BEFORE
THE OHIO POWER SITING BOARD

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

REPLY BRIEF OF YELLOW WOOD SOLAR ENERGY LLC

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I. INTRODUCTION

The proceedings in this matter were conducted by the Ohio Power Siting Board ("Board") in accordance with the provisions in Ohio Revised Code ("R.C.") 4906 and Ohio Administrative Code ("O.A.C.") 4906.

On February 24, 2021, Yellow Wood Solar Energy LLC ("Yellow Wood" or "Applicant") filed its Application[1] with the Board for a certificate of environmental compatibility and public need ("Certificate") to construct a solar-powered electric generation facility on leased land in Clark and Jefferson Townships, Clinton County, Ohio ("Project") with a generating capacity of up to 300 megawatts ("MW") alternative current ("AC").[2]

On August 8, 2022, Yellow Wood, the Board's Staff ("Staff"), and the Ohio Farm Bureau Federation ("OFBF"), (jointly referred to herein as "Signatory Parties") filed a Joint Stipulation and Recommendation ("Stipulation"). Yellow Wood, Staff, and OFBF recommend the Board adopt the Stipulation and issue a Certificate to Yellow Wood subject to the 34 Conditions set forth in the Stipulation.[3] OFBF, the Board of Commissioners of Clinton County ("Clinton County"), and a group of 23 residents/entities[4] were granted intervention in this case. 19 of the 23 residents/entities withdrew from this proceeding as a result of the execution of an agreement between those residents/entities and Yellow Wood.[5] These 19 residents/entities withdrew after Yellow Wood addressed their concerns, including, but not limited to:

- The creation of increased vegetative screening buffer zones between the Project's fencing and the residents; and

- Increased requirements regarding setbacks, noise, dust, dirt and gravel on roads, and water usage.

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1 On February 24, 2021, Yellow Wood filed its Application for a Certificate with the Board. Since that time, there have been 4 supplements to the Application and 6 responses to data requests from Staff filed in the docket (App. Exs. 2- 12). Together, those documents are referred to herein as the "Application."

2 App. Ex. 1 at 2.

3 Jt. Ex. 1 at 3-12.

4 The 23 residents granted intervention were: Brad Cochran/Brad Cochran Farms LLC, JWP Family Farms LLC, Diane Rhonemus, Charles W. Thompson, 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.

5 The 19 residents/entities that withdrew from this 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.

The 4 remaining resident/entity intervenors are: Brad Cochran/Brad Cochran Farms LLC; JWP Family Farms LLC; Diane Rhonemus; and Charles W. Thompson (jointly referred to herein as ("Residents"). It is important to note that these 4 remaining parcel owners are the only ones out of the approximate 82 unique parcels located directly adjacent to the Project Area.

The evidentiary hearing in this matter was called and continued on November 17, 2021, and then recommenced on September 26, 2022. At the evidentiary hearing:

- 11 expert witnesses provided testimony on the record on behalf of the Applicant supporting the Application[6] and the Stipulation – verifying that a Certificate should be issued to Yellow Wood;[7]

- 9 witnesses from Staff provided testimony on the record verifying the findings of the Staff Report of Investigation ("Staff Report") and supporting approval of the Stipulation and issuance of the Certificate;[8]

- 1 Resident witness submitted written testimony that referred to maps of the Project Area that were attached to the testimony that noted the locations of the properties of the resident intervenors; however, the testimony **did not state any objections or concerns** related to the Project;[9]

- 1 exhibit was submitted by Clinton County that provided a May 25, 2022 resolution authorizing the release of a press release concerning the Yellow Wood Project that contained the Commissioners' concerns with the Project.[10] As reflected and supported throughout the evidentiary record and as summarized in Yellow Wood's Initial Brief and herein below, all of the concerns expressed in the May 25, 2022 resolution have been addressed through the Application and the Stipulation.

At the evidentiary hearing, the administrative law judge ("ALJ") determined that the briefs and reply briefs would be due by November 18, 2022, and December 9, 2022, respectively. On November 18, 2022, initial briefs were filed by Yellow Wood, Staff, the Residents, and Clinton County.

