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, 4906-5, 4906-6, and 4906-7.	)))))	Case No. 21-902-GE-BRO

INITIAL COMMENTS OF THE AMERICAN CLEAN POWER ASSOCIATION, MAREC ACTION, AND THE UTILITY SCALE SOLAR ENERGY COALITION OF OHIO

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I. INTRODUCTION

On June 16, 2022, the Ohio Power Siting Board ("Board") issued an entry requesting comments on revisions to Ohio Adm.Code Chapters 4906-1 through 4906-7 proposed by the Board's Staff ("Staff"). American Clean Power ("ACP"), "MAREC Action," and the Utility Scale Solar Energy Coalition of Ohio ("USSEC") (collectively the "Clean Energy Industry") submit the following initial comments.

ACP is the voice of the clean power industry that is powering America's future, providing cost-effective solutions to the climate crisis while creating jobs, spurring massive investment in the U.S. economy and driving high-tech innovation across the nation. By uniting the power of wind, solar, storage, and transmission companies and their allied industries, ACP helps enable the transformation of the U.S. power grid to a low-cost, reliable and renewable power system.

MAREC Action is a nonprofit member organization formed to help advance the opportunities for renewable energy development in Ohio and the broader region where the PJM Interconnection, LLC ("PJM") the Regional Transmission Organization operates. MAREC Action members include utility-scale wind and solar energy developers, wind turbine and photovoltaic ("PV") solar panel manufacturers, and affiliated organizations. Many of MAREC Action's members have developed or are developing projects in Ohio.

USSEC is a non-profit organization representing large-scale solar developers, manufacturers, and industry leaders working to meet the demand for clean energy and drive economic development benefitting Ohio's communities, schools, and rural landowners.

We appreciate the time and effort the Board and its Staff have taken to update these rules. We believe the recommendations offered below can help meet the Board's goals without adding undue cost, delay, and risk to the businesses who wish to invest in Ohio's energy infrastructure and participate in the energy transition now underway.

In accordance with R.C. 121.82, the Board provided the business impact analysis ("BIA") with the proposed rules with the June 16, 2022 entry. The Board explained that "[i]f there will be an adverse impact on businesses…the agency is to incorporate features into the draft rules to eliminate or adequately reduce any adverse impact."[1] The Board also stated that it would provide the draft rules and the BIA to the Common Sense Initiative ("CSI") office.[2]

The Clean Energy Industry notes that, in response to questions 16(a) through (c) of the BIA, the OPSB is to: summarize the estimated cost of compliance with the rule; identify the nature of all adverse impact; and the estimate the cost of compliance with the rules and the scope of the impacted business community. However, the BIAs attached to the June 16, 2022 entry, do not acknowledge the real world adverse impacts or increased energy costs that will be passed on to consumers if the rules are implemented as proposed without the revisions proposed herein.

Contrary to the statements in the BIAs, the cost of compliance with certain provisions in the proposed rules could be significantly higher for applicants than under the current regulatory

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[1] *In re Ohio Power Siting Board's Review of Ohio Adm.Code Chapters 4906-1, 4906-2, 4906-3, 4906-4, 4906-5, 4906-6, and 4906-7*, Case No. 21-902-GE-BRO, Entry (June 16, 2022) at 2 ¶ 4.

[2] *Id.*; Under R.C. 121.82, the Board must conduct a BIA regarding the rules and provide the draft rules and the BIA to Ohio's CSI office. Led by Lt. Governor Jon Husted, the mission of CSI is "…to reform Ohio's regulatory policies to help make Ohio a jobs and business-friendly state. CSI reviews Ohio's regulatory system to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. While regulations play an important role in promoting fair competition and protecting the public, regulations should also facilitate economic growth. Ohio's regulatory process should be built on the foundations of transparency, accountability, and performance, and should hold state agencies accountable as rules and regulations impacting businesses are developed or renewed." https://governor.ohio.gov/priorities/common-sense-initiative/history

process. Such costs would be detrimental to the Clean Energy Industry and could result in Ohio losing out on the opportunity to bring on additional energy supply in a constrained, inflationary market, as well as additional jobs to the state through the construction and operation of new wind, solar, and battery energy storage system ("BESS") facilities. Ohio could also lose out on the opportunity to attract new companies that locate in Ohio to take advantage of access to these facilities. The Clean Energy Industry believes that, if the modifications proposed in these comments are rejected, then questions 16(a) through (c) in the BIAs should be revised to reflect that energy project developers and operators, as well as other businesses that support the Clean Energy Industry in Ohio, will be negatively impacted by those rules.

As detailed below, the Clean Energy Industry has concerns regarding certain of the proposed rules, which if not revised will cause severe negative business impacts for the industry. Further, implementation of these rules without the revisions proposed by the Clean Energy Industry would be contrary to the mission of CSI,[3] because the rules would fail to balance the objectives of the regulation and would be needlessly burdensome.

The Clean Energy Industry has invested more than $3 billion to develop the 85 wind, solar, and energy storage projects online today in Ohio. That is enough carbon-free, emissions free energy to power 453,000 homes. The Clean Energy Industry returns more than $10 million in annual tax revenue, $10.1 million in annual lease payments to Ohio landowners, and employs 8,600 Ohioans across the supply chain and the value chain.[4]

Unfortunately, we believe many of the proposed rules would lead to less investment and higher energy prices—ultimately borne by consumers. Our comments attempt to bring balance

[3] *See* R.C. 107.61 and https://governor.ohio.gov/priorities/common-sense-initiative/history
[4] As reported by members of American Clean Power.

to the regulatory structure while still allowing the Board and its Staff to perform its essential function as the statewide permitting authority.

The Clean Energy Industry offers detailed, rule-by-rule analysis below. But in terms of priorities, we would suggest the following proposed rules require significant revision in order to maintain a balanced siting regime that can attract investment in Ohio generation.

- Retroactivity (All Rules): As a general matter of constitutional law and fundamental fairness, *ex post facto* rulemaking is prohibited. It is unclear whether any (or which?) of these rules are meant to apply retroactively to projects already certificated (or in the application process at the time of effective date of these rules). Are they? And if that is the Board's intention, then any such rule should say so explicitly so stakeholders can examine the legal basis, provide written comments regarding impacts, and ultimately have clarity and certainty for compliance purposes.
- Public Interest (Rule 4906-3-06): The Board is charged with determining whether a project is in the public interest, convenience, and necessity, using a broad lens. Our comments offer substantive recommendations about how the Board should conceive of "public interest" and what that entails.
- Solar Setbacks, Fencing, and Vegetative Screening (Rule 4906-4-09): The Clean Energy Industry is supportive of reasonable administrative setbacks from homes and roads. We are committed to agricultural-style fencing and appropriate vegetative screening. Our comments are in the spirit of ensuring smart, responsible siting that maximizes all of a developer's tools to minimize impacts and preserves flexibility that can reflect the uniqueness of each project.

- Change in Corporate Structure (Rule 4906-3-15): The state has a strong interest in preserving the ability of energy projects to change hands. Not all project developers are operators, and vice-versa. Business models and company structures vary widely. While all certificate conditions of course should and will remain in place regardless of owner, the proposed rules conveying Board (or administrative law judge) discretion to deny an ownership or certificate transfer—with little or no objective criteria— is of great concern from a project-finance standpoint.
- Introducing New Local Regulations (Rule 4906-3-13): Ohio's statewide permitting structure is a strength. The Clean Energy Industry supports the continued primacy of the Board's rules. At a minimum, we need to understand whether the proposed rules delegate or contemplate any local level decision-making authority or approvals (aside from the county approval process under Substitute Senate Bill 52 ["SB 52"]).
- Sound (Rule 4906-4-09): The proposed sound regulations have generated significant confusion and concern that the standard is unworkable. We pose questions and offer recommendations.
- Battery Energy Storage Systems: The Clean Energy Industry recognizes the value proposition of energy storage and the benefits battery storage systems can bring to the power grid. Our comments suggest several areas where the rules should clarify their applicability to this growing industry.

II. DISCUSSION AND SUGGESTED AMENDMENTS TO THE PROPOSED RULES

A. Ohio Adm.Code Chapter 4906-1 – General Provisions

1. Rule 4906-1-01 – Definitions (Amended)

Revises or adds new defined terms that apply throughout Ohio Adm.Code Chapters 4906-1 to 4906-7:

"Resident" is newly defined as "determined by where a person is domiciled, and includes a tenant." The rule should also allow for notice to be addressed to "tenant," as tenant names are not always available. This clarification is necessary because often it is challenging to determine the identity or even existence of a tenant. This clarification will provide a straightforward and reasonable requirement for notice. Further, the "tenant" definition should refer exclusively to individuals renting a place of residence—not commercial or industrial properties.

> (LL) "Resident" is determined by where a person is domiciled, and includes the last known tenant. Tenant refers to individuals renting a place of residence and does not include commercial or industrial properties.[5]

"Substantial addition" to a generation facility is defined as the addition of structures or equipment that would result in a capacity increase of 50 [megawatts] MW or more." The Clean Energy Industry requests that this definition clarify that it does not include a new facility located adjacent to an existing facility that is separately obtaining the required authorization to construct and operate.

[5] Throughout our comments, for ease of explanation, the Clean Energy Industry has accepted Staff's proposed changes to the rules as issued for comment on June 16, 2022, and then provided a redline reflecting our proposed edits.

(QQ) "Substantial addition"

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(1) Addition of structures or equipment to an existing electric power generation facility that would result in a capacity increase of fifty megawatts or greater. This requirement does not include the addition of a new facility located adjacent to an existing facility that is separately obtaining the required authorization to construct and operate.

The current rules do not define the term "brownfield." The Clean Energy Industry recommends adding a new definition for facilities that are proposed to be located on a brownfield as defined in R.C. 122.65.[6]

To further the state's strong interest in brownfield redevelopment, the rules should encourage and streamline the location of new generation facilities on these sites. We recommend the rules allow for waivers for facilities located on brownfields. The Clean Energy Industry also recommends that these applications be reviewed and approved on an expedited basis given the strong public interest in redevelopment.

(H) "Brownfield" is defined as that term is defined in section (D) of Ohio revised code section 122.65 and means an abandoned, idled, or under-used industrial, commercial, or institutional property where expansion or redevelopment is complicated by known or potential releases of hazardous substances or petroleum.

For any application for a generation project proposed to be sited on a brownfield, the Board shall make reasonable efforts to expedite the application and give due consideration to any request to waive individual rules that may unduly hinder or delay brownfield development. Nothing in this rule shall be construed to waive any state or federal Environmental Protection Agency rule regarding brownfields.

[6] "Brownfield" means an abandoned, idled, or under-used industrial, commercial, or institutional property where expansion or redevelopment is complicated by known or potential releases of hazardous substances or petroleum.

2. Rule 4906-1-02 – Purpose and scope (Amended)

This change (which appears in each chapter of the rules being retained) allows the Board upon its own motion to waive administrative requirements not required by statute. The Clean Energy Industry supports this administrative flexibility.

