 4906-6-4 (Requests for expedited treatment and fees)

This rule contains a typo ("termini").

E. Ohio Adm.Code Chapter 4906-7

With regard to the proposed rules in this Chapter, NG Renewables initially notes that the Board does not have the authority to promulgate these rules. R.C. 4906.03(C) allows the Board to establish "such other rules as are necessary and convenient to implement this chapter." It is clear that these rules are not necessary to assess the environmental impact of solar generation projects. Further, while R.C. 4906.97, 4906.98, and 4906.99 allow the Board to investigate violations of issued certificates, certificate conditions, or Board opinions, there is no authority for the Board to set up ongoing compliance monitoring of projects. In other words, while the Board has ongoing jurisdiction to consider any violations of certificates and conditions contained therein and its opinions, it has no authority to implement the annual reporting (Ohio Adm.Code 4906-7-04), reporting of violations (Ohio Adm.Code 4906-7-05), and self-reporting of incidents (Ohio Adm.Code 4906-7-06) contemplated here. Therefore, NG Renewables believes these additions should be eliminated.

If the Board chooses to implement these rules (which it should not), then NG Renewables suggests targeted revisions, identified below, and in a redline of Ohio Adm.Code 4906-7-06 that

[8] https://www.intel.com/content/www/us/en/newsroom/news/intel-announces-next-us-site-landmark-investment-ohio.html#gs.7rtinh.

follows. NG Renewables further recommends that these rules only be applicable to projects that have not yet submitted applications as of the effective date of the rules. Currently, the proposed rules have no language that precludes pending projects and certificates existing prior to the rule's effective date. As explained above, it is well-settled that the Board can only exercise the authority granted by statute. *In re Application of Black Fork Wind Energy, L.L.C.*, 156 Ohio St.3d 181, 2018-Ohio-5206. No provision of R.C. Chapter 4906 allows the Board to retroactively apply these rules to pending or already certificated projects.

1. Ohio Adm.Code 4906-7-04 (Annual reporting requirement)

The reporting requirements in this rule are overly burdensome and unnecessary. Currently, the Board approves a condition which directs project owners/operators to submit quarterly complaint reports to Board Staff during construction of the Project and the first five years of project operation.[9] Consequently, there is no need for this particular rule and it should be deleted in its entirety.

2. Ohio Adm.Code 4906-7-05 (Reporting violations)

The parameters of the Staff investigation are unclear. For example, the rule does not identify what kind of investigation Staff will undertake, if remedies will be suggested, and whether Staff's report will be docketed. Further this rule is duplicative as it requires a similar type of reporting as identified in proposed Ohio Adm.Code 4906-7-06. Consequently, this rule should be eliminated, both because it is duplicative and it exceeds the Board's authority, as explained above.

3. Ohio Adm.Code 4906-7-06 (Self-reporting of incidents)

[9] *See, e.g.*, *In re Sycamore Creek Solar, LLC*, Case No. 20-1762-EL-BGN, Opinion, Order, and Certificate (Nov. 18, 2021), at ¶ 95(12) and *In re Yellowbud Solar, LLC*, Case No. 20-972-EL-BGN, Opinion, Order, and Certificate (Feb. 18, 2021), at ¶ 66(10).

As explained above, this rule is another instance of the Board exceeding its authority under R.C. 4906.03(C). Consequently, NG Renewables recommends this rule be eliminated. If the Board chooses to implement this rule, then NG Renewables recommends the following specific revisions. A redline also follows.

Ohio Adm.Code 4906-7-06(B)(1)

Project owners/operators should only have to report significant injuries. Consequently, NG Renewables suggests the following revision (revision in red).

(1) There is significant injury to any person

Ohio Adm.Code 4906-7-06(B)(2)

This rule should be revised to reflect that project owners/operators lease land from participating landowners. NG Renewables suggests the following revision (revision in red):

(B)(2) There is damage to property other than the property leased or owned by ~~of~~ the facility operator.

Ohio Adm.Code 4906-7-06(C)

The phone number listed in this rule appears to be the number for the Ohio Department of Natural Resources one-call incident hotline. The number should be revised to indicate the appropriate number for the Board's executive director.

Ohio Adm.Code 4906-7-06(F)

The proposed rule, as written, is not feasible because it will create unnecessary and costly construction delays for minor incidents. Further, there is no timeframe indicated within which the Board has to respond and allow construction to recommence. NG Renewables believes project owners/operators will employ construction teams who will be experienced and trained in determining when a project area should be shut down. If the Board chooses to implement this rule,

NG Renewables supports the Clean Energy Industry's position and recommends including language that would halt construction only in identified areas and provide timelines for response, investigation and ultimate release of that area. As noted below, NG Renewables suggests that a project owner/operator be allowed to restart operations within five business days after docketing the information required by the rule.

Redline of Proposed Ohio Adm.Code 4906-6-06

(A) This rule does not apply to a facility subject to rule 4906-4-10 of the Administrative Code where those rules would necessitate reporting of an incident as defined in this rule.

(B) For purposes of this rule, an "incident" ~~includes but is not limited to~~ is an event occurring at the site of any certificated facility where:

(1) There is significant injury to any person.

(2) There is damage to property other than the property leased or owned by ~~of~~ the facility operator.

(3) There is damage to the facility operator's property that is estimated to exceed fifty thousand dollars, excluding the cost of electricity lost, which is the sum of the estimated cost of material, labor, and equipment to repair and/or replace the operator's damaged property.

