

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of :
Yellow Wood Solar Energy, LLC, for a : Case No. 20-1680-EL-BGN
Certificate of Environmental :
Compatibility and Public Need. :
:

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

Dave Yost
Ohio Attorney General

John H. Jones
Section Chief

Jodi J. Bair
Assistant Attorneys General
Public Utilities Section
30 East Broad Street, 26th Floor
Columbus, OH 43215
614.644.8599 (telephone)
866.431.1581 (fax)
Jodi.Bair@OhioAGO.gov

**On behalf of the Staff of
The Ohio Power Siting Board**

December 9, 2022

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I. BACKGROUND

On August 8, 2022, Yellow Wood Solar Energy LLC (“Yellow Wood” or “Applicant”), the Staff of the Power Siting Board (“Staff”), and the Ohio Farm Bureau Federation (“OFBF”) filed a Joint Stipulation and Recommendation (“Stipulation”) in this case. On September 23, 2022, 19 of the 23 residents withdrew from this proceeding. Notice of Withdrawal.¹ The remaining residents, Brad Cochran, Brand Cochran Farms LLC, JWP Family Farms LLC, Diane Rhonemus, and Charles Thompson (“Residents”) continued to oppose the Stipulation. The evidentiary hearing began on September 26, 2022 and ended on September 27, 2022. The Administrative Law Judge determined that Initial Briefs were to be filed on November 18, 2022 and Reply Briefs to be filed on December 9, 2022. Initial briefs filed by the Applicant and Staff supported the Stipulation; whereas, briefs filed by the Residents and the Clinton County Board of

¹ The 19 residents that withdrew from the case are: Brian and Janet Collins, Margaret and Stephen Elam, G. Robert and Joyce Griffith, Alan and Deborah Hertlein, Hertlein Family Revocable Living Trust, Brett Hertlein, Darla and Matthew Long, Benjamin and K. Nicole Oberrecht, Jamie and Matthew Roberts, Janice Rowlands, Charles Simpson, Jr. and Pamela McConnell.

Commissioners (“County Commissioners”) opposed the Stipulation. Staff timely files its Reply Brief addressing issues in opposition to the Stipulation that were raised in briefs.

II. ARGUMENT

A. Yellow Wood’s Proposed Solar Generating Project Satisfies the Public Interest, Convenience, and Necessity Criteria

The Staff, OFBF, and Yellow Wood signed the Stipulation and recommend that the Ohio Power Siting Board (“Board”) approve this agreement. The County Commissioners and Residents are the only remaining intervenors that oppose the Stipulation.

One of the primary arguments made by both the County Commissioners and Residents is that the project will not serve the public interest, convenience, and necessity.² In order to determine whether a project is in the public interest, convenience, and necessity, the Board must “balance projected benefits against the magnitude of potential negative impacts.”³ Additionally, the Board has determined that public benefits can be “economic benefits, such as additional jobs and tax revenues” and that the positive impact on air quality and global climate fit into a broad understanding of the public benefit criteria.⁴ Power Siting precedent obligates the Board to use a broad lens in

² County Commissioners Brief at 4, Residents Brief at 6, 30.

³ *In re Application of Republic Wind, LLC*, Case No. 17-2295-EL-BGN, Opinion, Order, and Certificate (June 24, 2021) at 28 ¶ 91.

⁴ *Id.*

making the determination whether a project meets the public interest and convenience criteria.⁵

In this case, the predominant argument raised by Residents and the County Commissioners is that this solar project will take away land used for farming, thus negatively impacting agriculture in Ohio.⁶ The Yellow Wood project would not eliminate farming within the community. In fact, many acres of land will continue to be farmed. As provided in the Yellow Wood Application, this project represents approximately only 2,397 acres of land compared to approximately 896,000,000 million acres of total farm land in the nation.⁷ In addition, the U.S. Department of Agriculture and the Natural Resources Conservation Service designates certain areas as Farmland of Statewide importance and the Yellow Wood project area is not “Farmland of Statewide importance.”⁸ The project areas represent 0.1 percent of acreage available for agricultural use in Ohio⁹ and the Applicant, according to the Stipulation, must decommission the project at the end of its useful life.¹⁰ This decommissioning plan provides a financial assurance mechanism that includes a performance bond that must be updated every five years.¹¹ There is also a timeline of up to one year for the removal of the equipment, with all decommissioning to be finished within 18 months after the facility ceases operations,