3. Rule 4906-1-05 – Site visits (Amended)

The current rule requires facility owners to "make all reasonable efforts" such that "upon prior notification" the Board and its staff can make site visits to the project. The proposed rule simply says such visits "will be allowed," adds third-party contractors to the rule's scope, and dispenses with any notice at all.

The Clean Energy Industry understands and supports the need for Board representatives to visit project locations. Site visits are indeed common and welcome. However, in the interest of safety, insurance requirements, and to avoid accidents, the rule should also ensure Staff provides reasonable notice to the owner in advance of a visit, and checks in at the appropriate site access point for safety instructions (often mandated by liability insurance) so that a company representative can accompany them.

It is critical the rules establish a process that ensures anyone entering the site is authorized to do so and does not pose risk of intentionally or unintentionally damaging the facility. Unaccompanied Staff or third-party contractors exploring an electric generation facility—absent a safety protocol briefing—presents obvious risks that are easily mitigated with these modest changes.

Note the newly-proposed Rule 4906-7-07 also governs site visits for "compliance review," and that proposed rule explicitly allows for an owner to accompany Staff on a project

site. It is unclear why this Rule 4906-1-02 would differ or two separate rules are needed. We recommend the rules take a consistent approach or perhaps be combined into one rule.

> **4906-1-05 Site visits.**
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> Staff will provide reasonable notice to ~~P~~persons proposing, owning or operating major utility facilities or economically significant wind farms ~~will allow~~ before the board, its representatives (including, but not limited to contractors and inspectors), or staff to make visits to proposed or alternative sites or routes of a major utility facility or economically significant wind farm or a substantial addition in order to carry out board responsibilities pursuant to Chapter 4906. of the Revised Code. The board, its representatives (including, but not limited to contractors and inspectors), or staff will check in at the appropriate site access point for safety instructions upon arrival.
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> A representative of the person proposing, owning, or operating major utility facilities or economically significant wind farms may accompany the board, its representatives (including, but not limited to contractors and inspectors), or staff during any visit conducted under this rule.

B. Ohio Adm.Code Chapter 4906-2 – Procedure in Cases before the Board

1. Rule 4906-2-02 - Filing of pleadings and other documents (Amended)

This change updates the Board's paper and e-filing procedures. The Clean Energy Industry supports this modernization.

2. Rule 4906-2-10 – Ex parte discussion of cases (Amended)

This rule governs *ex parte* communications with Board members and administrative law judges ("ALJs") and contains an update per the statutory addition of local board members made in SB 52 and presumably clarifies that the rule applies to both voting and nonvoting legislative members.

Notably, the rules do not prohibit *ex parte* discussions. Rather, they require discussions of the merits of cases only occur after either notification and an invitation to all parties to

participate or a full disclosure of the communications as it pertains to the case has been made. In either situation, afterwards, a disclosure of the meeting and any communications is previewed with the Board member or ALJ for accuracy, and then docketed.

The Clean Energy Industry believes that increased Board member engagement can strengthen the siting process and lead to better, more efficient outcomes. Too often, the *ex parte* rules serve as a barrier to open discussion. As such, the rule should also allow an applicant to request to discuss applications with the Board, in full transparency, at regular or special meetings. The existing documentation requirements set forth in the rule would continue to apply.

> **4906-2-10 Ex parte discussion of cases.**
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> Except as provided in section 4906.024, of the Revised Code…
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> ***
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> The document filed and served shall include the following language: Any participant in the discussion who believes that any representation made in this document is inaccurate or that the communications made during the discussion have not been fully disclosed shall prepare a letter explaining the participant's disagreement with the document and shall file the letter with the board and serve the letter upon all parties and participants in the discussion within two business days of receipt of this document.
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> Upon request to the executive director, an applicant may discuss its application with the board at a regular or special public meeting of the board.

3. Rule 4906-2-30 – Decision by the board (No Change)

This existing rule states final decisions from the Board shall be made in a "reasonable time" after conclusion of a hearing. Given the strong state interest in certainty and finality, we suggest the rule also include an outside deadline of 90 days after post-hearing reply briefs are filed unless the applicant requests an extension.

4906-2-30 Decision by the board.

Within a reasonable time after the conclusion of the hearing but not longer than 90 days after post-hearing reply briefs are filed, unless the applicant requests an extension, the board shall issue a final decision based only on the record, including such additional evidence as it shall order admitted. The board may determine that the location of all or part of the proposed facility should be modified.

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C. Ohio Adm.Code Chapter 4906-3 – Certificate Applications Generally

1. Rule 4906-3-03– Public notification requirements (Amended)

The current rule requires an applicant to host a Public Information Meeting ("PIM") in the project area within 90 days prior to submitting its application. The proposed rule adds a requirement for a second PIM in that same 90-day period.

The Clean Energy Industry recognizes and supports the value of public education and input. As a practical matter, developers conduct dozens of local meetings to educate community members and garner feedback long before the PIM is held. As such, the requirement for a second PIM may not be overly burdensome.

However, to hold two PIMs within the same 90-day period prior to the filing of an application is neither feasible nor likely to garner the type of quality feedback and response that the Board is seeking. Applicants need sufficient time between the PIMs to take into consideration the information provided by stakeholders at the first, and include it in any project revisions presented at the second. They need time to revise project layouts and studies of the project area before they can be presented, and even more time

after the second PIM to take stakeholder feedback into consideration prior to filing the application.

Therefore, the Clean Energy Industry recommends that the two PIMs be held within 180 days of filing the application. 90 days is insufficient.

The proposed rule also adds unnecessary, prescriptive mandates for how to conduct the PIMs, requiring the first meeting to "notify the public and solicit input on the scope of the project," and the second to present what will appear in the application. The Clean Energy Industry recommends that the rules not inhibit or restrict the open dialogue that successful PIMs can foster by imposing an agenda. In reality, developers will solicit input as to scope and all manner of other items at both PIMs. Similarly, applicants will share their vision for the project at both meetings as well. Many community members may only attend one or the other, but not both.

The rules should not artificially force one meeting to be a scoping session and the next to be a presentation of the final application or otherwise artificially manage an organic community dialogue. We recommend striking the language, "The first of these informational meetings should notify the public and solicit input on the scope of the project. The second of these informational meetings should present the project to the public in a manner consistent with what will be presented in the application."

The proposal also requires applicants to present "mapping software" at their PIMs that includes aerial imagery that contains layers representing facility components along with sensitive receptors and address search capabilities." The Clean Energy Industry

requests more information about what this rule contemplates in terms of "mapping software."

4906-3-03 Public notification requirements.

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(B) After satisfying any applicable meeting requirements under section 303.61 of the Revised Code, and no more than ~~ninety~~ one-hundred and eighty days prior to submitting a standard certificate application to the board, the applicant shall conduct at least two informational meetings open to the public to be held in the area in which the project is located. ~~The first of t~~These informational meetings should notify the public and solicit input on the scope of the project and provide information to the public. ~~The second of these informational meetings should present the project to the public in a manner consistent with what will be presented in the application.~~ If substantial changes are made to the application after the second informational meeting, the executive director of the board may require that the applicant hold another informational meeting.

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(5) At the public informational meetings, the applicant shall present maps showing the proposed facility, as well as mapping software with aerial imagery that contains layers representing facility components along with sensitive receptors and address search capabilities. The applicant shall solicit written comments from the attendees. The applicant shall summarize in its certificate application how many and what types of comments were received and include all written comments with its application filing. Staff shall identify examples of mapping software packages that can be utilized.

2. Rule 4906-3-05– Fully developed site or route information (Amended)

This proposed rule would create great uncertainty for developers of energy generation in Ohio.

The first sentence of the proposed change appears to force developers of generation facilities to provide a second alternative site as part of their applications,

removing the existing limitation to transmission line facilities and gas pipelines only. If that is intended, the Clean Energy Industry strongly objects.

However, the second sentence grants developers of generation the option to "choose to include fully developed information on two or more sites."

The existing limitation should be restored. Otherwise, this change could more than double development costs by mandating "fully developed information" on two sites instead of one. This would be a terribly inefficient outcome.

This is a particular problem for solar and wind projects where land acquisition costs are high and projects cannot submit applications until they have requested interconnection with PJM, and a PJM interconnection request is not valid unless a project can demonstrate site control of enough land to house the generation capacity of the request. Renewable developers do not have the power of eminent domain, so site control requires the acquisition of land rights, such as leases or options to purchase, leading to the untenable scenario where developers would be required to secure land rights and join the interconnection queue for projects only to abandon them after submitting the application. It is not clear the PJM tariff would allow the latter, but it would definitely increase the size of the queue, subsequently delaying all PJM interconnection requests.

This would also result in local confusion as to a project developer's actual site plan, increase the difficulty of acquiring land rights (if landowners knew they had a 50% chance of not being developed after providing such rights), as well as increase the

competition for land, and hence the cost of leases, given a 50% increase in land right acquisition for projects.

Further, unlike projects that are subject to regulation by the Public Utilities Commission of Ohio (e.g., transmission lines and gas pipelines), deregulated generation projects do not simply add these costs to a captive rate base nor do they have the ability to avail themselves of eminent domain.

We also note that prior to passage of Ohio's deregulation law in 1999, this rule did apply to generation. The Board was wise to limit the scope of the rule since then and there is no need to return to the former approach.

4906-3-05 Fully developed site or route information.

All standard certificate applications for electric power transmission facilities and gas pipelines shall include fully developed information on two sites/routes. Applicants for electric power generation facilities may choose to include fully developed information on two or more sites. Each proposed site/route shall be designated as a preferred or an alternate site/route.

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3. Rule 4906-3-06– Completeness of standard certificate applications, staff investigations, and staff reports (Amended)

The amendment adds an express requirement that the Staff Report include recommended findings with regard to R.C. 4906.10(A)(6), which requires that a project must be determined to be in the "public interest" in order to be granted a certificate. This is perhaps the most important rule in this package.

"Public interest" has been defined by the courts in power siting cases, and the Board should consider codifying a definition. The definition should be broad enough to

encompass all the ways in which in-state generation can benefit Ohioans—including consumer access to power, maintaining a competitive marketplace, and safety.[7] Project economic benefits and in the case of clean energy, contributions to clean air and water and mitigation of climate change should also be considered. The rules should also recognize that expressed local opposition—by itself—need not result in application denial or recommendation from Staff for denial. The recent *Duke* pipeline case is instructive.[8] There, the Staff reported that the Board received over 1,390 comments on the project that were "overwhelmingly opposed." The Board nonetheless found the project met the public interest test, and the Ohio Supreme Court agreed.[9] In other words, the mere presence of local opposition—even vocal opposition—is not and should not be dispositive.

Further, not all opposition is created equal and the Board must consider the weight and sufficiency of the evidence in arriving at its determination. The Clean Energy Industry urges the Board to continue to evaluate the qualitative nature of any comments received—not just the quantity. Opposition that is expressed in vague ideological or hypothetical terms, or even based on misinformation, and perhaps not even provided as part of a case record subject to cross-examination, should not carry the same weight as evidence-based testimony objecting to real world impacts. The rules should facilitate the Board's responsibility to weigh the evidence - not outsource the finding of public interest to third parties.

