

BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Application)	
of Yellow Wood Solar Energy LLC,)	
for a Certificate of Environmental)	Case No. 20-1680-EL-BGN
Compatibility and Public Need for)	
The Construction of a Solar-Powered)	
Electric Generation Facility in)	
Clinton County, Ohio)	

**POST-HEARING REPLY BRIEF OF INTERVENORS BRAD
COCHRAN, BRAD COCHRAN FARMS LLC, JWP FAMILY
FARMS LLC, DIANE RHONEMUS, AND CHARLES THOMPSON**

Jack A. Van Kley (0016961)
Counsel of Record
Van Kley Law, LLC
132 Northwoods Blvd., Suite C-1
Columbus, Ohio 43235
(614) 431-8900 (telephone)
(614) 431-8905 (facsimile)
Email: jvankley@vankley.law

TABLE OF CONTENTS

I.	Standards for Certification Of Major Utility Facilities.....	1
II.	An Administrative Agency Such As The Ohio Power Siting Board Is Required To Comply With Its Own Rules	5
III.	Public Opposition To The Project Shows That The Project Does Not Serve The Public Interest, Convenience, And Necessity Under R.C. 4906.10(A)(6)	5
IV.	The Board Should Not Accept The Narrow Setbacks Proposed By Yellow Wood Solar, Because They Are Not Adequate To Minimize The Project's Adverse Environmental Impacts Under R.C. 4906.10(A)(3) And Because Yellow Wood's Paltry Plans For Vegetative Screening Will Not Protect The Neighbors' Views Of The Nearby Solar Facilities	6
V.	The Ohio Power Siting Board Cannot Issue A Certificate For The Project Without Receiving The Information Required By OAC 4906-4-08(A)(4)(a) And R.C. 4906.10(A)(2) & (3) Concerning The Project's Potential Impacts On Groundwater Supplies Or Without Preventing The Loss Of Water Supplies Pursuant To R.C. 4906.10(A)(3).....	8
VI.	Because The Evidentiary Record Demonstrates Construction Noise Will Impair The Neighbors' Quality Of Life, The Board Has No Basis To Find That The Project Complies With R.C. 4906.10(A)(3) Or R.C. 4906.10(A)(6).....	9
VII.	The Application Lacks The Decibel Data For Operational Noise From The Inverters Required By OAC 4906-4-08(A)(3), R.C. 4906.10(A)(2), And R.C. 4906.10(A)(3)	10
VIII.	The Operational Noise Limit Proposed by Condition 29 Of The Stipulation Exceeds The Standard In OAC 4906-4-09(F)(2).....	11
IX.	Because The Evidentiary Record Does Not Demonstrate That Yellow Wood Solar Informed Local Aviation Facilities About The Project Or Its Potential Impacts As Required By OAC 4906-4-07(E), R.C. 4906.10(A)(2), And R.C. 4906.10(A)(5), The Board Lacks The Information Necessary To Determine Compliance With R.C. 4906.10(A)(3), (5), And (6)	11
X.	Because The Evidentiary Record Does Not Estimate The Volume Or Disposal Destinations Of Solid Waste And Debris Generated During Construction As Required By OAC 4906-4-07(D), R.C. 4906.10(A)(2), And R.C. 4906.10(A)(5), The Board Lacks The Information Necessary To Determine Compliance With R.C. 4906.10(A)(3) And (5)	11