⁵ *In re Application of Amer. Transm. Systems, Inc.*, Case No. 19-1871-EL-BTX, Opinion, Order, and Certificate (May 19, 2022) at 31 ¶ 29.

⁶ *Residents Initial Brief at 6; Board Brief at 3, 5.*

⁷ App. Ex. 16 at 6.

⁸ App. Ex 18 at 12;

https://www.nass.usda.gov/statistics_by_State/Ohio/Publications/Ag_Across_Ohio/2021/aao2103.pdf

⁹ Staff Ex. 1 at 40.

¹⁰ Stipulation at 11 -12.

¹¹ *Id.*

and monitoring the site for at least one additional year after completion of decommissioning to ensure successful revegetation and rehabilitation.¹²

Furthermore, in weighing the public benefits, the Board must note that the increased tax revenues will go to the county, the school districts, the townships, the local libraries and the community health organization. The Applicant will also establish a \$50,000.00 drain tile commitment¹³, and include Clinton County personnel (though Clinton County Board of Commissioners is not a signatory party) in the preconstruction conferences, notify the county, among others when construction shall begin and is completed; submit copies of the as-built specifications for the entire facility to Clinton County, provide permits and authorizations to the County,¹⁴ include pollinator friendly vegetation,¹⁵ and provide vegetative screening at least 90 percent of which will be maintained over the life of the facility.¹⁶ Through the Applicant's commitments to the project, the Yellow Wood project's benefits far outweigh any negative results; thus the project meets the public interest, convenience, and necessity under R.C. 4906.10(A)(6).

B. The Applicant Will Minimize Adverse Environmental Impacts under R.C. 4906.10(A)(3) By Committing to Implement a Sizeable Setback.

Yellow Wood recognized the need for increased setbacks and commits to setbacks that will minimize environmental impacts. Residents complain in their brief that these sizeable setbacks are not large enough.¹⁷ However, Yellow Wood commits to a 300-foot

¹² *Id.*
¹³ Joint Ex. 1 at 11.
¹⁴ *Id.* at 5 – 7.
¹⁵ *Id.* at 6.
¹⁶ *Id.*
¹⁷ Residents Brief at 8.

setback for placement of panels next to nonparticipating residences; at least a 150-foot setback from nonparticipating parcel boundaries; and at least a 150-foot setback from the edge of pavement of any state, county, or township road.¹⁸

Residents presented no testimony or record evidence showing that these distances are not adequate to minimize adverse impacts to neighboring residences. In fact, Yellow Wood’s Property Value Impact Study found that the primary methods to address the potential visual impacts of the solar facility is through setbacks that keep the closest home at least 300 feet away from the nearest panel.¹⁹

C. The Applicant Provided Adequate Information Regarding the Groundwater and Karst Implications Related to the Project in Accordance with R.C. 4906.10(A)(2) and (3).

The Residents argue on brief that the Applicant has not done enough studies regarding the project’s impact to the groundwater.²⁰ The Residents claim that there is a potential threat to the area’s groundwater. However, Residents provide no citation nor point to any evidence that explains how the Yellow Wood facility could be a potential threat to any of the area’s groundwater. Furthermore, Residents only assert that Yellow Wood “failed to identify the depths of the wells used by nonparticipating neighbors.”²¹ Residents provided none of the information – such as depth of their wells – that they themselves have. No nonparticipating neighboring landowners provided testimony or comments regarding this issue.