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[7] *See In re Champaign Wind LLC*, 146 Ohio St.3d 489, 2016 Ohio 1513, 58 N.E.3d 1142.
[8] *See Duke Central Corridor Extension Gas Pipeline*, OPSB No.16-253-GA-BTX, Opinion, Order, and Certificate (Nov. 21, 2019).
[9] *In re Application of Duke Energy Ohio, Inc*., 158 Ohio St.3d 1501, 2020 Ohio 2803, 144 N.E.3d 438.

The proposal also provides that, if Staff deems an application incomplete, "any person" may seek a redetermination by an ALJ. The Clean Energy Industry supports the ability of an applicant to seek re-determination. But we oppose extending a right of appeal to non-applicants. In some cases, an applicant may wish to accept the incomplete determination and abandon a project or revise its application and re-apply. It should not be involuntarily pulled into (and forced to bear the costs of) an appellate process initiated by a third party.

4906-3-06 Completeness of standard certificate applications, staff investigations, and staff reports.

(A) Upon receipt of a standard certificate application for an economically significant wind farm or major utility facility, excluding those filed under paragraph (B) of this rule, the chairperson, or the chairperson's designee, shall examine the certificate application to determine compliance with Chapters 4906-1 to 4906-7 of the Administrative Code. Within sixty days following receipt, the chairperson or designee shall either:

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(2) Reject the standard certificate application as incomplete and mail a copy of the completeness decision to the applicant setting forth specific grounds on which the rejection is based. If an application is determined as incomplete, ~~any person~~the applicant may appeal for redetermination by an administrative law judge.

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(C) Staff shall conduct an investigation of each accepted, complete application and submit a written report as provided by division (C) of section 4906.07 of the Revised Code not less than fifteen days prior to the beginning of public hearings.

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(2) The staff report for a major utility facility that is filed under paragraph (B) of this rule shall set forth the nature of the investigation and shall contain recommended findings with regard to divisions (A)(2), (A)(3),

(A)(5), (A)(6), as further specified in paragraph (D) of this rule, and (A)(7) of section 4906.10 of the Revised Code.

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(D) When evaluating the "public interest, convenience, and necessity" under division (A)(6) of section 4906.10, the staff report and ultimately the board must (1) balance all of the facts in the application, (2) weigh the positive benefits from the project that will be realized by the community and the state (including access to affordable energy, maintaining competitive supply and energy choice, economic, and environmental benefits) against any concerns that have been expressed, and (3) evaluate the technical, environmental, ecological, and socioeconomic facts and whether any concerns have been properly mitigated by commitments made by the applicant. The determination shall account for the totality of the evidence presented. In addition, comments filed on the docket for an application must be evaluated qualitatively and those not supported in the evidence or subject to cross-examination shall not be given undue weight.

4. Rule 4906-3-09 – Public notice of accepted, complete applications (Amended)

The proposal clarifies who receives notice of a complete application, including owners and residents of adjacent and "crossed" property. The Clean Energy Industry recommends notice to owners and tenants.

Note this rule requires two notices. For the first, [4906-3-09(A)(1)], the current rule only requires that a letter be served within 15 days of the filing of the accepted, complete application – it does not require newspaper publication. To avoid any perceived inconsistency with R.C. 4906.06(C), which requires newspaper publication within 15 days of the filing of an accepted, complete application, and the existing rule, the Board should revise the existing rule to simply mirror the language in Ohio Adm.Code 4906-3-09(A)(2).

4906-3-09 Public notice of accepted, complete applications.

(A) After filing an accepted, complete application with the board, the applicant shall give two notices of the proposed utility facility.

(1) The initial notice shall be a written notice to those persons that received service of a copy of the application pursuant to rule 4906-3-07 of the Administrative Code and each owner and resident of a property that would contain or be crossed by the proposed equipment, route, or facility or any proposed alternatives, and each owner and resident of a property that would be adjacent to a property that would contain or be crossed by the proposed equipment, route, or facility or any proposed alternatives and shall be published in newspapers of general circulation in those municipal corporations and counties in which the chief executive received service of a copy of the application pursuant to rule 4906-3-07 within fifteen days of the filing of the accepted, complete application. The notice shall be published with letters not less than ten-point type, shall bear the heading "Notice of Proposed Major Utility Facility" in bold type not less than one-fourth inch high or thirty-point type and shall contain the following information:

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5. Rule 4906-3-11– Amendments of accepted, complete applications and of certificates (Amended)

This proposed rule would alter the standard to determine whether proposed changes to projects under review for a certificate require formal amendments. Under the current rules, amendments are not required if the modification does not "create further impacts for each property owner or within the planned site…."

The proposed rule introduces significant new ambiguity and uncertainty to the standard. It exempts minor changes from the formal amendment process only if they "do not appear to create additional adverse impacts." (Emphasis added).

Rather than inviting a subjective argument about "appearances," the rule should

continue to require that if the Board is going to require a formal amendment, it first must make a factual, science-based finding that indeed a change would result in additional adverse impacts. A mere "appearance" is not enough.

> **4906-3-11 Amendments of accepted, complete applications and of certificates.**
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> (A) The applicant shall submit to the board any applications for amendment to a pending accepted, complete application in accordance with rule 4906-3-06 or 4906-6-06 of the Administrative Code.
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> ***
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> (6) 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~~ create further additional adverse impacts within the planned right-of-way of the proposed facility. Unless otherwise ordered by the board or administrative law judge, modifications to the footprint of an electric power generation facility 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 do not ~~appear to~~ create additional adverse impacts to properties adjacent to or within the planned site, or adjacent to or within the right-of-way of the proposed facility.

6. <u>Rule 4906-3-12– Application fees and board expenses (New; rescind prior rule)</u>

The proposed rule eliminates the existing application fee cap of $150,000 for generation facilities. The Clean Energy Industry requests that the rules maintain this cap to act as a ceiling on administrative costs, and that the Board provide a monthly,

itemized statement to developers indicating all costs incurred. Further, the rule should require any such fees (including for travel and site visits) to be reasonable and prudently incurred.

Last, any such change to the fee structure must apply prospectively to new projects and not increase costs to projects already sited and having contracted the sale of their output.

4906-3-12 Application fees and board expenses.

(A) The board's expenses associated with the review, analysis, processing, and monitoring of applications made pursuant to Chapters 4906-1 to 4906-7 of the Administrative Code shall be borne by the person submitting the application, and the board shall provide the person with a monthly itemized list of those expenses. The board's expenses shall also include all expenses associated with monitoring, construction, and operation of the facility to assure compliance with certificate conditions. The board's expenses, including expenses for travel and site visits, only include those expenses which are actually and reasonably incurred as a necessary part of fulfilling the board's duties.

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(D) Application fees for the board's expenses following the determination that an application is complete shall be determined as follows:

1. For a single or multiple unit electric power generation plant and associated facilities, or substantial additions thereto, the fee is the product of fifty cents times the maximum kilowatt electric capacity, as determined by the estimated net demonstrated capability of the highest capacity alternative. The maximum application filing fee shall be one hundred fifty thousand dollars.

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(M) An amendment to this rule only applies to applications filed after the effective date of the amendment. Any change in fee structure shall not increase fees for projects that have obtained a certificate or already filed an application with the board.

7. Rule 4906-3-13– Construction and operation (Amended)

The proposed rule contains new language in Section (C) stating "[t]he certificate authority provided by the board does not exempt the facility from any other applicable and lawful local, state, or federal rules or regulations nor can it be used to affect the exercise of discretion of any other local, state, or federal permitting or licensing authority with regard to areas subject to their supervision or control."

The Clean Energy Industry finds this language legally problematic and prohibitive as a practical matter of project finance, as well as to be in conflict with R.C. 4906.13(B).

First, a state administrative rule need not express that it does not override an "applicable and lawful" federal authority. As a matter of constitutional law, it cannot. Hence, generation projects routinely also obtain clearances or permits from federal agencies such as the Federal Aviation Administration ("FAA") and the U.S. Fish and Wildlife Service. This proposed language is superfluous, neither adding nor subtracting from the federal supremacy doctrine.

Second, with respect to state and local law, R.C. 4906.13(B) states: "[n]o public agency or political subdivision of this state may require an approval, consent, permit, certificate, or other condition for the construction or operation of a major utility facility…." The General Assembly is explicit that a certificate from the Ohio Power Siting Board is a license to build and operate a generation facility. Local governments—aside from a very specific statutory process in SB 52—cannot add their own approvals, consents, permits, certificates, or conditions.

Thus, a proposed siting rule that invites local "lawful, applicable" regulations or discretion on permitting is, at best, confusing and, at worst, a direct contradiction of state law that would not survive scrutiny of the Joint Commission on Agency Rule Review or judicial review.

As a commercial matter, the proposed rule is equally troubling. In order for lenders and investors to provide significant upfront capital to build large-scale electrical generation, they require definitive identification of each and every permit required to construct and operate, as well as proof that each has been obtained. Thus, Ohio's Power Siting Board statute offers assurance to investors by clearly prohibiting another layer of local permits. This proposed rule dispenses with that certainty and will naturally cause financiers to ask, "what local permits does this rule allow?"

Proposed Rule 4906-3-13(C) should be stricken in its entirety.

Section (D) of this proposed rule also allows an applicant to file proposed changes to a certificated facility for a determination of whether the modification will require a formal amendment. The process includes notice requirements and the opportunity for public comment. The Clean Energy Industry supports the change.

4906-3-13 Construction and operation.

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~~(C) The certificate authority provided by the board does not exempt the facility from any other applicable and lawful local, state, or federal rules or regulations nor can it be used to affect the exercise of discretion of any other local, state, or federal permitting or licensing authority with regard to areas subject to their supervision or control.~~

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8. Rule 4906-3-14– Preconstruction requirements (Amended)

Proposed Section (C)(1) of this rule requires applicants to file preconstruction engineering drawings to the public docket and requires additional mapping files to be provided to Staff prior to the preconstruction conference. The Clean Energy Industry requests that this rule be revised to clarify that applicants may request protection of proprietary or trade secret information that may be in the drawings.

In addition, Section (C)(2) of the proposed rule requires mapping to show "temporary" infrastructure. But temporary items like laydown yards may not necessarily be known 30 days prior to the preconstruction conference because there may be a need to adjust those locations during the construction process. Thus, the Clean Energy Industry recommends the word "temporary" be stricken from Rule 4906-3-14(C)(2).

Section (D) of this proposed rule also requires the interconnection service agreement ("ISA") to be docketed prior to construction; the rule should also allow for an "interim" ISA, which are commonly used by PJM.

4906-3-14 Preconstruction requirements.