(C) Telephone Notice. Facility operators are obligated to notify the board's executive director ~~by calling 1-844-OHCALL1 (1-844-642-2551)~~ as well as local law enforcement and first responders of all incidents involving a certificated facility, within thirty minutes after discovery unless notification within that time is impracticable under the circumstances.

(D) Written reports regarding incidents.

(1) Within thirty days after an incident is discovered, a facility operator is obligated to submit a written report to the executive director describing the cause of the incident, where ascertainable, and any damage to the facility or to neighboring properties or persons, on a form provided by the board.

(2) Each facility operator will also docket, in the facility's certificate case, a final written report on a form provided by the board within sixty days after discovery of the incident, unless both of the following apply:

(a) The facility operator, for good cause shown, demonstrates more time is needed;

(b) The facility operator submits interim reports to the executive director at intervals of not more than sixty days until a final report is docketed.

(3) Each written report submitted pursuant to this rule will address:

(a) The cause of the incident.

(b) The date and time the incident occurred and date and time it was discovered.

(c) A narrative description of the incident and actions taken by the facility operator, including a timeline of those actions and other relevant events.

(d) What, if any, damage occurred to the property within the facility.

(e) What steps were necessary to repair, rebuild, or replace damage to any property of the facility.

(f) What, if any, personal injury was caused by, or related to, the incident.

(g) What, if any, damage to properties within or adjacent to the project area was caused by, or related to, the incident.

(h) What, if any, steps were, or will be taken to prevent future incidents.

(E) Staff will investigate every incident that results in a report being submitted under paragraph (D)(1) this rule. ~~Except as necessary for public safety, no facility operator may disturb any damaged property within the facility or the site of a reportable incident until the staff approves action to move the damaged property.~~

(F) A facility involved in a reportable incident under paragraph (D) of this rule may restart operations in the area of the incident within five business days of providing the information required under this rule ~~cannot restart or resume construction until such action is approved by the board's executive director or the executive director's designee~~.

4. Ohio Adm.Code 4906-7-07

The proposed rule, as written, does not allow for proper scheduling of Staff visits and adherence to safety procedures. NG Renewables recommends that at least a two-week notice be provided to the project operator/owner for reasonable notice of Staff's desire to inspect a facility. This will also allow the project owner/operator to provide Staff safety guidelines and instructions prior to the visit and the assignment of a project escort.

IV. Conclusion

NG Renewables thanks the Board for the opportunity to present comments on the proposed revisions to Ohio Adm.Code Chapters 4906-1 through 4906-7. Important to the Board's review is compliance with R.C. 121.95 (the two for one requirement). While perhaps difficult to implement, that is the directive of the General Assembly. That directive cannot be satisfied by merging the application requirements for transmission lines and gas pipelines with the application requirements for generation facilities because the statute expressly states that merging restrictions does not satisfy the two for one requirement. NG Renewables respectfully requests that the Board adopt the recommendations set forth in these comments for compliance with R.C. 121.95 as well as ensuring that conditions are not included in these rules in violation of R.C. 4906.03 and 4906.10.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically service notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being sent via electronic mail on August 5, 2022 to:

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EXHIBIT A

List of Conditions Proposed to be Codified in this Rule Proceeding

- Ohio Adm.Code 4906-3-13(A): construction and commercial operations notifications
- Ohio Adm.Code 4906-3-13(B): certificate expiration after five years
- Ohio Adm.Code 4906-3-13(C): compliance with local regulations
- Ohio Adm.Code 4906-3-13(E): submission of as-built drawings
- Ohio Adm.Code 4906-3-13(F): registration of as-built locations of electric lines and gas pipelines
- Ohio Adm.Code 4906-3-13(G): proof of compliance with above conditions
- Ohio Adm.Code 4906-3-14(A): landowner notification of construction activities
- Ohio Adm.Code 4906-3-14(B): preconstruction conference with Board Staff
- Ohio Adm.Code 4906-3-14(C): deliverables for preconstruction conference
- Ohio Adm.Code 4906-3-14(D): provision of executed interconnection service agreement
- Ohio Adm.Code 4906-3-14(E): proof of compliance with preconstruction deliverables
- Ohio Adm.Code 4906-3-15: notification of change in corporate structure
- Ohio Adm.Code 4906-4-06(F)(8): various requirements regarding the complaint resolution plan and notices sent to the community regarding construction and operation of the project
- Ohio Adm.Code 4906-4-08(B)(5): requirements regarding weed control
- Ohio Adm.Code 4906-4-08(E)(2)(b)(i)-(iii): requirements regarding identification of drainage systems and their prompt repair
- Ohio Adm.Code 4906-4-08(E)(3)(a)-(e): requirements regarding documenting benchmark conditions of drain tiles, their avoidance, and repair (including compensation for crop impacts)
- Ohio Adm.Code 4906-4-09: this entire rule is comprised of conditions, with the exception of Ohio Adm.Code 4906-4-09(A)(2)(b)(i), including but not limited to noxious weed control; the ability of Staff-approved environmental specialist to halt construction in sensitive areas; stormwater management; project perimeter fencing; minimum setback requirements; landscaping plans; etc.
- Ohio Adm.Code 4906-4-10: this entire rule is comprised of conditions requiring various notices and reports for wind farms
- Ohio Adm.Code 4906-7-04: annual reporting requirements
- Ohio Adm.Code 4906-7-05: reporting violations
- Ohio Adm.Code 4906-7-06: self-reporting of incidents

Summary: Comments Initial Comments electronically filed by Mr. Michael J. Settineri on behalf of National Grid Renewables Development, LLC