XI.	The Ohio Power Siting Board Cannot Issue A Certificate For The Project Without Receiving The Information Required By OAC 4906-4-07(C) And R.C. 4906.10(A)(2), (3), And (5) About The Project’s Drainage Impacts And Associated Mitigation To Prevent Flooding	11
XII.	The Ohio Power Siting Board Cannot Issue A Certificate To Yellow Wood Solar Without Receiving The Information Required By OAC 4906-4-07(C) And R.C. 4906.10(A)(2), (3), And (5) Concerning The Project’s Pollution Impacts And Associated Mitigation	11
XIII.	The Ohio Power Siting Board Cannot Issue A Certificate For The Project Without Receiving The Information Required By OAC 4906-4-08(B) And R.C. 4906.10(A)(2) And (3) Concerning The Project’s Potential Impacts On Wildlife And Plants.....	13
XIV.	Because The Project Will Destroy The Local Public Roads, The Board Should Find That The Project Does Not Comply With R.C. 4906.10(A)(3) Or R.C. 4906.10(A)(6)	13
XV.	Because The Project Will Damage Drainage Tiles And Surface Waterways, The Board Should Find That The Project Does Not Comply With R.C. 4906.10(A)(3) Or R.C. 4906.10(A)(6).....	13
XVI.	Because The Project Will Displace Food Production On Thousands Of Acres Of Farm Land, The Board Should Find That The Project Does Not Serve The Public Interest, Convenience, And Necessity Under R.C. 4906.10(A)(6)	14
XVII.	The Ohio Power Siting Board Cannot Issue A Certificate To Yellow Wood Solar Without Evaluating The Project’s Negative Economic Impacts As Required By OAC 4906-4-06(E)(4) And R.C. 4906.10(A)(6)	14
XVIII.	Stipulations That Do Not Settle Anything Are Not Entitled To Deference	15
XIX.	Conclusion	15
	Certificate of Service	16

BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Application)
of Yellow Wood Solar Energy LLC,)
for a Certificate of Environmental) Case No. 20-1680-EL-BGN
Compatibility and Public Need for)
The Construction of a Solar-Powered)
Electric Generation Facility in)
Clinton County, Ohio)

**POST-HEARING REPLY BRIEF OF INTERVENORS BRAD
COCHRAN, BRAD COCHRAN FARMS LLC, JWP FAMILY
FARMS LLC, DIANE RHONEMUS, AND CHARLES THOMPSON**

Intervenors Brad Cochran, Brad Cochran Farms LLC, JWP Family Farms LLC, Diane Rhonemus, and Charles Thompson (collectively, the “Residents”) hereby file their Post-Hearing Reply Brief.¹ For the reasons described below, the Residents request that the Ohio Power Siting Board (“Board” or “OPSB”) deny the application by Yellow Wood Solar Energy LLC (“Yellow Wood”) for a certificate to construct and operate its proposed solar power facility (the “Project”).

ARGUMENT

I. Standards for Certification Of Major Utility Facilities

It is no accident that six of the seven criteria applicable to this Project are aimed at examining and minimizing its potential harmful impacts on the public. R.C. 4906.10(A)(2) (environmental impacts); R.C. 4906.10(A)(3) (environmental impacts); R.C. 4906.10(A)(5) (impacts on the environment and aviation); R.C. 4906.10(A)(6) (impacts on the public’s

¹ This brief uses the following abbreviations for citations to the evidentiary record: (1) “Application” refers to Applicant’s Exhibit 1, the Application submitted by Yellow Wood on February 24, 2021; (2) “Narrative” refers to the narrative of the Application; (3) “Application Exh.” refers to the exhibits attached to the Application; (4) “Applic. Exh.” refers to the Applicant’s exhibits introduced at the hearing; (5) “Tr.” refers to the transcript of the hearing, which is preceded by the name of the witness and followed by the transcript’s volume, page numbers, and line numbers; and (6) “OAC” refers to the Ohio Administrative Code.

interests and convenience); R.C. 4906.10(A)(7) (impacts on farmland); R.C. 4906.10(A)(8) (impacts on water supplies).² These criteria reflect the Ohio General Assembly's priority for protecting the public from ill-sited and badly designed energy facilities. Yellow Wood, improperly citing (at 3-4) a mission statement on OPSB's website that is not in the evidentiary record, deemphasizes the Board's responsibility to protect the public from harm and overemphasizes OPSB's energy promotion role. Neither R.C. 4906.10(A) nor OPSB's mission statement is meant to overlook a project's threats in favor of promoting more energy production.

While Yellow Wood's brief admits that the Board must balance a project's benefits and detriments, Yellow Wood employs the wrong standard to explain how those considerations must be balanced. As explained in the Residents' initial brief (at 2), R.C. 4906.10(A)(3) prohibits OPSB from issuing a certificate unless "the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations." Emphasis added. The dictionary meaning of "minimum" is "the least quantity assignable, admissible, or possible." The Merriam-Webster Dictionary, "Minimum," <https://www.merriam-webster.com/dictionary/minimum> (last accessed Nov. 17, 2022). 2022). That is, R.C. 4906.10(A)(3) prohibits OPSB from issuing a certificate unless the facility poses the least quantity assignable, admissible, or possible adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations. Whether R.C. 4906.10(A)(3) requires zero impact or allows some adverse impact depends on how much community damage is the least quantity assignable, admissible, or possible adverse environmental impact, considering the state of available

