

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of South :
Branch Solar, LLC, for a Certificate of : Case No. 21-669-EL-BGN
Environmental Compatibility and Public :
Need to Construct a Solar-Powered :
Electric Generation Facility in :
Hancock County, Ohio.

**REPLY BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE OHIO POWER SITING BOARD**

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INTRODUCTION

This case concerns an application to construct a solar facility in a rural area of Ohio. Such development is consistent with state policy. The Ohio General Assembly has declared renewable energy development to be both lawful and important to promote a diversified state energy portfolio. There are a finite number of sites in Ohio that can support a commercial-size solar facility. The proposed project site in Hancock County is well-suited for such development, and that is why it has been selected.

To sustain legal muster, the proposed South Branch Solar Project (“Project”) need not be impact-free or without risk. Improvements and maintenance to local roads will be required and made. Aesthetics and other impacts will be addressed and minimized where possible. The Board’s adjudicatory role is to identify expected impacts and adopt

measures that reasonably address and mitigate those impacts to the Project area and environment.

Pursuant to the briefing schedule established by the Administrative Law Judge, the Staff filed an initial post-hearing brief on August 5, 2022. Briefs were also filed by the Applicant and intervenor Travis Bohn. In this Reply Brief, Staff will address arguments made by Travis Bohn. As the Board's Staff (Staff) demonstrated in its initial brief, the Application and the numerous conditions proposed by Staff and other Parties have ensured proper mitigation of impacts as required by statute. Nothing contained in the other parties' initial briefs rebuts this. Staff again respectfully requests that the Board adopt the proposed Stipulation and Recommendation and grant the certificate subject to the conditions set forth therein.

The law requires the Board's Staff to investigate an application to assess likely impacts and to recommend conditions to the Board to mitigate or minimize impacts to the project environment. The law does not, of course, require a finding that the project be totally free of all potential impacts as a precondition to Board approval. As discussed in its initial brief, the Staff has proposed comprehensive recommendations for the Board's studied consideration in order to address and reduce Project impacts to reasonably acceptable levels. A number of those conditions were modified through the negotiations that resulted in the Stipulation. Staff submits that, if implemented, these conditions, as modified by the Stipulation, will allow this project to lawfully move forward under the requisite statutory criteria. The Staff again respectfully requests that any certificate issued by the Board be made subject to such conditions.

ARGUMENT

I. The Board should determine the Project, with conditions as recommended in the Staff Report as modified by the Stipulation and Recommendation, satisfies the criteria of R.C. 4906.10.

As Staff established in its initial brief, the proposed facility will have minimal environmental impacts, including on nearby property owners. The facility will produce electricity without polluting the air and without using, much less polluting, water. When operational, this facility promises a negligible environmental impact and, certainly, the minimum adverse environmental impact in comparison to other electricity generating methods. Staff also demonstrated that the facility is consistent with state policy and will further the public interest.

Staff conducted a comprehensive review scrutinizing nearly two dozen areas. The Staff Report discusses each of the R.C. 4906.10 criteria and speaks for itself. Staff also recommended conditions to reasonably minimize impacts and risks. Staff believes that its recommended conditions will sufficiently mitigate any such impacts and allow the Board to find overall minimal adverse environmental impact. Through negotiations, the parties have agreed to even more stringent conditions that further minimize environmental impact. The Staff Report provides the Board with a sound, objective, evidentiary basis for determining the existence of all R.C. 4906.10 criteria, and, the Staff submits, supports Board issuance of a certificate conditioned as the Stipulation has recommended.

A. Public Interest, Convenience, and Necessity.

In his initial brief, Travis Bohn focuses first on R.C. 4906.10 (A)(6). According to Mr. Bohn, the project is not in the public interest based on opposition from area residents. Travis Bohn Brief at 5-6. Mr. Bohn relies on the Board decision in *Republic Wind*, 17-2295- EL-BGN (June 24, 2021). In that case, the Board pointed to the “especially prominent and one-sided” local opposition to the wind project as an important factor in its determination that the Republic Wind project did not serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6).

This case, however, is very different from *Republic Wind*. Far from being one-sided, a review of the case docket shows that there are many public comments in favor of the Project. Mr. Bohn downplays these comments, contending that they should be disregarded because many of the Project’s supporters are from the city of Findlay. These citizens, however, are members of the public and are entitled to have their views considered.

Mr. Bohn also erroneously asserts that the Hancock County Commissioners are opposed to the Project. Travis Bohn Brief at 6. This assertion is contravened by the fact that the Board of Commissioners of Hancock County is a signatory to the Stipulation. Joint Ex. 1 at 16. Because the commissioners represent constituents in the Project area, their support should be given heavy weight in the Board’s consideration. Certainly, that support should not be disregarded as Mr. Bohn would have the Board do.

Mr. Bohn further argues that the Project will conflict with local land use plans. As he acknowledges, however, such local regulations are not binding on the Board. R.C.