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(C) At least thirty days prior to the preconstruction conference, the applicant shall:

(1) submit to staff and on the docket of the certificate case one set of engineering drawings of the final project design, including associated facilities and construction access plans. The engineering drawings shall be sufficiently detailed and complete, so that staff can determine that the final project design is in compliance with the certificate. The final project layout shall be provided to staff in hard copy and as

geographically-referenced electronic data. The drawings shall include references at the locations where the applicant and/or its contractors must adhere to a specific avoidance or mitigation measure in order to comply with the certificate. An applicant may seek a protective order regarding engineering drawings of the final project design in accordance with rule 4906-2-21.

(2) submit to staff, for review and acceptance, mapping in the form of PDF and geographically referenced electronic data (such as shapefiles or geodatabases based on final engineering drawings to confirm that the final design would be sited as certificated. Mapping will include the limits of disturbance, permanent ~~and temporary~~ infrastructure locations, areas of vegetation removal and vegetative restoration as applicable, and specifically delineate any adjustments made from the siting detailed in the application.

(D) Prior to commencement of construction of any electric generation project or associated facilities, the applicant shall provide on the docket of the case a copy of a signed interim interconnection service agreement or interconnection service agreement.

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9. Rule 4906-3-15 – Change in corporate structure (New)

While perhaps not self-evident, this proposal for a brand new rule regarding asset ownership could have major implications for financing energy projects across Ohio. This new rule requires that, within 30 days of any change to a project's "corporate structure," the applicant must file notification to the Board. This is likely workable.

However, the first sentence of the proposed rule raises significant questions. It states a certificate "granted by the Board is granted pursuant to the corporate structure of the certificate holder as presented in the application…."

This strongly suggests that Board approval of a corporate structuring change is required and, for reasons not stated, could be withheld. There is nothing in R.C. Chapter

4906, however, that suggests the Board is entitled to review and approve any change in ownership of a project where the certificate holder remains the same and the terms and conditions of the certificate remain enforceable *vis a vis* that certificate holder.

Project lenders and equity providers are likely to interpret this (untested) new rule as a material risk to the ability to invest in a project. As such, this proposal will drive up the cost of capital and dampen investment in Ohio energy infrastructure.

Energy projects not eligible for a regulated rate of return are by their nature speculative ventures. At the time of application, a developer often does not know the "corporate structure" of the project's eventual owner. Thus, as written, this new rule could create unintended consequences and harm the ability for new owners to enter the market. The Clean Energy Industry recommends striking the first sentence while maintaining the notification provision.

Alternatively, if there are ownership structures the Board believes are inappropriate, this should be explained and discussed so that market participants can assess the risks prior to investing in Ohio generation.

4906-3-15 Change in corporate structure.

~~Any certificate granted by the board is granted pursuant to the corporate structure of the certificate holder as presented in the application, unless otherwise specified in the board's order.~~ Within thirty days of any change to ~~such~~ corporate structure, the holder of a certificate will notify the board of such change by filing notification of the change in the case docket in which the certificate was granted.

D. Ohio Adm.Code Chapter 4906-4 – Certificate Applications for Electric Generation Facilities –and Electric Power Transmission Lines, and Gas Pipelines

The proposed combined chapter addresses certificate applications by electric generation facilities, electric transmission facilities, and gas pipelines. The new proposed chapter merges the procedures for applying for certification from the current Ohio Adm.Code Chapter 4906-4 (generation facilities) and Ohio Adm.Code Chapter 4906-5 (electric transmission and gas pipeline facilities).

1. Rule 4906-4-02– Project summary and applicant information (Amended)

As drafted, these proposed changes seem to only apply to the "summary of information" for the PIMs and not information included in the application. If that is the intent, we recommend this language be moved to Ohio Adm.Code 4906-3-03 so applicants are aware of this requirement for the PIMs. If this information is to be included in the applications, the initial paragraph should be clarified to say so. Further, consistent with our previous comment regarding the PIMs above in response to Ohio Adm.Code 4906-3-03, we propose a minor change to this rule.

4906-4-02 Project summary and applicant information.

The applicant shall provide a summary of the proposed project at ~~both the scoping and~~ public informational meetings. The summary should be suitable as a reference for state and local governments and for the public. The summary shall include the following:

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2. Rule 4906-4-03– Project description in detail and project schedule in detail (New; rescind former rule)

Proposed Section (B)(1) requires generation projects to provide a host of detailed information, including an "interactive map" on the project's website containing a two-mile radius from the project area and showing certain project characteristics, at least fourteen days before the first PIM and to keep such a map up to date until construction is complete.

Preliminarily, we note, since the rule contains a requirement for the PIM, this change should be contained or referenced in the PIM rule (Ohio Adm.Code 4907-3-03) for better visibility.

The Clean Energy Industry believes a map showing a 1-mile radius of the area is sufficient for solar projects and especially storage projects, as this is (conservatively) the distance from which projects can be seen—even without screening or other obstructions like hills, vegetation, and buildings. A 2-mile rule for solar is therefore unnecessary and unduly broad. This is especially true in more urban areas where energy storage projects may be sited. For example, a 2-mile radius would encompass almost all of downtown Columbus, Ohio. This would be an expensive and unruly map for developers to create and stakeholders to use.

In addition, the rule should recognize that applicants may need to file some of this information "subject to change." Projects evolve through the permitting process due to community input, Staff feedback, supply chain constraints, contractor expertise and input, and much more. Indeed, this is the intent of Board's multi-stepped, rigorous

permitting process. As our comments on 4906-3-14 point out, details on construction are generally not available until the preconstruction conference, when there is enough certainty on project design that construction contractors can start to plan construction activities.

Relatedly, the Clean Energy Industry is concerned that proposed Section (B)(3) may be interpreted to require applicants to identify major equipment models in the application, thereby precluding the flexible "preliminary-maximum site plan" approach that has proven an effective regulatory structure for many years.

Specifically, the proposed rule requires disclosure of "[t]he manufacturers, models, specifications, and material safety data sheets for all solar panels, inverters, racking systems, wind turbine models, and all other components selected for the facility." Does the language "selected for the facility" mandate a developer to have made such a selection by the time the application is submitted? In most cases, developers will not yet have chosen specific equipment, and the rule should not prematurely force them to do so—or even to speculate about what might be the best choice at time of final engineering and design. This important subject is discussed in detail on pp. 2-5 of USSEC's comments that were filed in this docket on November 24, 2021.[10]

This concern also applies to energy storage systems, which can be updated or replaced with different chemistries and technologies as they are improved. As the

[10] *See* https://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A21K24B23717C00573

industry rapidly grows and evolves, the intended technology at the permit stage may not be the best choice by the time of procurement, construction, or unit replacement.

We recommend that if certain components are not yet selected, then that information can be provided later with minimal regulatory burden if the equipment choices do not exceed the "maximums" provided in terms of footprint, height, impacts, etc.

4906-4-03 Project description in detail and project schedule in detail.

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(B) For a proposed electric generation facility:

(1) The applicant will post an interactive map on the project's website containing a ~~two~~one-mile radius from the project area and showing the features listed in rule 4906-4-03(A)(3)(a) of the Administrative Code at least fourteen days before the first public informational meeting under rule 4906-3-03 of the Administrative Code and will keep such map up to date until construction completes. If the project is proposed for an urban environment (i.e. storage), the board may reduce this distance while ensuring the map provides meaningful context to the public.

***

(3) The applicant shall submit the following for each generation equipment alternative, where applicable, subject to change:

(a) Type, number of units, estimated net demonstrated capacity, heat rate, annual capacity factor, and hours of annual generation.

(b) The manufacturers, models, specifications, and material safety data sheets for all solar panels, inverters, racking systems, wind turbine models, and all other components selected for the facility. For wind farms, this includes the turbine hub height, tip height, rotor diameter, and blade length for each model under consideration. If this component information is unavailable because it has not yet been selected, the applicant may provide indicative information, and, in the case of wind, maximum turbine hub height, tip height,

rotor diameter, and blade length as long as the final component selection does not necessitate an increase in impacts associated with the preliminary maximum site plan (e.g., project footprint, setbacks, etc.). However, the actual component information shall be provided when selected and prior to commencement of construction.

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(4) The applicant shall describe, in as much detail as is available at the time of submission of the application, the construction method, site preparation and reclamation method, materials, color and texture of surfaces, dimensions, and structures included to assure safe operation of all facility components, subject to change, including the following:

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(i) Construction laydown areas (if known).

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3. Rule 4906-4-04– Project area selection and site design. (Amended)

The current rule requires a description of both the "selection" of the project area and the process of determining facility layout in significant detail. Notably, the newly proposed rule combines the application processes for generation in Chapter 4906-4 and electric transmission and gas pipelines in Chapter 4906-5. To accomplish this, it adds a section for transmission, deletes the reference to designing the site layout, and adds Section (C) of 4906-5-04 (Route alternatives analysis) to the site selection process section in 4906-4.

While the provision requiring a description of the type and number of comments currently appears in 4906-4-04, the proposed change moves it from the site layout design section to the selection process section. However, the requirement to describe "all public involvement that was undertaken in the site selection process" is not currently in 4906-4-04. Similar to the proposal to add an alternative site requirement for all generation, adding

4906-4-05(C) to 4906-4-04(A)(5) conflates the fundamentally different processes of site/route selection for generation compared with transmission and gas pipelines. The Clean Energy Industry recognizes the challenge of combining and streamlining rules and provides several suggestions below for ensuring that like-sections are combined, but incompatible sections are not merged.

Public involvement in the transparent certification process is welcome and encouraged. The pre-application notice, PIMs, and sharing feedback with the Board is part of a healthy siting process. But the rules should distinguish between siting of projects with eminent domain authority, which is inherently a command-and-control type of regulated process, and siting of projects that solely rely on the approval of willing landowners, which is a highly competitive business process involving commercially-sensitive information.

Public engagement is critical in site selection for projects utilizing eminent domain. Site selection of renewable energy generation, on the other hand, relies on private business arrangements between landowners and developers. In order to maintain the integrity of this competitive business process, renewable projects are first sited by developers and then presented to the public for feedback and discussion. The rule should not conflate the two and presume the public is selecting sites for energy generation.

4906-4-04 Project area selection and site design.

(A) The applicant shall describe the selection of the project area.

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(5) The applicant shall provide a description of the project area(s) selected for evaluation, and the factors and rationale used by the applicant for selecting the proposed project area and any alternative area(s). ~~describe all public involvement that was undertaken in the site/route selection process.~~

(B) For a proposed electric generation facility, the applicant shall describe the process of designing the facility layout:

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(3) The applicant shall provide a description of how many and what types of comments were received.

(C) For a proposed electric power transmission line or gas pipeline:

(1) The applicant shall conduct a site and route selection study prior to submitting an application for an electric power transmission line or gas pipeline, and associated facilities. The study shall be designed to evaluate all practicable sites, routes, and route segments for the proposed facility within the study area.

***

(e) The applicant shall provide a description of the process by which the applicant utilized the siting criteria to determine the route or site. and describe all public involvement that was undertaken in the site/route selection process.