² The criterion in R.C. 4906.10(A)(1) applies only to transmission lines and pipelines.

technology and the nature and economics of the various alternatives, and other pertinent considerations. The Board must not allow Yellow Wood to settle for half-hearted mitigation measures where less public damage can be achieved through more robust mitigation that is economically reasonable and technologically available.³

As explained below, Yellow Wood has not demonstrated that its Project achieves this standard with respect to the many harms that the Project will cause. In many cases, Yellow Wood proposes half-hearted remedial measures to address Project harms that can be feasibly reduced further. Yellow Wood also has not provided the information required by OPSB's rules that is necessary for the Board to determine the nature of the Project's probable adverse impact under R.C. 4906.10(A)(2), (5), and (6).

Yellow Wood seeks to excuse the unmitigated impacts of the Project by stating (at 14) that "what might seem to be impactful for one person may not be impactful for someone else." Excusing widespread harm to the public just because there exists someone who can tolerate that harm is not what the Ohio General Assembly had in mind when it instructed OPSB to minimize the impacts of energy projects. By analogy, the attendees of a loud party may not be bothered by the noise, but that does not excuse their imposition on nearby residents who are trying to sleep. Just as local ordinances are adopted to protect the community from such nuisances, R.C. 4906.10(A) is designed to protect the community from the ravages of irresponsible energy production.

³ In another OPSB case, the law firm representing Yellow Wood herein has misrepresented the position taken by the Residents' counsel on this criterion, arguing that he had argued that R.C. 4906.10(A)(3) required minimal adverse environmental impact without considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations. The Board's decision in that case erroneously incorporated the applicant's misrepresentation into its opinion. *In re Harvey Solar*, Opinion, Order and Certificate, 2022 WL 15476795, ¶ 257 (Ohio Power Siting Board). The Board should not be fooled again if Yellow Wood's post-trial reply brief attempts the same trick here.

Yellow Wood brags (at 5-6) that it paid 11 experts to advocate for the Project, while only one witness testified for the Residents. Not surprisingly, Yellow Wood has enormous financial resources to pay witnesses (and to pay for bogus opinion polls, as discussed in the Residents' initial brief). After all, Yellow Wood's Application boasts that its parent company Invenenergy is North America's largest independent renewable power generation company and has developed over 160 projects in the United States, Central and South America, Canada, Europe, and Japan. Narrative, p. 4. In contrast, the Residents are financially unable to pay for experts. However, OPSB proceedings are not mere games in which applicants always win just because they are wealthy. OPSB is required to carefully examine the evidence to determine whether the Project complies with the law and the Board's rules, not automatically award the prize to the side with the most money and witnesses.

Yellow Wood also emphasizes (at 6) that Resident witness Diane Rhonemus did not state any objections or concerns about the Project. But the Residents had no obligation to testify about their objections or concerns, or to produce any witnesses at the hearing. They hired an attorney to express their views through the examination of witnesses and the preparation of post-hearing briefs. Moreover, Ms. Rhonemus was not presented as an expert witness to opine about the Project's threats, and Yellow Wood undoubtedly would have moved to strike her testimony had she done so. Yellow Wood's own witnesses, the Application, and other exhibits provided plenty of evidence about the Project's many problems as well as exposing the numerous gaps in the rule-required information presented by Yellow Wood.

Importantly, it is Yellow Wood, not the Residents, that has the burden of proof in this case. Yellow Wood is required to demonstrate its compliance with R.C. 4906.10(A) and the

Board's rules. Because Yellow Wood has failed to sustain this burden, OPSB should not issue a certificate.

II. An Administrative Agency Such As The Ohio Power Siting Board Is Required To Comply With Its Own Rules.

Yellow Wood's and the Staff's initial briefs contain no argument on this issue.

III. Public Opposition To The Project Shows That The Project Does Not Serve The Public Interest, Convenience, And Necessity Under R.C. 4906.10(A)(6).