4906.13(B) provides that: “No public agency or political subdivision of this state may require any approval, consent, permit, certificate, or other condition for the construction or operation of a major utility facility or economically significant wind farm authorized by a certificate issued pursuant to Chapter 4906 of the Revised Code.” Ohio Rev. Code §4906.13(B).

Mr. Bohn also argues that the Project is contrary to the public interest because it will remove farmland from food production. Significantly, however, the Ohio Farm Bureau Federation (OFBF) is a signatory to the stipulation. The OFBF is an organization that advocates for the interests of agriculture. According to its motion to intervene in this case, the OFBF is “a non-profit organization representing agricultural interests at the state and local levels with member families in every county, including hundreds of families in Hancock County.” The support of the OFBF strongly supports an inference that the Project is compatible with agriculture in the Project area.

As demonstrated by the record, the proposed Project serves the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6).

B. Economic Impact

Ohio Adm.Code 4906-4-06(E)(4) requires applicants for certificates of public need and environmental compatibility to “provide an estimate of the economic impact of the proposed facility on local commercial and industrial activities.” Mr. Bohn argues that the project will have adverse consequences on farmland and thus this test is not met.

Here, Staff noted that the Project could create 757 construction jobs. Staff Ex. 1, Staff Report, 14. The Project was estimated to create 11 operational jobs. Id. Staff's witness confirmed this on record. Tr. II 131:14–16. The Board is to consider impacts to “local commercial and industrial activities” which does not require an analysis of each and every subset of the economy. Moreover, Mr. Bohn did not point to any evidence that agricultural jobs would be lost in his brief—thus, the “negative economic impacts” referenced in Mr. Bohn's brief are largely hypothetical and not substantiated by record evidence.

C. R.C. 4906.10(A)(3) – Minimum Adverse Impact

Travis Bohn also argues that the proposed setbacks are insufficient to minimize the Project's adverse environmental impact. Travis Bohn Brief at 15. According to Mr. Bohn, the Board must impose greater minimum setbacks between the Project and the property lines and homes of adjacent landowners. This argument has no merit.

Despite Mr. Bohn's suggestion otherwise, there are at present no minimum setbacks prescribed by either statute or Board rule. Setbacks therefore are left to the Board's discretion. In this case, the planned setbacks, in conjunction with vegetative screening, are more than sufficient to protect adjacent landowners.

As noted in the Staff Report, the Applicant has committed to a setback of 160 feet from non-participating sensitive receptors and 60 feet from public roads. Staff Ex. 1 at 12. In addition to these setbacks from non-participating residences, the Applicant also proposes mitigation in the form of vegetative screening at selected sensitive areas around

the project site. Taken together, the setbacks and screening will protect adjacent landowners from adverse impacts.

D. Noise Impacts

Mr. Bohn further argues that construction and operation of the Project will create noise that will adversely impact the health of area residents. This contention, however, is not supported by the record.

As noted in the Staff Report, the operational noise impacts for the Project would be relatively minor and occur only during the day. Operational noise sources include inverters and tracking motors. The step-up transformer at the new substation may operate at day or night but the noise impact would also be relatively minor. Staff Ex. 1 at 13.

Mr. Bohn also ignores the stipulation conditions that impose significant mitigation measures to reduce noise impacts. In particular, Condition 40 addresses construction noise and provides time restrictions for general construction activities and even greater restrictions for pile driving. Joint Ex. 1 at 8. Condition 44 addresses noise from inverters and transformers. It imposes a limit of 5 dba over ambient sound levels and requires further study and mitigation if that limit is exceeded. Taken together, these conditions will sufficiently mitigate noise impacts from the project.

E. Flood Control.

Travis Bohn contends that the certificate should be denied due to the potential for flooding in the area. Importantly, the Staff Report states that no part of the project will overlap with any 100-year floodplain. Staff Ex. 1 at 27. Mr. Bohn nevertheless contends

that the area is already subject to periodic flooding and that the potential for tile damage during construction will only exacerbate the problem.

Once again, Mr. Bohn overlooks recommended conditions in the stipulation that are designed to mitigate the risk of flooding. Condition 32 requires that the Project must incorporate construction stormwater management in accordance with guidance by the Ohio Environmental Protection Agency. Joint Ex. 1 at 6. Additionally, Condition 45 is intended to protect field tile drainage systems. Condition 45 provides:

The Applicant shall avoid, where possible, or minimize to the extent practicable, any damage to functioning field tile drainage systems or compaction to soils resulting from the construction, operation, and/or maintenance of the facility in agricultural areas. Damaged field tile systems shall be promptly repaired or rerouted to at least original conditions or modern equivalent at the Applicant's expense to ensure proper drainage. The affected landowner(s) may agree to not having the damaged field tile system repaired, but they may do so only if: i) the field tile systems of nearby parcels remain unaffected by the non-repair of the landowner's field tile system; and ii) the damaged field tile does not route directly onto or into an adjacent parcel. The Applicant shall design the Project to ensure that nearby parcels are protected from unwanted drainage problems due to construction and operation of the Project. The Applicant shall document benchmark conditions of surface and subsurface drainage systems on Project parcels prior to construction, including the location of laterals, mains, grassed waterways, and county maintenance/repair ditches. The Applicant, together with an independent tile and drainage consultant retained by the Applicant, shall consult with owners of all parcels

adjacent to the project parcels, the county soil and water conservation district, and the county engineer to request drainage system information over those parcels. The Applicant shall consult with the county engineer and the county soil and water conservation district for tile located in a county maintenance/repair ditch, and the Applicant shall consult with the county engineer for tile, storm sewers, and ditches located in a county or township right-of-way. A map of discovered drain tile systems shall be filed in the case docket once construction is complete.