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4. Rule 4906-4-06– Economic impact and public interaction (Amended)

The new proposed Section (B)(1)(a) mandates the applicant provide "cost estimates for … land and land rights," among other items. Similar to our comments on 4906-04-4 (Project area selection and site design), with respect to disclosure of costs of land acquisition, the rules should distinguish between projects utilizing eminent domain and those that do not.

For renewable energy generation development, this information is commercially sensitive and should remain confidential; forcing disclosure of private real estate transactions is not appropriate and should be removed from the proposed rule.

The proposed Section (F)(8) mandates applicants file a "complaint resolution plan." Both prior to construction and prior to operating, it must be mailed to public authorities, residents within one mile of the project, and "anyone who has requested updates regarding the project." The rule then requires applicants to file a quarterly "complaint summary report" for the facility's first five years of operations (for a total of 20 reports).

While potentially burdensome, the rule may be workable for new projects. Existing generation projects—many of which have operated for years—have long implemented complaint resolution. The proposed rule should clarify that this new 5-year reporting protocol applies to projects certified after the rule's effective date.

Last, for ease of compliance, we suggest Section (F)(8) be divided into two separate sections: one governing pre-construction notice and operation notice, and the other governing complaint summary reports to be filed during construction and operation.

4906-4-06 Economic impact and public interaction.

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(B) The applicant shall provide information regarding capital and intangible construction costs.

(1) The applicant shall provide estimates of applicable capital and intangible costs for the facility and various applicable alternatives. The data submitted shall be classified according to federal energy regulatory commission uniform system of accounts prescribed by the public utilities commission of Ohio for utility companies, unless the applicant is not an electric light company, a gas company or a natural gas company as defined in Chapter 4905. of the Revised Code (in which case, the applicant shall file the capital and intangible costs classified in the accounting format ordinarily used by the applicant in

its normal course of business). The cost estimates shall include, but not be limited to:

~~(a) Land and land rights.~~

(a~~b~~) Structures and improvements.

(b~~e~~) Substation equipment.

(c~~d~~) Poles and fixtures.

(d~~e~~) Towers and fixtures.

(e~~f~~) Overhead conductors.

(f~~g~~) Underground conductors and insulation.

(g~~h~~) Underground-to-overhead conversion equipment.

(h~~i~~) Pipes.

(i~~j~~) Valves, meters, boosters, regulators, tanks, and other equipment.

(j~~k~~) Right-of-way clearing and roads, trails, or other access.

***

(F) The applicant shall provide information regarding public interaction.

(8) *** During the construction and operation of the facility, the applicant shall submit to staff a complaint summary report by the fifteenth day of ~~April~~, July~~, October~~, and January of each year through the first five years of operation. The report shall include a list of all complaints received through the applicant's complaint resolution process, a description of the actions taken toward the resolution of each complaint, and a status update if the complaint has yet to be resolved. The applicant shall file a copy of these complaint summaries on the public docket.

5. Rule 4906-4-07– Compliance with air, water, solid waste, and aviation regulations (Amended)

The current rule requires projects to demonstrate compliance with air, water, solid waste, and aviation regulations. Proposed Section (E)(2) requires applicants to provide the

height of the tallest anticipated structures as well as all airports, heliports, landings strips, medical use heliports, and seaplane landing sites within six nautical miles—rather than current five miles. The need for this regulatory expansion should be made clear or else should be stricken.

In addition, the applicant must provide the maximum possible height of construction equipment and copies of any "coordination" with the FAA and the Ohio Department of Transportation's ("ODOT") Office of Aviation. Since the federal government already has airspace protocols for siting of renewable generation, we suggest that "coordination" should be replaced with "correspondence."

We suggest wind, solar, and energy storage facilities, given their emission-free nature, need not supply information regarding air pollution regulations. Last, the reference in Section (E)(6) to "debris" should be replaced with "solid waste."

Finally, the Clean Energy Industry recommends that the requirement to provide "information regarding preconstruction water quality" apply only to generation facilities that will discharge wastewater to a body of water, and therefore require an "individual" National Pollutant Discharge Elimination System ("NDPES") permit. Such information is useful to assess, for instance, the process wastewater or cooling water that may be discharged by fossil generation facilities into lakes and rivers. Solar and wind energy facilities, of course, do not discharge such wastewater and typically require only a "general" NPDES permit, such as the Ohio Environmental Protection Agency ("Ohio EPA") Permit No. OHC000005, the "General Permit Authorization for Storm Water Discharges Associated with Construction Under the National Pollutant Discharge Elimination System" (Issued April 23, 2018) ("General Construction

Permit"). This general NPDES permit is applied without the need for information about the preconstruction water quality of any receiving water bodies.

4906-4-07 Compliance with air, water, solid waste, and aviation regulations.

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(B) Except for wind, solar, and energy storage facilities, ~~T~~the applicant shall provide information on compliance with air quality regulations.

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

(1) For any facility that requires an individual National Pollutant Discharge Elimination System (NPDES) permit for operation, t~~T~~he applicant shall provide information regarding preconstruction water quality and permits.

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(E) The applicant shall provide information on compliance with environmental and aviation regulations.

(1) Provide the height of the tallest anticipated installed, above ground structures.

(2) List all airports, heliports, landing strips, medical use heliports, and seaplane landing sites within ~~six~~ five ~~nautical~~ miles of the project area or property within or adjacent to the project area, and show these facilities on a map(s) of at least 1:24,000 scale. For all structures located within the ~~six~~ five ~~nautical~~ miles, the applicant shall provide the maximum possible height of construction equipment, and include a list of air transportation facilities, existing or proposed, and copies of any ~~coordination~~ correspondence with the federal aviation administration and the Ohio office of aviation. Additionally, applicant shall provide confirmation that the owners of these facilities have been notified of the proposed facility and any impacts it will have on aviation operations.

***

(6) Provide a description, quantification and characterization of ~~debris~~ solid waste that will result from construction of the facility, and the plans for disposal of the ~~debris~~solid waste.

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6. Rule 4906-4-08– Health and safety, land use and ecological information (Amended)

This 15-page rule is voluminous, thus, for ease of review, we have broken down our comments by topic and then provided proposed revisions.

Sound: With respect to sound, proposed Section (A)(3)(a) requires that the applicant estimate the nature of any "intermittent, recurring, or "particularly annoying" sound. The last of these should be stricken as overly subjective.

Water Supply: The word "potential" should be stricken from Section (A)(4)(a) as overly subjective. Impacts to water supply should be disclosed if they are expected based on a factual, scientific analysis.

Proposed Section (A)(4)(c) requires applicants to identify "potential" impacts to public and private water supplies due to construction and operation of the proposed facility. The revision specifies that the maps for mapping aquifers, water wells, and drinking water source protection areas shall include "at a minimum, an additional one-mile buffer around the project area." It is unclear whether this provision would require a setback of one mile from these features (which the Clean Energy Industry would oppose) or merely that the mapping must show a one-mile radius around these features or the project area. If the latter, we recommend removal of the word "buffer."

Grading: The revisions to Section (A)(5) require additional information concerning the mapping and description of the project area's geologic features, to also include a

"grading plan" and maximum grading acreage; describing the suitability of the soils for foundation construction and areas with slopes that exceed 12% and/or highly erodible soils and providing the results and initial analysis of preliminary test borings; and the provision of results and initial analysis of preliminary test borings.

The "grading plan" requirement is problematic for solar. It would be premature (and perhaps not feasible) to require substantial information on grading prior to the selection of models for major equipment—particularly racking—which will determine optimum grading. Different racking models have significantly different slope tolerances and other design features, which greatly affect the amount of grading that may be needed. And as explained above, equipment selection (including racking) generally comes later in the process, prior to construction.

To the extent the Board should require such information at all, the rule should specify it be shared post-certificate along with the major equipment selections and final engineering and design.

Likewise, grading is closely connected with construction stormwater management, and so a grading plan can be submitted along with the final design of the facility and the Stormwater Pollution Prevention Plan ("SWPPP") or any required notice of intent. The Clean Energy Industry notes that grading constitutes land disturbance under the General Construction Permit required by the Ohio EPA, and that SWPPPs submitted pursuant to that permit must extensively address grading.

Ecological: The proposed revisions to Section (B)(1)(a)(vii) include additional requirements for ecological information to be shown on maps, including "woody and

herbaceous vegetation land." We would request additional clarity regarding this term and whether it is intended to include cropland.

Construction: There is also a new provision in Section (C)(1)(b)(iv) requiring a description of the "mitigation procedures" to be used during construction, operation, and maintenance to minimize impact to structures near the facility. It is unclear what such procedures this proposed new regulation calls for.

Aesthetic: Revised Section (D)(6)(D) requires "a narrative of how the proposed facility will likely affect the aesthetic quality of the site and surrounding area." It is not clear what "aesthetic quality" means, but it is clearly highly subjective. We recommend that this phrase be more fully described, or the sentence be deleted.

Irrigation: As amended, Section (E)(2)(b)(ii) requires the applicant to "describe existing irrigation systems and demonstrate how impacts…will be avoided of mitigated, and how damaged irrigation systems will be promptly repaired to original conditions." It is unclear how an electric generation project would impact irrigation on parcels of land for which it did not have a land use agreement. Damage to irrigation systems is generally covered under land use agreements between project developers and the landowner—and those agreements generally do not require a project developer to "promptly" repair an irrigation line during construction. This is of course because a parcel occupied by a solar project will not return to irrigated cropland for 35-40 years (unlike a transmission or gas pipeline project where the land goes quickly back to its prior use). We recommend the rule be clarified accordingly.

Drainage Systems: The proposed rules bifurcate drainage system regulation between Section (E)(2)(b)(iii) [field drainage systems and mitigation measures] and Section (E)(3) [benchmarking, avoidance and repair, and adjacent landowners]. There is considerable overlap between these two sections. For clarity, we recommend placing all field drainage mapping and benchmarking in (E)(2)(b)(iii) and all mitigation measures in (E)(3).

Furthermore, the Clean Energy Industry has several recommendations for a more outcome-oriented, results-driven rule for drain tile.

With regard to drainage system identification and benchmarking, the proposed rule requires a "perimeter dig" to benchmark drain tile conditions at the outset of construction. The Clean Energy Industry supports the concept of benchmarking, but the rule should allow for flexibility in methodology as opposed to mandating a specific technique such as a perimeter dig. There are a variety of technologies and techniques that can deliver the same or better results as perimeter digs—such as drone pictures to identify drainage locations in conjunction with information provided by landowners, probing, and radar.

With respect to the drain tile mitigation, the rule should take into consideration how different types of projects may impact drainage in different ways. As discussed earlier in the section on irrigation, and in several other proposed rules within Chapter 4906-4, electric transmission lines, gas pipelines, and even varying types of electricity generation create differing land use impacts. Our comments here pertain specifically to solar facilities, for which we believe the rule's objective should be to avoid adverse drainage impacts to neighboring properties, not simply repair drainage tile for its own sake, particularly where the only purpose served by the tile is to increase crop yields.