As explained in Section III of the Residents' initial brief, R.C. 4906.10(A)(6) requires OPSB to consider the county commissioners' views on whether the Project is in the public interest, convenience, and necessity. Starting with the *Republic Wind* decision, the Board has acknowledged that R.C. 4906.10(A)(6) provides OPSB with this authority and mandate. Notwithstanding Yellow Wood's comment (at 4) that the Project is exempt from Senate Bill 52, this legislation does not negate OPSB's mandate to consider the commissioners' view as evidence of local opposition under R.C. 4906.10(A)(6). Senate Bill 52 enlarged on the *Republic Wind* precedent by giving the commissioners direct authority to disapprove energy projects that do not serve the public interest, convenience, and necessity. Although Yellow Wood's Project may be exempt from the commissioners' authority to disapprove a project by resolution, Senate Bill 52 does not amend the standard in R.C. 4906.10(A)(6) that requires OPSB to reject a project that the local population opposes.

Yellow Wood contends (at 41) that the Board should use a "broad lens" to determine compliance with R.C. 4906.10(A)(6), and that it thus should find that the Project's benefits outweigh any possible negative impacts. Of course, it is easy to make the Project's benefits look larger than its negatives, since Yellow Wood has not studied the negatives. See Section XVII of the Residents' initial brief and Section XVII below.

Incredibly, after cross-examination exposed the deception in Yellow Wood's "opinion poll" of July 2021, Yellow Wood still pretends (at 45) that its "opinion poll" by Calvert Street is evidence of local public support for the Project. Yellow Wood acts as if it has done nothing wrong in attempting to perpetrate this fraud on the Board. As explained in the Residents' initial brief (at 6-7), Calvert Street skewed its poll results by selecting only respondents already known to favor solar energy. Moreover, Calvert Street did not ask whether the respondents favored Yellow Wood's Project, but only whether they favored solar energy in general.

Given Calvert Street's underhanded polling, OPSB should be skeptical of the other Yellow Wood arguments that are based on Calvert Street's testimony. This includes Calvert Street's representations about the number of commenters in OPSB's docket favoring the Project.

IV. The Board Should Not Accept The Narrow Setbacks Proposed By Yellow Wood Solar, Because They Are Not Adequate To Minimize The Project's Adverse Environmental Impacts Under R.C. 4906.10(A)(3) And Because Yellow Wood's Paltry Plans For Vegetative Screening Will Not Protect The Neighbors From Views Of Nearby Solar Facilities.

Yellow Wood's discussion (at 16-17) of visual impacts stands primarily for the proposition that people will not be able to see the solar equipment from far-distant locations. But Yellow Wood does not and cannot contend that nearby neighbors will not see the Project. As to those persons, Yellow Wood grasps at straws with unconvincing arguments such as the purported blockage of nearby views by growing crops, which will occur only for one crop (corn) and only when it grows high enough late in the growing season to block view of 14-foot panels. Yellow Wood also claims that its 150 setbacks from property lines and roads and its 300-foot setback from houses will help, but these distances are too short to protect neighboring residents and motorists from the offensive views.

Yellow Wood promises (at 28) to compensate for its short setbacks by installing vegetated screens at locations between solar facilities and neighboring residences. The Application contains scant detail about these screens. Applic. Exhs. M and N. The Application's descriptions of its screening modules states that Module 1 will have native grasses, Module 2 will have small to medium shrubs, and Module 3 will have large trees and shrubs. Applic. Exh. N, p. 2-3. These unhelpful descriptions provide no detail about the spacing between the plants or their growth rates. Yellow Wood's vegetation plan provides additional descriptions of the modules, but it still lacks commitments as to which plant species will be planted at which locations. Applic. Exh. M. The scarce vegetation depicted in Yellow Wood's visual simulations of its screens demonstrates that Yellow Wood has no intent to provide any meaningful blockage of the public's views of its ugly facilities. *Id.*, p. 7-1; Applic. Exh. N, pp. 3-10, 3-12, 3-14, 3-16.

Yellow Wood promises to provide additional detail in a landscape plan to be submitted to the Staff after certification pursuant to Condition 17. However, this plan should have been included in the Application to provide the neighbors with meaningful input into the plan's contents during the adjudicatory process. This is required by OAC 4906-4-08(D)(4)(f), which directs an applicant to do the following:

Describe measures that will be taken to minimize any adverse visual impacts created by the facility, including, but not limited to, project area location, lighting, turbine layout, visual screening, and facility coloration. In no event shall these measures conflict with relevant safety requirements.