¹⁸ App. Exs. 12 and 18 at 6.
¹⁹ App. Ex. 23, Att. RCK-2 at 3.
²⁰ Residents Brief at 9.
²¹ *Id.*

Applicant asserts that construction “or operation of the proposed solar facility ‘will not affect the water system(s) as the project activities are similar to or less than agriculture and the Applicant will have permanent ground stabilization and design storm-water control that will likely improve local water quality.’”²²

Staff evaluated potential impacts that may affect the groundwater and found that that there appears to be no unreasonable risk posed to public or private drinking water supplies, thereby, conclusively determining that the mandates of R.C. 4906.10(A)(2) – the nature of the probable environmental impact and R.C. 4906.10(A)(3) – the facility represents the minimum adverse environmental impact – have been met.

Another complaint raised by the Residents is the issue of karst being present in the project and possibly affecting the groundwater. Residents argue that the Board should “hold Yellow Wood to its promise by adding to the certificate a prohibition against siting solar equipment on karst formations unless they are of ‘very low risk’”²³ The Staff Report indicates that though conditions necessary for the formation of karst geology features do exist throughout the project site, karst features are not expected to impact the construction and operation of the proposed project.²⁴ The Stipulation requires that if karst features are identified during additional geotechnical exploration or during construction, the Applicant shall avoid construction in these areas when possible and should karst features

²² Staff Ex. 1 at 24.

²³ Residents Brief at 13.

²⁴ Staff Ex. 1 at 23.

be identified and the Applicant intends to pursue remedial measures, this proposal shall be submitted to Staff review and concurrence prior to implementation..²⁵

D. The Construction Noise Shall be Temporary and Limited to Daytime Hours.

The construction activities for the Yellow Wood project would include site clearing, installation of mechanical and electrical equipment, and commissioning and testing of equipment.²⁶ Residents argue that the Applicant has not agreed to minimize construction noise as required by Ohio Adm.Code 4906-4-08(3)(d).²⁷ This rule requires that the Applicant describe the effects of noise emissions from the proposed construction and operation, including limits on the time of day when construction may occur. Yellow Wood's commitments under the Stipulation, specifically condition number 28, to follow this rule. The Stipulation very clearly requires the Applicant to comply with this rule. Residents further argue that the Applicant is not being truthful when it states that the construction activity will produce sounds that are already familiar to the community, including sounds from farming activity, and home and other mid-size building construction.²⁸ Again, Residents cited to no authority, nor provided any evidence to show that the construction noise would be worse than that expected by the Applicant. The Staff Report indicated that the construction activities would generate significant noise levels during the 21 months of construction; however, the noise would be temporary and

²⁵ Joint Ex. 1 at 4.
²⁶ Staff Ex. 1 at 18.
²⁷ Residents Brief at 16.
²⁸ *Id.* at 15.

intermittent.²⁹ The construction activities are limited to daytime hours. The impact pile driving shall be limited to the hours between 9 am and 6 pm and hoe ram operations, if required, shall be limited to the hours between 10 am and 4 pm.³⁰ These restrictions clearly comply with the rule.

E. The Stipulation Adequately Addresses Operational Noise Mitigation Measures in Compliance with R.C. 4906.10(A)(2) and (3).

The Stipulation creates specific limitations on the noise levels within which the project must operate. Residents also claim that the project lacks mitigation measures for the operational noise from the inverters as required by Ohio Adm.Code 4906-4-08-(A)(3).³¹ However, the Stipulation provides:

The Applicant shall operate a facility that limits sound levels emitted to nonparticipating receptors to no higher than the closest Long-Term Monitoring Station's area ambient Leq level plus five decibels ("dBA") as referenced in Application Exhibit K Table 4-3. If the facility is found to be above these limits, the Applicant shall install additional noise mitigation measures to maintain compliance with this provision. If the inverters or substation transformer chosen for the project have a higher sound power output than the models used in the noise model, the Applicant shall show that sound levels will not exceed daytime ambient level plus five dBA at any non-participating sensitive receptor and shall submit a report making this demonstration at least 30 days prior to construction.³²

These limitations on operational noise are measures that are in compliance with the rule.