Drain tile systems have two main components: mains and laterals. Mains are larger, tend to run along the edge of the low side of the property, and may be connected to neighboring properties before they reach their terminus. Mains can be a shared resource into which more than one property owners' laterals drain. As such, damage to mains may impact many properties. For this reason, the Clean Energy Industry agrees that mains crossing property lines should be avoided and promptly repaired, replaced, or rerouted if damaged.

Laterals on the other hand are smaller, feed into a property's main, and are laid out in parallel under the field(s) that require draining to improve crop yields. Laterals typically do not cross property lines. They generally are not a shared resource and problems with them usually have only localized impact in much the same way one's home sewage system operation impacts the dryness and cleanliness of their basement, but not their neighbor's basement or the sewage main for the street. Furthermore, the localized drainage impact of a broken lateral can vary significantly, depending on many factors, such as where on the lateral the damage happens (near the top or the bottom where it feeds into the main), and if nearby laterals are also damaged. Decisions on whether, how, and when to replace laterals depend on maintaining safe construction and operating conditions for the project, the desired land use upon decommissioning, project life span, the condition of the original tile, and other factors. In some cases, a damaged lateral may not even require repair. Lateral mitigation, therefore, should be assessed on a case-by-case basis.

Our recommended changes to the proposed rule reflect these distinctions and are made in consultation with drain tile experts.

4906-4-08 Health and safety, land use and ecological information.

(A) The applicant shall provide information on health and safety.

***

(3) Noise. The applicant shall provide information on noise from the construction, operation, and maintenance of the facility.

(a) Estimate the nature of any intermittent or~~,~~ recurring~~, or particularly annoying~~ sounds from the following sources:

***

(4) Water impacts. The applicant shall provide information regarding water impacts

(a) Provide an evaluation of the ~~potential~~ impact to public and private water supplies due to construction and operation of the proposed facility.

(b) Provide an evaluation of the impact to public and private water supplies due to pollution control equipment failures.

(c) Provide existing maps of aquifers, water wells, and drinking water source protection areas that may be directly affected by the proposed facility, including, at a minimum, an additional one-mile ~~buffer~~ around the project area.

***

(5) Geological features. 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, injection wells, and underground abandoned mines. The applicant shall also:

(a) Describe the suitability of the site geology and plans to remedy any site-specific inadequacies, including proposed mitigation.

(b) Describe the suitability of soil for grading, compaction, and drainage, and describe plans to remedy any inadequacies and restore the soils during post-construction reclamation, including ~~a grading plan and~~ maximum graded acreage. An applicant may provide its grading plan after making major equipment selections

that will affect grading and concluding final engineering design, but prior to construction.

***

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

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

(a) Provide a map of at least 1:24,000 scale, including the area one thousand feet on each side of the proposed facilities which shall include the following features:

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(vii) Woody and herbaceous vegetation land, excluding cropland.

***

(C) The applicant shall provide information on land use and community development.

(1) Existing land use. The applicant shall provide information regarding land use in the region and potential impacts of the facility through the following maps and related information. A map of at least 1:24,000 scale shall be provided, showing the following:

***

(b) Provide, for the types of structures identified on the map in paragraph (C)(1)(a) of this rule, a table showing the following:

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(iv) A description of the mitigation procedures to be used during the construction, operation, and maintenance of the proposed facility to minimize impact to structures near the facility. Mitigation procedures may include [Staff to supply intent].

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(D) The applicant shall provide information on cultural and archaeological resources

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(6) Visual impact of facility. The applicant shall evaluate the visual impact of the proposed above-ground facility within at least a ten-mile radius from the project area. The evaluation shall be conducted or reviewed by a licensed landscape architect or other professional with experience in developing a visual impact assessment. The applicant shall:

***

(d) Describe the alterations to the landscape caused by the facility, including a description and illustration of the scale, form, and materials of all facility structures, and evaluate the impact of those alterations to the scenic quality of the landscape. ~~This description should also include a narrative of how the proposed facility will likely affect the aesthetic quality of the site and surrounding area.~~

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(E) The applicant shall provide information regarding agricultural districts and potential impacts to agricultural land.

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(2) Agricultural information. The applicant shall provide, for all agricultural land, and separately for agricultural uses and agricultural districts identified under paragraph (E)(1) of this rule, the following:

(a) A quantification of the acreage impacted.

(b) An evaluation of the impact of the construction, operation, and maintenance of the proposed facility on the land and the following agricultural facilities and practices within the project area:

(i) Field operations such as plowing, planting, cultivating, spraying, aerial applications, and harvesting.

(ii) Irrigation. For transmission and gas pipelines, ~~T~~the applicant shall describe existing irrigation systems and demonstrate how impacts to those systems will be avoided or mitigated, and how damaged irrigation systems will be promptly repaired to original conditions.

(iii) Field drainage systems. The applicant shall describe, locate, ~~and~~ map, and document benchmark conditions of the project's knowable field drainage systems. System components may be

located using a perimeter dig, drones, probing, radar, or other equivalent or combination of equivalent methods and technologies. Owners of adjacent parcels the county soil and water conservation district, and the county shall be consulted to locate drainage systems and drainage system information. Applicants shall also demonstrate how impacts to those systems will be avoided or mitigated, and describe how damaged drain tile mains~~age systems~~ will be ~~promptly be repaired to original conditions~~ repaired, replaced, re-routed, or otherwise altered in a time appropriate fashion to ensure safe construction and operating conditions, and to maintain the original drainage conditions of adjacent properties. Applicant must also provide a description of data sources and methods used to obtain information for field drainage system mapping.

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(3) Drain tile considerations. The applicant shall

~~a) Document benchmark conditions of the project drain tile system by locating all mains and laterals using a perimeter dig utilizing a tile search trench and consult with owners of all parcels adjacent to the property, the county soil and water conservation district, and the county to request drainage system information over those parcels.~~

(a~~b~~) Avoid and repair all damaged drain tile mains~~systems~~ that flow into or out of the construction area.

~~(c) Locate, replace and avoid all mains and laterals in the construction area.~~

(~~d~~b) Avoid, where possible, or minimize to the extent practicable, any damage to functioning field tile drainage systems and soils resulting from the construction, operation, and/or maintenance of the facility in agricultural areas.

(~~e~~c) ~~Promptly repair, a~~At applicant's expense, repair, replace, re-route, or otherwise alter in a time-appropriate fashion damaged drain tile mains to ensure safe construction and operating conditions, and to maintain the original drainage conditions of adjacent properties and public rights-of-way. ~~damaged field tile systems to at least original conditions or modern equivalent. However, if the affected landowner agrees to not having the~~

~~damaged field tile system repaired, the landowner may do so only if the field tile systems of adjacent landowners and public rights-of-way remain unaffected by the non-repair of the landowner's field tile system.~~ The applicant shall compensate affected parcel owners whose crops ~~we~~are impacted by damage to functioning field tile drainage systems and soils resulting from the construction, operation, and/or maintenance of the facility in agricultural areas.

7. Rule 4906-4-09– Regulations associated with renewable energy generation facilities (Amended)

The existing rule is applicable only to wind farms; the proposed changes would apply the rule to all "renewable energy generation facilities." It is unclear why these regulations—if on balance deemed beneficial—would not be applied broadly across generation technologies and not just the renewable energy generation facilities.

Weeds: Proposed new Section (A)(3)(e) requires renewable projects to provide "annual proof of weed control" for the first four years of operation of the facility, with the goal of weed eradication significantly completed by year three. It is unclear what sort of "proof" the rule contemplates. Also, we recommend the rule specify it applies to "noxious" weeds such that common plants that may be considered a pollinator species (such as milkweed) need not be completely eradicated.

Photographic Simulations: Section (C)(5) would require among other things: "[a]esthetic and recreational land use, which covers … photographic simulations from at least one vantage point in each area of three square miles within the project area, showing views to north, south, east, and west." Given the low profile of solar, these facilities may be discerned on the landscape only up to one mile away. As such, the existing 3-mile rule should be one mile for solar.

Environmental Specialist: A proposed new Section (D)(5) would also require renewable projects (and only renewable projects) to have a Staff-approved environmental specialist on site during construction activities that may affect sensitive areas and the specialist shall have authority to "stop construction."

The Clean Energy Industry notes the applicant is charged with responsibility for all aspects of the project—and wears regulatory and legal liability for its impacts. As such, the rules should not require the outsourcing of a major construction decision (i.e., a forced complete shut-down) to third parties. Would the applicant maintain hiring and firing authority over this individual?

This concern is heightened under a newly-proposed rule that offers little guidance regarding under what circumstances construction would be halted, and what would or would not trigger a re-start. At the height of construction, a utility-scale energy project will employ hundreds of workers. We submit this untested, new regulatory proposal to place construction shut-down authority in the hands of a single "environmental specialist" is unsound and unreasonable.

And if truly necessary, why would the rule single out only renewable projects?

Sound: Most critically, the proposed revision makes several very restrictive modifications to sound standards applicable to (arguably) both existing and future renewable generation projects. Notably, these new sound standards are not applicable to any other generation source.

The purpose of the new sound requirements is unclear. In white papers published in April 2022, the Ohio Department of Health ("ODH")—represented on the Board—

concluded that existing sound and setback standards for wind and solar farms already ensure these facilities do not cause negative health effects to people nearby, even stating in one paper that the agency "supports using the existing set-back distance requirements and noise level requirements."[11,12]

There are two different types of changes to sound standards for renewable projects, both of which contribute to significantly restricting the standard: a new project-level sound standard and a new measurement metric.

First, proposed Rule 4906-4-09(E)(2) mandates noise contributions do not result in levels that exceed 40 A-weighted decibels ("dBA") or the project area ambient daytime and nighttime average sound level (L50) by five dBA. There is no provision for the "greater of" the 40 dBA or the 5 dBA increase historically applied by the Board which was reviewed and supported by the ODH—and which would be more appropriate.

Additionally, as currently drafted, the 40 dBA would presumably apply during both the day and nighttime periods. Existing daytime sound levels are generally higher than nighttime and sensitivity to sound is also reduced during the daytime. As such, it is customary to permit higher sound levels during the day than the night.

Second, this same sentence discussed above changes the sound metric from

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[11] Health Assessment Section, Ohio Department of Health. 2022. "Ohio Department of Health Wind Turbines and Wind Farms Summary and Assessments." https://odh.ohio.gov/wps/wcm/connect/gov/816f89dc-767f-4f08-8172-71c953b8ee02/ODH+Wind+Turbines+and+Farms+Summary+Assessment_2022.04.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-816f89dc-767f-4f08-8172-71c953b8ee02-o3S-n4c

[12] Health Assessment Section, Ohio Department of Health. 2022. "Ohio Department of Health Solar Farm and Photovoltaics Summary and Assessments." https://odh.ohio.gov/wps/wcm/connect/gov/fc124a88-62b4-4e91-b30b-bc1269d0dde5/ODH+Solar+Farm+and+PVs+Summary+Assessments_2022.04.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-fc124a88-62b4-4e91-b30b-bc1269d0dde5-o3S-Ssw

Leq—the average or equivalent continuous sound level to L_{50} (the median sound level). The average (Leq) is utilized by ODOT[13] whose Noise Abatement Criteria for residential uses is an hourly Leq of 66 dBA or a 10 dBA increase. ODOT's criteria are consistent with the requirements of the Federal Highway Administration. The Leq is also the basis for the 24-hour average metrics utilized by the FAA (65 Ldn, which is equivalent to an Leq of 65 dBA during the day and 55 dBA during the night) and the Federal Energy Regulatory Commission (55 Ldn, which is equivalent to 55 dBA during the day and 45 dBA during the night).