Emphasis added. This provision requires the applicant to describe the measures such as visual screening that will be taken to minimize a project's adverse visual impacts, not what measures might be taken. This provision is a vital component in ensuring that the Project poses the least quantity assignable, admissible, or possible adverse environmental impact, considering the state

of available technology and the nature and economics of the various alternatives, and other pertinent considerations as required by R.C. 4906.10(A)(3). In a strategy calculated to avoid public review of its final landscape plan, Yellow Wood is trying to evade its duty to provide a complete landscape plan during the adjudicatory process.

OPSB should require Yellow Wood to expand its setbacks to compensate for the company's failure to provide for vegetative screening that would effectively mitigate the neighbors' views of the Project.

V. The Ohio Power Siting Board Cannot Issue A Certificate For The Project Without Receiving The Information Required By OAC 4906-4-08(A)(4)(a) And R.C. 4906.10(A)(2) & (3) Concerning The Project's Potential Impacts On Groundwater Supplies Or Without Preventing The Loss Of Water Supplies Pursuant To R.C. 4906.10(A)(3).

Yellow Wood contends (at 21) that it does not anticipate impacts to "local water sources," because the Project Area contains no "source water protection areas." The Application makes the same statement. Narrative, p. 55. Actually, Yellow Wood intended to refer to "drinking water source protection areas," which Ohio EPA defines as areas "surrounding a public water supply well" that provide water from an aquifer to a well within five years. OAC 3745-9-01(D)(2) (emphasis added). A public water system has at least fifteen service connections or regularly serves at least twenty-five individuals. R.C. 6109.01(A). A private well serving a single residence does not have a source water protection area, and the wells within and near the Project Area serve single residences. Accordingly, the absence of drinking water source protection areas in the Project Area has no bearing on whether the Project will harm the community's wells. Yellow Wood's mistake on this elementary hydrogeological fact is not surprising, since no hydrogeologists authored any studies for the Application or testified at the hearing. Hreha, Tr. I 27:16-18; Singh, Tr. I 62:2-8.

Yellow Wood also asserts (at 21, 23) that no private water wells will be harmed by piles driven down 10 to 15 feet. The Residents' initial brief explains (at 10-11) that groundwater levels are as shallow as five feet and sometimes approach the surface. Thus, contrary to Yellow Wood's position, it will be driving its piles into the aquifer.

Yellow Wood also tries (at 22) to portray its plans to install its facilities on and to plug karst cavities as benign. However, without submitting this issue for evaluation by an experienced hydrogeologist, Yellow Wood has no basis for its position. The Residents' initial brief (at 11-13) explains why the Board should take seriously the potential danger that these activities may pose to neighboring drinking water wells. Otherwise, the Project will not comply with R.C. 4906.10(A)(3) or (6). The Board should not issue a certificate for the Project, since the record does not contain the information required by OAC 4906-4-08(A)(4)(a).

VI. Because The Evidentiary Record Demonstrates Construction Noise Will Impair The Neighbors' Quality Of Life, The Board Has No Basis To Find That The Project Complies With R.C. 4906.10(A)(3) Or R.C. 4906.10(A)(6).

The Residents' initial brief explains how intrusive the Project's noise will be during construction. Yellow Wood, on the other hand, states (at 6) that it will limit construction to certain hours and "maintain limited noise levels during construction" pursuant to Condition 28 of the Stipulation. However, Condition 28 allows Yellow Wood to subject its neighbors to 12 hours of construction noise per day, and even longer when the sun sets after 7 pm. Jt. Exh. 1, p. 9. The highly annoying noises from impact pile driving are allowed for nine hours per day. Yellow Wood and the Staff, in concocting Condition 28, did not even have the decency to restrict these loud activities on weekends and holidays. *Id.*

Yellow Wood promises (at 29) to follow several practices that it says will "alleviate any concerns regarding sound at the Project site," which are to use broadband backup alarms,

maintain equipment such as mufflers, and maintain communications with neighbors (i.e., warn them when loud noises are imminent). These token actions will do little to reduce the annoyance to the community. Furthermore, no mitigation is planned for pile driving, which will be the most aggravating noise in the Project.