²⁹ Staff Ex. 1 at 18.

³⁰ Joint Ex. 1 at 9.

³¹ Residents Brief at 14.

³² Joint Ex. 1 at 9.

The setbacks further mitigate any noise impacts on the neighbors. As indicated earlier in this brief, the setbacks will be at least a 300-foot setback from nonparticipating residences and at least a 150-foot setback from nonparticipating parcel boundaries.³³

The Board should find that Yellow Wood has adequately evaluated sound impacts from the project and has mitigated for noise impacts with increased setbacks and restrictive sound limitations.

F. The Record Demonstrates that Yellow Wood’s Application Complied with R.C. 4906.10(A)(5) Regarding Contact with the Office of Aviation.

Ohio Revised Code 4906.10(A)(5) requires the following:

That the facility will comply with Chapters 3704., 3734., and 611 of the Revised Code and all rules and standards adopted under those chapters and under section 4561.32 of the Revised Code. In determining whether the facility will comply with all rules and standards adopted under section 4561.32 of the Revised Code, the board shall consult with the office of aviation of the division of multi-modal planning and programs of the department of transportation under section 4561.341 of the Revised Code.

In compliance with this law, Applicant contacted the Federal Aviation Administration (“FAA”) and the FAA provided information that the closest public-use airports are the Wilmington Air Park and Hollister Field airports which are between 10 and 12 miles from the proposed solar facility project area.³⁴ The Staff Report states that the FAA performed an aeronautical study for various point around the solar facility and determined that there were no hazards to air navigation for those points of the solar facility.³⁵ In addition, pursuant to R.C. 4906.10(A)(5), the Staff contacted the ODOT

³³ App. Exs. 12 and 18 at 6.

³⁴ Staff Ex. 1 at 36.

³⁵ *Id.* at 37.

Office of Aviation as part of its investigation in this case. No concerns have been raised regarding potential impacts of the facility on local airports.³⁶

The record demonstrates compliance with the aviation requirements contained in Chapter 4906 and the Applicant also sought the assistance of the FAA in further determining that the proposed Yellow Wood facility would not impact air traffic in the vicinity.

G. The Project Should Not Cause Increased Surface Water Drainage.

The Stipulation requires that Yellow Wood comply with all of the Board's rules regarding surface water runoff. Residents argue that the construction of the project will cause increased water runoff and that flooding may occur.³⁷ The Residents claim that the Board cannot issue a certificate to Yellow Wood without the Applicant complying with various provisions of the Ohio Administrative Code that require prudent management of potential water runoff.³⁸ The evidence in the case shows that there are extensive conditions that cover the Applicant's responsibility to handle runoff during construction. An important condition that shows compliance with the Board's water runoff rules states that:

Applicant shall construct the facility in a manner that fully incorporates all construction and operations phase requirements of the construction stormwater management permit OHC00005 in accordance with the Ohio Environmental Protection Agency's ("OEPA") requirements, including the supplemental Guidance on Post-Construction Storm Water Controls for Solar Panel Arrays. Furthermore, the Applicant shall: 1) hold an in-progress design review meeting with the County Soil and Water District to solicit

³⁶ *Id.*

³⁷ Residents Brief at 22.

³⁸ *Id.*

design feedback and commentary of the project’s Civil Engineering design and the Landscape Architect design components; 2) include qualified local drainage and earthwork contractors on solicitation for bids on applicable local drainage and earthwork contractors on solicitations for bids on applicable project scopes of work to be performed; and 3) in addition to engagement with the OEPA, and third party inspectors. The Applicant shall also engage with the County Soil and Water District periodically throughout construction to ensure conformance with the design documents.³⁹

The specificity of the terms of this condition demonstrates compliance with the rules and further shows coordination with the local experts regarding water runoff. This condition satisfies any concerns regarding Residents’ claims of flooding and the Board should reject their arguments.