The rationale for the change in metric is unclear as this was not identified as a necessary change to protect public health by the ODH in its April 2022 review.

Third, since 4906-4-09(E)(2) is an operations standard, the rule must be explicit that it only applies to facilities filed after the rule's effective date. It would be inappropriate to apply a new sound standard to generators governed by the current rule.

Last, the sound standards as applied to energy storage facilities may require further consideration. We propose to continue to work with the Board and the Staff to identify an appropriate sound standard for storage based on its unique characteristics and studies of existing energy storage facilities.

Wind Velocity: Proposed Section (G)(1) for solar projects only requires an analysis of high wind velocities for the area, including the probability of occurrences and likely consequences of various wind velocities, and mitigation plans. This is not necessary and overly burdensome.

As a practical matter, solar developers under contract to provide power are highly

[13] Noise Analysis Manual | Ohio Department of Transportation
https://www.transportation.ohio.gov/programs/noise/resources/noise-analysis-manual

incentivized to ensure their panels are not damaged by high winds. Projects are engineered accordingly. More so, developers are required to submit their engineering drawings to the Board. The rule could simply require projects to meet prevailing engineering standards, which of course take into account worse-case wind speeds.

Stormwater Management: The proposed Section (G)(2) requires solar projects to incorporate stormwater management under the General Construction Permit (Part III.G.2.e, pp. 19-27) in accordance with "the ["Ohio EPA's"] guidance." However, by its very nature, this guidance is not intended to function as a rule; it is meant to be uncodified and flexible over time. The courts have consistently held that standards of uniform application must be promulgated as rules in order to be valid; in this case, the Ohio EPA has not done that. As such, the Board rules should not destroy the very flexibility granted by the Ohio EPA guidance. The reference to Ohio EPA guidance should be stricken.

Fencing: A proposed Section (G)(3) requires solar panel perimeter fence must be both "small-wildlife permeable" and "aesthetically fitting" for a rural location. We are in support of the spirit of the proposed rule.

Note this standard allows for farm animals to be kept inside the fence and predators like coyotes kept out, as solar projects in particular can also host certain agricultural activities, such as sheep grazing.

Solar Setbacks / Landscaping: With regard to proposed Sections (G)(4), setbacks, and (G)(5) landscaping, the Clean Energy Industry has appreciated the on-going dialogue with state policymakers and regulators regarding solar setbacks and vegetative screening as both are complementary tools that when properly employed together, can help mitigate

visual impacts to stakeholders.

Section (G)(4) requires projects to incorporate a minimum setback from the project's solar modules of:

- At least 150 feet from non-participating parcel boundaries,
- At least 300 feet from non-participating residences existing as of the application filing date, and
- At least 150 feet from the edge of pavement of any state, county, or township road within or adjacent to the project area.

In addition, the rule proposes in the next Section (G)(5) to require a "landscape plan" in consultation with a landscape architect licensed by the Ohio Landscape Architects Board. It must address the aesthetic impacts of the facility on adjacent residential non-participating properties, the "traveling public," nearby communities and "recreationalists" through measures such as shrub plantings or enhanced pollinator plantings. It must also be in harmony with the existing vegetation and viewshed in the area.

First, the Clean Energy Industry recommends combining Sections (G)(4) and (5). Setbacks and landscaping are complementary tools used to mitigate visual impacts that can be used independently, or jointly, and in varying intensity, as needed by project-specific variables such as topography, home density, existing vegetation, existing structures, facility design, and other factors. Distance between the viewer and a solar panel mitigates visual effects. Likewise, visual screening between a viewer and a solar panel mitigates visual effects. Requiring both can be economically wasteful if one or

the other can achieve the desired effect.

To that end, rather than imposing blunt, "one-size-fits-none" fixed setbacks, the rule should incorporate discretion to reduce the setbacks based on specific site conditions and the efficacy of the landscape plan.

Property Lines: Should the Board determine some absolute standards are required, the Clean Energy Industry submits that a 150-feet mandatory setback from all non-participating parcel boundaries is inappropriate and would materially harm the industry's ability to economically site projects in Ohio. The "halo effect" this creates around entire parcels of land, where often no homes, buildings, or roads are to be found, would remove thousands of acres from potential solar production and farmed land—resulting in oddly-shaped, poorly-designed projects with stranded strips of acreage off limits to solar but no longer practical to farm, while providing minimal or no corresponding benefit to project neighbors. The practical impact of this change would be increased project costs due to increased acreage per project, as well as an increase in per-project solar acreage to make up for the reduced efficiency of large setbacks.

A more appropriate solar setback from a property line is 25 feet. 150 feet would result in wasted farmland as many farmers will not find it economical to tend to isolated strips of land. Finally, the rule should be explicit that adjacent landowners are free to waive any administratively-imposed setback.

Residences: As to the proposed residential setback, the Clean Energy Industry does not believe that a 300-foot setback from homes either is necessary to protect homeowners or consistent with prevailing permitting and zoning practices across the

country[14]. Nonetheless, we will not object to this proposed setback from residences as part of a larger package of rules that provides, on balance, for rigorous but sound regulation. For clarity, however, the rule should specify this setback is measured from the edge of the residence and, again, the homeowner should retain the option to waive it.

Roads: With respect to the proposed setback from a road of 150 feet, the Clean Energy Industry recommends the rule build in some flexibility. While 150 feet may be the default, we would propose that the Board retain discretion to reduce this setback on a case-by-case basis but in no case less than 50 feet. In exercising this discretion, the Board should consult closely with its local *ad hoc* members who can provide valuable input and carefully review the proposed visual screening plan (including vegetative screening). Ohio is fortunate to have extensive state, county, and township roadways across its diverse 88 counties; a rigid setback of 150 feet from every one of those roads (irrespective of screening and other factors) is simply too blunt an instrument and would unduly hinder solar energy generation.

With respect to landscape plans, the new and undefined terms "traveling public" and "recreationalist" could suggest that, in addition to the new rules imposing a lengthy setback from all roads, landscape plans must include an "invisibility standard," including 360-degree screening around the entire project perimeter. This would come at a huge project cost that is not justified. But the rule as proposed is vague and requires clarity and certainty.

[14] The Indiana legislature passed a voluntary siting standard bill in 2021, with setbacks of 150 feet from non-participating residences (but landscape buffers for projects less than 250 feet). The bill also includes setbacks of 40 feet from a highway, 30 feet from a collector road, 10 feet from a local road, and 50 feet from non-participating property lines, See IN 2021, HB 1381.

It also appears to equate the interests of someone who may observe a solar farm while driving past it with those living adjacent to it. Given finite resources, the rules should drive investment into screening for near neighbors and their significant interest at stake as opposed to the occasional passer-by.

If the intent is to require virtually full vegetative screening around the perimeter of solar projects, the Clean Energy Industry strongly objects, as the costs would be tremendous (including maintenance for the life of the project), likely making projects uneconomic, and in many cases the benefits miniscule.

Finally, we suggest the rule delete reference to roads "within" a project area. There simply are no public roads inside the fenceline of a solar project, so "adjacent to" is sufficient.

Setbacks / Storage: We also note that urban environments, with significant electricity load and grid volatility, can benefit greatly from energy storage facilities. Energy storage facilities can be housed in corrugated steel containers and buildings, sometimes even as an adaptive reuse of an existing building. Because of the nature of these facilities, setbacks that have traditionally applied in more rural or industrial contexts are inappropriate.

Similarly, the vegetative screening provisions proposed for solar should not attach to storage projects. Again, storage projects are often proposed for commercial areas in an urban context—where blending with a rural landscape is not the mitigation goal. In many instances, walls, fences, building façade design, and other features can be utilized to screen an energy storage project or blend it in with its surroundings.

Microwave Path Study: For wind, the revised Section (H)(4) requires a microwave

path study from an independent surveyor and use of design standards to avoid microwave interference. We recommend the rule clarify that it refers to "Federal Communications Commission-licensed" microwave paths as those are identifiable, and that a "communications engineer or other qualified professional" aside from merely a "surveyor" be able to perform the required study.

Waiver: The Clean Energy Industry also believes the rules should explicitly state that requirements of this rule shall be waived if the affected property owner(s) agree, i.e., become a participating landowner.

4906-4-09 Regulations associated with renewable energy generation facilities.

The following requirements are applicable to a renewable energy generation facility.

(A) Construction, location, use, maintenance, and change.

***

(3) Maintenance and use.

***

(e) The Applicant shall prevent the establishment and propagation of noxious weeds identified in Ohio Adm.Code Chapter 901:5-37 while at the same time ensuring that common pollinator species are not completely eradicated in the project, including its setback areas, during construction, operation, and decommissioning via procedures and processes specified and required by the project's vegetation plan. The Applicant shall provide annual proof of weed control for the first four years of operation, with the goal of weed eradication significantly completed by year three of operation. Such proof may consist of [Staff to supply intent].

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(C) Aesthetics and recreational land use.

***

(5) The applicant shall provide photographic simulations or artist's pictorial sketches of the proposed facility from at least one vantage point in each area of ~~three~~ one square mile~~s~~ within the project area, showing views to the north, south, east, and west. The photographic simulations or artist's pictorial sketches shall incorporate the environmental and atmospheric conditions under which the facility would be most visible.

(D) Wildlife protection. The applicant shall satisfy the following requirements to avoid or mitigate impacts to federal or state listed and protected species.

***

(5) The Applicant shall have an ~~Staff-approved~~ environmental specialist, mutually agreed upon by the applicant and staff on site during construction activities that may affect sensitive areas. Sensitive areas which would be impacted during construction shall be identified on a map provided to Staff, and shall include, but are not limited to, wetlands and streams, and locations of threatened or endangered species. The environmental specialist shall be familiar with water quality protection issues and potential threatened or endangered species of plants and animals that may be encountered during project construction. The environmental specialist shall have authority to stop construction on all or part of a facility for up to forty-eight hours ~~to assure that~~ if the construction activities are creating unforeseen environmental impacts in the sensitive areas identified on the map. The environmental specialist will~~do not progress and~~ recommend procedures to resolve the impact. A map shall be provided to Staff showing sensitive areas which would be impacted during construction with information on when the environmental specialist would be present.

***

(E) Noise.

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(2) The facility shall be operated so that the facility's daytime and nighttime noise contributions do not result in noise levels at any non-participating sensitive receptor within one mile of the project boundary that exceed the greater of 40 dBA or the project area ambient daytime

and nighttime average sound level (L50) by five A-weighted decibels (dBA).