Yellow Wood admits (at 18) that construction activities during pile driving sessions will produce noises as high as 82 dBA at nonparticipating residences and as high as 93 dBA at the property lines. These loud noise levels are in stark contrast to the average daytime Leq sound levels in the Project Area of 42 dBA. Applic. Exh. 6, Attachment 5, p. 10, Table 4-3. Yellow Wood's pretense that construction noise will not be painful for the community is not credible. Consequently, the Project does not comply with R.C. 4906.10(A)(3) or R.C. 4906.10(A)(6).

VII. The Application Lacks The Decibel Data For Operational Noise From The Inverters Required By OAC 4906-4-08(A)(3), R.C. 4906.10(A)(2), And R.C. 4906.10(A)(3).

Yellow Wood admits (at 18) that it failed to estimate the noise levels from inverters at night. This is a major oversight, since the normal community sound levels are much quieter at night than during the daytime. The average Leq background level at night is 33 dBA, in contrast to 42 dBA during the daytime. Applic. Exh. 6, Attachment 5, p. 10, Table 4-3. Without knowing how loud the inverters will be at night, compared to the normal sound level at night, OPSB has no way of knowing whether the inverters' nighttime noise output, in combination with transformer noise from the substation, will disturb surrounding residents trying to relax and sleep at night. Yellow Wood also has provided no data to identify nighttime inverter noise levels at the property lines. While Yellow Wood may disagree with the premise that nighttime inverter noise will equal daytime noise, it does not have a scintilla of proof for that assertion. It is not enough for Yellow Wood to identify noise levels during part of the day and then pretend, with no analysis or quantification, that they will be insignificant for the rest of the time. Yellow Wood

needs to produce modeling data to prove such an assertion. The Board's issuance of a certificate without the required nighttime noise data would violate OAC 4906-4-08(A)(3)(b) and R.C. 4906.10(A)(2) and (3).

VIII. The Operational Noise Limit Proposed by Condition 29 Of The Stipulation Exceeds The Standard In OAC 4906-4-09(F)(2).

Yellow Wood's and the Staff's initial briefs provide no analysis of this issue.

IX. Because The Evidentiary Record Does Not Demonstrate That Yellow Wood Solar Informed Local Aviation Facilities About The Project Or Its Potential Impacts As Required By OAC 4906-4-07(E), R.C. 4906.10(A)(2), And R.C. 4906.10(A)(5), The Board Lacks The Information Necessary To Determine Compliance With R.C. 4906.10(A)(3), (5) And (6).

Yellow Wood's and the Staff's initial briefs do not address the company's failure to document notices to local airports and the local heliport pursuant to OAC 4906-4-07(E).

X. Because The Evidentiary Record Does Not Estimate The Volume Or Disposal Destinations Of Solid Waste And Debris Generated During Construction As Required By OAC 4906-4-07(D), R.C. 4906.10(A)(2), And R.C. 4906.10(A)(5), The Board Lacks The Information Necessary To Determine Compliance With R.C. 4906.10(A)(3) And (5).

Yellow Wood's and the Staff's initial briefs provide no analysis of this issue.

XI. The Ohio Power Siting Board Cannot Issue A Certificate For The Project Without Receiving The Information Required By OAC 4906-4-07(C) And R.C. 4906.10(A)(2), (3), And (5) About The Project's Drainage Impacts And Associated Mitigation To Prevent Flooding.

Section XI of the Residents' initial brief addresses the points made in Yellow Wood's and the Staff's initial briefs about this issue.

XII. The Ohio Power Siting Board Cannot Issue A Certificate To Yellow Wood Solar Without Receiving The Information Required By OAC 4906-4-07(C) And R.C. 4906.10(A)(2), (3), And (5) Concerning The Project's Pollution Impacts And Associated Mitigation.

Yellow Wood represents (at 39) that "the Project has no water pollutants associated with the operations of the Project." Emphasis added. The company has no data to support this

assertion, since it has not obtained or submitted any such data to OPSB. Just as importantly, the Project will produce water pollutants from the Project's construction. As explained in the Residents' initial brief (at 24-26), construction will discharge soil into the vicinity streams, and soil is a water pollutant. See R.C. 6111.01(D) (defining "other wastes" to include sand and silt) and R.C. 6111.01(A) (defining "pollution" to include the placement of "other wastes" in any waters of the state).