H. The Project will have a Minimal Effect on Wildlife.

Residents claims that the Applicant inappropriately conducted literature and field surveys of species in the Project areas; therefore, not providing the required wildlife data.⁴⁰ The Applicant requested information from the Ohio Department of Natural Resources and the U.S. Fish and Wildlife Service regarding state and federal listed threatened or endangered plant and animal species.⁴¹ Staff gathered and reviewed additional published ecological information.⁴² Residents claim that “Yellow Wood plans to continue its pattern for not looking for wildlife[.]”⁴³ However, the Applicant has an obligation, according to the Stipulation, to continue to look for wildlife, contrary to the

³⁹ Joint Ex.1 at 7.
⁴⁰ Residents Brief at 27.
⁴¹ Staff Ex. 1 at 25.
⁴² *Id.*
⁴³ Residents Brief at 28.

Residents' assertions. The signatory parties agreed to protect those potentially threatened or endangered species of plants and animals that may be encountered both prior to, as well as during construction:

The Applicant shall contact Staff, the ODNR, and the USFWS within 24 hours if state or federally listed species is encountered during construction activities. Construction activities that could adversely impact the identified plants or animals shall be immediately halted until an appropriate course of action has been agreed upon by the Applicant, Staff and the appropriate agencies.

If the Applicant encounters any state or federal listed plant or animal species or suitable habitat of these species prior to construction, the Applicant shall include the location in the final engineering drawings and associated mapping, as required in Condition 5. The Applicant shall avoid impacts to these species and explain how impacts would be avoided during construction.⁴⁴

This provision will protect those potentially threatened or endangered species of plants or animals. There are other Stipulation requirements that protect wildlife by limiting seasonal cutting and avoiding construction in areas where state or federally listed plant or animal species or their habitat is detected.⁴⁵

The Applicant satisfied the requirement of Ohio Adm.Code 4906-4-08(B). The Board should find that the impacts have been adequately described and that appropriate measures will be taken to minimize those impacts.

⁴⁴ Joint Ex. 1 at 7.

⁴⁵ *Id.* at 6 – 7.

I. The Stipulation Obligates the Applicant to Work with Local Agencies and Coordinate the Use of the Local Roads.

The Applicant is obligated to reach a road use agreement with the local agencies.⁴⁶ Residents claim that the use of the local roads by Yellow Wood during construction does not comply with R.C. 4901.10(A)(3) or (6). Residents did not provide any evidence nor any arguments explaining how the Applicant fails to meet these provisions of the law.⁴⁷ The Stipulation obligates Yellow Wood to coordinate with the Ohio Department of Transportation, local law enforcement, and health and safety officials prior to commencement of construction in order to coordinate a transportation management plan that includes traffic control measures⁴⁸. The Applicant is literally complying with the Ohio Adm. Code's requirements and not only signing a road use agreement but also coordinating with all of the local agencies regarding the Project and its effect on local public roads.

Residents' argument complaining about Yellow Wood's road use should be rejected.

J. The Yellow Wood Project will Effectively Minimize any Damage to Drainage Tiles and may Improve the Condition of Current Drainage Tile System.

The Board's rules require that Yellow Wood describe mitigation procedures that will be used to both avoid and minimize damage to field tile drainage systems. Ohio Adm.Code 4906-04-08(E)(2). Residents complain that the Application only contains

⁴⁶ *Id.* at 8.

⁴⁷ *See* Residents Brief at 29.

⁴⁸ Joint Ex. 1 at 8.

generic promises to repair drain tiles and does not identify the locations of the Residents' tiles.⁴⁹ However, according through obligations of the Stipulation, Yellow Wood will make efforts to conduct a perimeter dig utilizing a tile search trench and consult with owners of all parcels adjacent to the property, the County Soil and Water District, and the County to request drainage system information over those parcels.⁵⁰ This provision of the Stipulation thereby addresses the Residents' concerns regarding identifying the locations of the drainage tiles. In addition, the Applicant, according to the Stipulation, must repair drainage tile issues that affect nonparticipating parcels and agree to compensate those affected parcel owners for any damage to crops within 30 days of the completed correction.⁵¹

Residents arguments regarding the Applicant's failure to identify drainage tiles and failure of an obligation to repair drainage tiles is thoroughly addressed with strong requirements in the Stipulation. The Residents' drainage tile arguments must be rejected.