Taken together, these conditions will guard against flooding caused by the Project, both within the Project area and on adjacent properties. The fact that the area is already subject to some flooding is not within the responsibility of the Applicant or the Board.

F. Wildlife

Staff continues to recommend that the Board find that the proposed facility would represent the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and therefore complies with the requirements specified in R.C. 4906.10(A)(6), as well as with all other requirements of R.C. 4906.10. Ohio Adm.Code 4906-4-08(B) requires Applicant to conduct literature and field surveys of the plant and animal species in the project area to assess and mitigate a project's potential ecosystem impacts. Per that rule, the literature study "shall include aquatic and terrestrial plant and animal species that are of commercial or recreational value, or species designated as endangered or threatened."

Mr. Bohn focuses on resident reports of bald eagle sightings in his post-hearing brief but does not acknowledge that bald eagles are not designated as “endangered” or “threatened” – in fact, bald eagles, once a “threatened” species, are now considered “least concern” due to large population growth in the last several decades. Their inclusion in the literature study is not required by the administrative code.¹ Here, staff accurately stated that no endangered or threatened listed plant or animal species were identified during the onsite survey investigation, ODNR and USFWS did not identify any concerns regarding impacts to listed plant or animal species. Staff Ex. 1 at 28. Further, the potential for significant impacts to other wildlife species was not identified by these agencies.

Likewise, the fact that some residents have seen bald eagles in the area is not evidence of overarching surveying flaws. The presence of eagle nests, which may trigger the need for construction restrictions, were not observed in the area, and it is not unreasonable that residents might see eagles on occasion in the area but that they might not be present during surveys. The assertion that the applicant failed to properly conduct a field survey is not grounded in record evidence.

G. Three-Part Test

The first prong of the test has been met. When considering a stipulation’s reasonableness, whether the parties to the stipulation were “knowledgeable and capable parties” is examined, the sophistication of the parties who are not parties to the stipulation is immaterial. Thus, the fact that Mr. Bohn was not represented by counsel is

¹ Mr. Bohn does not allege that the bald eagle should be considered “of commercial or recreational value” under the code.

not relevant to the test. Moreover, whether or not Mr. Bohn was represented by counsel at the time is squarely the responsibility of Mr. Bohn.

Moreover, Respondent witness Kalbouss did make reasonable overtures to Mr. Bohn to be involved in the process. Tr. 44-45. While the Board has encouraged diversity of interests in stipulations, there is no “requirement” that there be diversity for a settlement to be reasonable. The case cited to by Mr. Bohn contains no such proposition. See, *In the Matter of the Application of Firelands Wind, LLC for a Certificate of Environmental Compatibility and Public Need to Construct a Wind-Powered Electric Generation Facility in Huron and Erie Counties, Ohio*, Case No. 18-1607-EL-BGN, Opinion, Order, and Certificate at ¶ 108 (June 24, 2021). Moreover, here, the fact that Mr. Bohn declined to be part of the stipulation negotiations demonstrates that diversity was not an achievable goal under the circumstances.

Mr. Bohn states that the Stipulation is not in the public interest, but does not address the specifics of the stipulation, instead attacking the project as a whole. The stipulation enhanced numerous conditions in the Staff Report in furtherance of the public interest, including enhancing setbacks from oil and gas wells and from water wells (Condition 17), enhancing monitoring, control, and reporting regarding noxious weeds identified in O.A.C. 901:5-37 (Condition 34); requiring additional consultation with Hancock County officials during construction, including the county engineer (Condition 33) and enhancing provisions relative to mapping, maintenance, and mowing for pollinator habitat areas (Condition 33). These conditions all benefit the public interest,

and they were achieved by the stipulated settlement. Thus, the stipulation benefitted the public interest.

Mr. Bohn's arguments as to why the stipulation violates regulatory principles are largely a retelling of Mr. Bohn's arguments as to why 4906.10 was not satisfied more generally. That is not what is required to overcome a stipulation, and the project overall satisfies the statutory requirements, as set forth in this brief as demonstrated in greater detail above.

CONCLUSION

Based upon the foregoing, the Staff respectfully requests that the Board adopt the Stipulation and Recommendation. Staff further specifically requests that the Board condition any certificate issued in this case by adopting the conditions set forth in that Stipulation and Recommendation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Reply Brief**, submitted on behalf of the Staff of the Ohio Power Siting Board, was served via electronic mail upon the following parties of record, this 26th day of August, 2022.

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