This water pollution from soil will result from earthmoving activities in the Project Area during construction. Yellow Wood claims (at 21) that soil grading will be "limited" because the Project Area is "relatively flat." But in the next sentence it admits that grading may require excavation, soil redistribution, and soil compaction. Yellow Wood provided no grading plan or other data to show how much earthmoving will occur. The company did not even provide the final grades to its geotechnical engineer for evaluation. Applic. Exh. 28A, Singh Suppl. Direct Testimony, Attachment RS-1, p. 3. This prevented Yellow Wood's geotechnical engineer from making any assessment of earthmoving quantities other than to assume that earthmoving would change the existing grades by up to three feet in elevation. *Id.*

Regardless of the amount of earthmoving, Yellow Wood was required to submit the water quality data described in OAC 4906-4-07(C)(1)(d) and 4906-4-07(C)(2)(b), (c), (d), and (e) to enable the Board to evaluate the Project's adverse impacts on water quality from soil erosion. Yellow Wood cannot excuse its failure to do so by just arguing that soil erosion is not a big deal. The Board's rules require actual data so that OPSB can make its own evaluation rather than relying on Yellow Wood's self-serving assurances that no water pollution will occur.

XIII. The Ohio Power Siting Board Cannot Issue A Certificate For The Project Without Receiving The Information Required By OAC 4906-4-08(B) And R.C. 4906.10(A)(2) And (3) Concerning The Project's Potential Impacts On Wildlife And Plants.

As explained in the Residents' initial brief (at 26-29), Yellow Wood chose not to conduct the complete surveys required by OAC 4906-4-08(B). Instead, it looked only for rare, threatened, and endangered ("RTE") species. That is why Yellow Wood's brief only describes (at 26) the company's findings with regard to RTE species.

Yellow Wood attempts to shift the blame for its failure to the U.S. Fish and Wildlife Service and the Ohio Department of Natural Resources, stating (at 26) that these agencies did not recommend additional studies. However, those agencies do not administer OPSB's rules, nor do they possess the authority to excuse Yellow Wood from complying with the Board's requirements.

XIV. Because The Project Will Destroy The Local Public Roads, The Board Should Find That The Project Does Not Comply With R.C. 4906.10(A)(3) Or R.C. 4906.10(A)(6).

Yellow Wood's initial brief does not dispute the fact that its numerous vehicle deliveries will disrupt community traffic and damage the public roads. Yellow Wood promises (at 19, 30) to work out an agreement with the county to address these problems, but that agreement should have been included in the Application so that the Board can determine whether the Project complies with R.C. 4906.10(A)(3) and (6). OPSB cannot issue a certificate without this information.

XV. Because The Project Will Damage Drainage Tiles And Surface Waterways, The Board Should Find That The Project Does Not Comply With R.C. 4906.10(A)(3) Or R.C. 4906.10(A)(6).

Yellow Wood's initial brief (at 20-21, 32) does not dispute the fact that Yellow Wood will damage or destroy drainage tile and surface waterways. Still, while Yellow Wood promises to fix or replace compromised tiles, the company provides little detail on how this remediation

will be conducted. The Board should not issue a certificate without providing sufficient information about how the Residents' tiles will be protected.

XVI. Because The Project Will Displace Food Production On Thousands Of Acres Of Farm Land, The Board Should Find That The Project Does Not Serve The Public Interest, Convenience, And Necessity Under R.C. 4906.10(A)(6).

As discussed in the Residents' initial brief (at 30), the Application provides varying figures (3,250 acres or 2,448 acres) for how much land will be lost to agricultural use for 50 years. Adding to the confusion, Yellow Wood's initial brief states (at 7, 20) that 2,397 acres of farming will be lost during the Project's life. The Staff's initial brief states (at 5) that the solar equipment will occupy 2,448 acres of farmland. Regardless of which figure is accurate, the loss of food production will be substantial, especially when combined with other projects (including renewable energy facilities) that are despoiling farmland in Clinton County, the state of Ohio, and the United States.⁴ The Board should not fall for Yellow Wood's comparison of the Project's acreage to the Ohio's total farmland acreage, which ignores the cumulative conversion of farmland to other uses. The Board should not approve such a large waste of good farmland and thus should deny the certificate for noncompliance with R.C. 4906.10(A)(6).⁵

XVII. The Ohio Power Siting Board Cannot Issue A Certificate To Yellow Wood Solar Without Evaluating The Project's Negative Economic Impacts As Required By OAC 4906-4-06(E)(4) And R.C. 4906.10(A)(6).