K. The Yellow Wood Project will Economically Benefit the Local Communities.

Residents argue that the Applicant must estimate the negative impact that the project will have on the local communities.⁵² The Residents cite to R.C. 4906.10(A)(6) as creating the obligation to study negative economic impacts; however, the provisions of (A) (6) require that the facility serve the public interest, convenience, and necessity. The

⁴⁹ Residents Brief at 29.

⁵⁰ Joint Ex. 1 at 11.

⁵¹ Joint Ex. 1 at 11.

⁵² Residents Brief at 32.

next citation provided by Residents is Ohio Adm.Code 4906-4-06(E)(4). Again, no analysis nor evidence was presented by the Residents explaining why there is no compliance with this rule. The rule requires that the Applicant provide an estimate of the economic impact of the proposed facility on local commercial and industrial activities. This is exactly what the Applicant provided. The fact that the Residents do not agree with the results of the economic impact analysis does not mean that the Applicant has not complied with the law or the rule. In fact, Residents claim that the analysis is one-sided, but provide no other “side” to evaluate.

The Staff reviewed the economic analysis set forth by the Applicant and found that the project is likely to produce 1,235 construction jobs, 34 long-term operation jobs; create \$102.5 million in annual earning during construction and \$1.9 million in annual earning during facility operations; produce \$161.3 million in local output during construction and \$5.9 million in local output during facility operations; and generate an estimated \$2.1 million annually for the Yellow Wood taxing Districts.⁵³ This economic analysis shows a positive benefit for the Yellow Wood communities. Residents have produced no evidence to show otherwise and its economic argument fails.

III. CONCLUSION

Yellow Wood’s application for a Certificate should be granted subject to the recommended conditions contained in the Stipulation. Residents make no strong arguments that the Project does not meet the statutory test for in R.C. 4906.10. The

⁵³ Staff Ex. 1 at 14 – 15.

record in this case contains sufficient evidence to allow the Board to determine that the Revised Code and Administrative Code requirements have been met. Staff respectfully requests that the Board issue a certificate for the construction, operation, and maintenance of the Yellow Wood solar project conditioned upon the Applicant satisfying the terms of the Stipulation.

Respectfully submitted,

Dave Yost
Ohio Attorney General

John H. Jones
Section Chief

/s/ Jodi J. Bair

Jodi J. Bair
Assistant Attorney General
Public Utilities Section
30 East Broad Street, 26th Floor
Columbus, OH 43215
614.644.8599 (telephone)
866.431.1581 (fax)
Jodi.Bair@OhioAGO.gov

**On behalf of the Staff of
The Ohio Power Siting Board**

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Post-Hearing 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 9th day of December 2022.

/s/ Jodi J. Bair

Jodi J. Bair

Assistant Attorney General

Parties of Record:

cpirik@dickinsonwright.com
wvorys@dickinsonwright.com
mmcdonnell@dickinsonwright.com
jsecrest@dickinsonwright.com
dlockshaw@dickinsonwright.com
jvankley@vankleywalker.com

tboggs@fbtlaw.com
jshamp@fbtlaw.com
ekelly@fbtlaw.com
amilam@ofbf.org
cendsley@ofbf.org
lcurtis@ofbf.org

Administrative Law Judges:

daniel.fullin@puco.ohio.gov
jacqueline.St.John@puco.ohio.gov

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Summary: Reply Post-Hearing Reply Brief Submitted on Behalf of the Staff of the Ohio Power Siting Board electronically filed by Mrs. Kimberly M. Naeder on behalf of OPSB