(3) After commencement of commercial operation, the applicant shall conduct further review of the impact and possible mitigation of all project-related noise complaints through its complaint resolution process. Non-participating, as used in this context, refers to a property for which the owner has not signed a waiver or otherwise agreed to be subject to a higher noise level.

(4) Any amendment to this rule regarding sound only applies to applications filed after the rule's effective date.

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(G) The following are applicable to solar facility applications.

(1) High wind velocities. Solar facility applicants will ~~provide an analysis of high wind velocities for the area, including the probability of occurrences and likely consequences of various wind velocities, and describe plans to mitigate any likely adverse consequences. A tabulation of maximum and median wind speeds recorded daily at weather stations or airports near the facility would be very useful in satisfying this requirement~~design projects to meet prevailing engineering standards, taking into consideration wind speed.

(2) Stormwater management. ~~The applicant shall construct the facility in a manner that incorporates post construction stormwater management under OHC00005 (Part III.G.2.e, pp. 19-27) in accordance with the Ohio environmental protection agency's guidance on post-construction storm water controls for solar panel arrays.~~ The Applicant shall mitigate potential water quality impacts associated with aquatic discharges by obtaining an Ohio national pollutant discharge elimination system construction stormwater general permit from the Ohio environmental protection agency with submittal of a notice of intent for coverage under that permit. The applicant shall develop and implement a stormwater pollution prevention plan, a spill prevention control and counter measure plan, and a horizontal directional drilling inadvertent release of drilling fluid contingency plan to minimize and prevent potential discharges to surface waters in the project area and surrounding area.

(3) Fencing. Solar panel perimeter fence type is to be both small-wildlife permeable and aesthetically fitting for a rural location.

Such fencing requirement does not apply to substation fencing governed by the National Electric Safety Code or other similar safety code standards applicable to substations.

(4) Visual and Aesthetic Impact Mitigation~~Setbacks~~.

(a) The board recognizes that the visual impact of each project varies and depends on specific variables such as topography, home density, existing vegetation, existing structures, facility design, and other factors make each project's potential visual impact unique. In lieu of following the suggested visual mitigation methods described below, applicants can demonstrate they have designed a project that provides appropriate visual mitigation measures in an effort to properly reduce visual impact through combined setback and landscaping plans.

(b) The facility design is to incorporate a minimum setback from the project's solar modules of (i) at least ~~150~~ 25 feet from non-participating parcel boundaries, (ii) at least 300 feet from the edge of non-participating residences existing as of the application filing date, and (iii) at least 150 feet from the edge of pavement of any state, county, or township road ~~within or~~ adjacent to the project area. Adjacent landowners may waive these setbacks from parcel boundaries and residences. With respect to the setback from a road, the board may in its discretion reduce the setback to not less than 50 feet if, after consultation with the local ad hoc members of the board and a review of the proposed aesthetic and visual impact mitigation measures (including vegetative screening), it finds that the reduction is appropriate.

(c)~~(5) Landscape Plans.~~ The application is to include a landscape plan in consultation with a landscape architect licensed by the Ohio Landscape Architects Board that addresses the aesthetic impacts of the facility on adjacent residential non-participating properties, ~~the traveling public~~, and nearby communities, ~~and recreationalists~~ through measures such as shrub plantings or enhanced pollinator plantings and be in harmony with the existing vegetation and viewshed in the area. Such vegetative screening is to be maintained for the life of the facility. The plan shall include robust landscaping for heavily travelled roads and lighter landscaping for lightly travelled roads. Screening is not required around the entire perimeter of a solar project and landscape plans are not expected to screen projects entirely from all public viewsheds. For energy

storage facilities, landscape plans shall include appropriate screening measures for the environment in which the project is proposed. Architectural elements such as building facades, fences, and walls may be incorporated to address aesthetic impacts.

(H) The following are applicable to wind facility applications.

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(4) Communications.

(a) At least thirty days prior to the preconstruction conference, the applicant shall conduct a microwave path study that identifies all existing Federal Communications Commission-licensed microwave paths that intersect the wind farm project, and a worst-case Fresnel zone analysis for each path. A copy of this study shall be provided to the path licensee(s), for review, and to staff for review and confirmation that the applicant is complying with this condition. The assessment shall conform to the following requirements:

(i) An independent ~~and~~ communications engineer or other qualified professional ~~registered surveyor,~~ licensed to survey within the state of Ohio, shall determine the exact locations and worst-case Fresnel zone dimensions of all known microwave paths or communication systems operating within the project area, including all paths and systems identified by the electric service providers that operate within the project area. In addition, the ~~surveyor~~ engineer or qualified professional shall determine the center point of all turbines within one thousand feet of the worst-case Fresnel zone of each system, using the same survey equipment.

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(d) The requirements contained in this rule will be waived if the impacted property owner(s) enter into an agreement with the applicant.

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E. Ohio Adm.Code Chapter 4906-7 – Compliance Monitoring

1. Rule 4906-7-04 – Annual Reporting Requirement (New)

This newly proposed rule requires that for the first three years of operation, the owner must docket an annual report to include facility status, significant monitoring and mitigation activities, compliance with all certificate conditions, any facility modifications, status of surety information and an incident summary. In subsequent years, the owner must file a letter indicating no changes from the last report, or else file a new report.

Coupled with the new proposal for 5 years of quarterly reports, these annual reports make for 23 new filings with the Board—in addition to all of the existing information owners provide. The Clean Energy Industry would request if these annual reports are to be required, perhaps the quarterly complaint summaries required by Rule 4906-4-06 could be made every six months instead of four for a total of 13 new reports. And of course this is in addition to the Board's power to request information and make site inspections at any time.

2. Rule 4906-7-05- Reporting Violations (New)

Under the newly-proposed rule, within 30 days of discovery an owner must file a written report of any certificate violation. The report must include details regarding the violation and "all potential future actions" that can be taken to address it.

The Clean Energy Industry supports self-reporting and the 30-day timeline seems reasonable. However, the rule should be made more precise than simply asking for "all

potential" remedies, which could presumably include closure. Requiring the owner's plan to respond and avoid future violations would be more appropriate.

4906-7-05 Reporting Violations.

(A) Except as provided in rule 4906-7-04 of the Administrative Code, a certificate holder will docket, within thirty days of its discovery, a written report of any violation of section 4906.98 of the Revised Code in its certificate case. Each written report will include:

(1) A description of the violation.

(2) The date and time the violation occurred.

(3) The date and time the violation was discovered.

(4) All actions taken to address the violation, including a timeline of those actions and other relevant events.

(5) ~~All potential future actions that can be taken by t~~The certificate holder's plan to respond to the violation and avoid future similar ~~to address the~~ violations.

***

3. Rule 4906-7-06 – Self-Reporting Incidents (New)

This newly-proposed rule on incident reporting applies to all generation facilities except wind, which are governed by a separate rule [4906-4-10(D)(2)]. It requires an owner to report any "incident" within 30 days of discovery. "Incident" includes:

1) Injury to any person;

2) Damage to property other than the facility operator's; and

3) Damage to the facility operator's property if estimated to exceed $50,000, 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 damaged property.

In addition, under the proposed Section (F), a facility involved in a reportable incident cannot restart or resume construction until such action is approved by the Board's executive director or the executive director's designee.

As was discussed at some length at the Joint Committee on Agency Rule Review while the analogous wind rule was being promulgated,[15] the prospect of total, indefinite shutdown for even a relatively minor incident introduces a needlessly large amount of uncertainty into Ohio's regulatory structure—especially for generation technologies that are modular enough to run some but not all of the equipment, such as solar and energy storage.

As such, the Clean Energy Industry recommends this proposed rule more closely mirror 4906-4-10(D)(2) and limit the shut-down order to the "damaged property within the facility" as opposed to the facility itself. In addition, 4906-4-10(D)(2) also contains a presumption that 5 days after filing the needed information with the Board, operations may resume. That timetable should be carried over here as well.

4906-7-06 Self-Reporting of Incidents.

***

(F) A facility involved in a reportable incident under paragraph (D) of this rule will not~~cannot~~ restart or resume damaged property within the facility or ~~construction~~ until such action is approved by the board's executive director or the executive director's designee.

(1) Such approval is premised upon the filing of:

(a) A complete and final written report fully addressing the factors set forth in paragraph (C) of this rule,

[15] *In re Ohio Power Siting Board Ohio Adm.Code Chapter 4906*-4, Case No. 19-778-GE-BRO, Finding and Order (Sept. 17, 2020).

(b) A representation by the facility operator that it is ready to restart the damaged property, and,

(c) A notarized statement that a satisfactory repair or replacement of the damaged property has been completed from:

(i) A licensed professional engineer;

(ii) A qualified representative from the manufacturer of the damaged equipment; or

(iii) A person employed by or hired by the operator having appropriate qualifications under the circumstances to provide the required statement.

(2) Unless otherwise suspended for good cause shown the board, executive director, or an administrative law judge, a facility operator may restart damaged property five business days after docketing the information required in this rule.

4. Rule 4906-7-07- Compliance Site Review (New)

Under this newly proposed rule, Staff may inspect facilities at any time. Inspections may include all materials, activities, related or supporting facilities, premises, and records pertaining to construction, operation and maintenance of the project. If Staff finds, any actual or "potential" violations of a certificate or evidence an incident was not reported, Staff will docket a written report of its findings.

The Clean Energy Industry made comments on proposed Rule 4906-1-05 above supporting certain safety conditions that should be met on any site visit. Reasonable advance notice is also important. To the extent there is a need for two separate rules governing the topic, we reiterate those concerns and recommendations here. Otherwise, we recommend deletion of this rule to avoid overlapping and confusing regulations.

~~4906-7-07 Compliance Site Review.~~

~~(A) Each certificate holder will allow properly identified representatives of the board, including, but not limited to, compliance staff or its contractors, to inspect the operations of a certificated facility at any time. Inspections may include, but are not limited to, all materials, activities, related or supporting facilities, premises, and records pertaining to construction, operation, and maintenance of the facility.~~

~~(B) The certificate holder's representative may accompany compliance staff during any inspection conducted under this rule.~~

~~(C) The board will maintain written records of all inspections conducted under this rule.~~

~~(D) If compliance staff finds, pursuant to any inspection conducted under this rule, any actual or potential violations of section 4906.98 of the Revised Code or evidence of an incident that was not reported in accordance with this rule, compliance staff will docket a written report of compliance staff's findings in the facility's certificate proceeding and notify the certificate holder.~~

III. CONCLUSION

MAREC, ACP, and USSEC appreciate the opportunity to respond to the proposed rules. The Clean Energy Industry stands ready to provide best practice guidance based on member company experience throughout this process. We look forward to continued work with the Board, staff, and interested parties.

Respectfully Submitted,

__/s/ Terrence O'Donnell_____
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Comments were served by electronic mail upon the following on this 5th day of August, 2022.

/s/ Terrence O'Donnell
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Administrative Law Judge:

Michael.Williams@puco.ohio.gov

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