It is easy to make a Project's economic benefits appear to outweigh its economic damage when the economic damage is not studied. Yellow Wood discusses (at 46) the number of jobs

⁴ Yellow Wood claims (at 44) that some of Ohio's corn production is used to make ethanol, improperly citing an internet page that is not in the record. Even if this information is accurate, the Project's irresponsible displacement of another energy source is hardly a good reason to approve the Project.

⁵ R.C. 4906.10(A)(6), not R.C. 4906.10(A)(7), is the appropriate criterion for considering the Project's adverse impacts on farmland. Although some of the Project Area is in an agricultural district, R.C. 4906.10(A)(7) only requires OPSB to determine the Project's impact on land in an agricultural district. That impact has been determined, as Yellow Wood has admitted that this land will be lost to agriculture for 50 years. Now the Board must consider whether the 50-year loss of this farmland, along with the 50-year loss of farmland outside of the agricultural district, is in the public interest, convenience, and necessity under R.C. 4906.19(A)(6).

that the Project will sponsor, but the company's figures do not show whether the Project will produce a net gain in jobs since it has not evaluated the losses of jobs caused by the Project. The Staff's initial brief states (at 6) that the Staff found Yellow Wood's economic analysis to be "reasonable," but a one-sided analysis is anything but reasonable. As explained in the Residents' initial brief (at 33), Yellow Wood's complete failure to examine the Project's negative economic impacts violates R.C. 4906.10(A)(6) and OAC 4906-4-06(E)(4).

XIX. Stipulations That Do Not Settle Anything Are Not Entitled To Deference.

Yellow Wood and the Staff state that the Joint Stipulation and Recommendation filed by Yellow Wood, Staff, and the Ohio Farm Bureau Federation ("OFBF") should be afforded substantial weight. However, the Clinton County Board of Commissioners and the Residents did not agree to this unsatisfactory stipulation. The stipulation is not the product of serious bargaining and is entitled to no weight, because it does not settle anything. It only states the litigation positions of three parties.

In addition, the stipulation does nothing to promote the public interest, convenience, and necessity, as explained in the Residents' and the County Commissioners' briefs. The stipulation also violates important regulatory principles and practices, because the Project violates R.C. 4906.10(A) and OPSB's rules as described in the Residents' and the County Commissioners' briefs. OPSB should not pay any deference to the stipulation and should deny the certificate.

XIV. Conclusion

As explained above, there a multitude of good reasons to deny the certificate sought by Yellow Wood Solar. Yellow Wood has failed to provide the information on the Project's adverse impacts and mitigation measurements necessary to minimize them that is required by the Board's rules. The Board cannot violate its own rules by approving the Project without this

information. Nor do the criteria in R.C. 4906.10(A)(2), (3), and (6) authorize the issuance of this certificate. The Board should deny Yellow Wood's Application.

Respectfully submitted,

/s/ Jack A. Van Kley
Jack A. Van Kley (0016961)
Van Kley Law, LLC
132 Northwoods Blvd., Suite C-1
Columbus, Ohio 43235
(614) 431-8900 (telephone)
(614) 431-8905 (facsimile)
Email: jvankley@vankley.law
(Willing to accept service by email)

CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, I hereby certify that, on December 9, 2022, a copy of the foregoing document also is being served by electronic mail on the following:

Christine M.T. Pirik at cpirik@dickinsonwright.com; Jonathan Secrest at jsecrest@dickinsonwright.com; David Lockshaw at dlockshaw@dickinsonwright.com; Matthew C. McDonnell at mmcdonnell@dickinsonwright.com; Jodi Bair at jodi.bair@ohioAGO.gov; Thaddeus M. Boggs at tboggs@fbtlaw.com; Chad A. Endsley at cendsley@ofbf.org; Leah F. Curtis at lcurtis@ofbf.org; Jesse Shamp at jshamp@fbtlaw.com; and Emmett Kelly at ekelly@fbtlaw.com.

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

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

12/9/2022 1:56:27 PM

in

Case No(s). 20-1680-EL-BGN

Summary: Brief (Post-Trial Reply Brief) electronically filed by Jack A Van Kley on behalf of Cochran, Brad and Cochran Farms and JWP Family Farms and Rhonemus, Diane and Thompson, Charles