When the Ohio General Assembly created the Board almost 50 years ago, it mandated that the Ohio Power Siting Board would be the sole governmental body in the State of Ohio authorized

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7 App. Exs. 18-28, 18A, 28A.
8 Staff Exs. 1-10.
9 Resident Ex. 1.
10 County Ex. 1.

to determine if a certificate should be issued for the construction and operation of a major utility facility. The General Assembly charged the Board with finding the appropriate balance between the growth and advancement in energy development, and the preservation and protection of ecological and sociological interests. To assist the Board with its determinations in this regard, the Ohio General Assembly created a set of eight criteria to measure the impact from a proposed energy facility. Those criteria are found in R.C. 4906.10(A)(1) through (8). A review of the record and the initial briefs submitted reflects that there is no dispute regarding the following 4 criteria found in R.C 4906.10(A):

1. 4906.10(A)(1): There is no dispute in this proceeding that the criterion set forth in R.C. Section 4906.10(A)(1), i.e., the basis of need for this facility, is not applicable in this proceeding.

2. 4906.10(A)(4): There is no dispute that the facility is "consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the facility will serve the interests of electric system economy and reliability."

3. 4906.10(A)(7): There is no dispute that, based on the record in this case, the Board can determine the impact of the facility on agricultural land.

4. 4906.10(A)(8): There is no dispute that the facility incorporates the maximum feasible water conservation practices.

The Residents are only disputing in their brief that the Stipulation and the record in this case do not satisfy the following 4 of the 8 criteria in R.C. 4906.10(A):

1. 4906.10(A)(2): The Residents erroneously claim that the record does not provide enough information for the Board to determine the probable environmental impact of the facility.

2. 4906.10(A)(3): The Residents erroneously claim that the record and the Stipulation do not provide sufficient documentation to enable the Board to determine that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of various alternatives.

3. 4906.10(A)(5): The Residents erroneously claim that the record and the Stipulation do not enable the Board to determine aviation, waste, and alleged impacts from pollution.

4. 4906.10(A)(6): The Residents erroneously claim that the record and the Stipulation do not provide sufficient documentation to enable the Board to determine that the facility will serve the public interest, convenience, and necessity.

Clinton County only disputes that the Stipulation and record in this case satisfy the criterion in R.C. 4906.10(A)(6) regarding the public interest. As fully documented in the record, and summarized at length in Yellow Wood's Initial Brief and below, all of the concerns expressed by Clinton County have been fully addressed and resolved.

As thoroughly summarized in the Yellow Wood's Initial Brief, as well as Staff's Initial Brief, and as further reinforced herein, the assertions by the Residents and Clinton County in their initial briefs regarding the Board's ability to make its determinations under R.C. 4906.10(A)(2), (3), (5), and (6) and adopt the Stipulation in its entirety are incorrect and not supported by the evidentiary record in this case. The following sets forth the Applicant's reply that points to the evidence in the record that fully supports the Board's adoption of the Stipulation without modification. The arguments set forth in Yellow Wood's Initial Brief filed on November 18, 2022, in support of the Application and Stipulation are fully incorporated herein.

II. ARGUMENTS

In its initial brief, Clinton County only disputes that the Stipulation and record in this case satisfy the criterion in R.C. 4906.10(A)(6) regarding the public interest, claiming that the County and not the Board should make the sole necessary determinations in this case.

The Residents allege several issues citing to the 4 criteria summarized above as in dispute [i.e., R.C. 4906.10(A)(2), (3), (5), and/or (6)]. The issues raised by the Residents in their brief are:

(1) The theory that "minimum" under R.C. 4906.10(A)(3) equates to zero.[11]

(2) Compliance with the Board's O.A.C. rules.[12]

(3) R.C. 4906.10(6) and public opposition.[13]

(4) Setbacks, alleging non-compliance with R.C. 4906.10(A)(3).[14]

(5) Groundwater and water supplies, alleging non-compliance with R.C. 4906.10(A)(2) and (3) and O.A.C. 4906-4-08(A)(4)(a).[15]

[11] Resident Br. at 1-3.
[12] *Id.* at 3-5.
[13] *Id.* at 6-7.
[14] *Id.* at 8.
[15] *Id*. at 9-13.

(6) Construction sound, alleging non-compliance with R.C. 4906.10(A)(3) or (6).[16]

(7) Operational sound from the inverters, alleging non-compliance with R.C. 4906.10(A)(2) and (3), and O.A.C. 4906-4-08(A)(3).[17]

(8) Operational sound limit in Stipulation Condition 29, arguing it exceeds the standard for wind facilities in O.A.C. 4906-4-09(F)(2).[18]

(9) Aviation, alleging non-compliance with R.C. 4906.10(A)(2), (3), (5), and (6), and O.A.C. 4906-4-07(E).[19]

(10) Impact of the volume and disposal destinations for solid waste, alleging non-compliance with R.C. 4906.10(A)(3) and (5), and O.A.C. 4906-4-07(D).[20]

(11) Drainage, flooding, and the mitigation for flooding, alleging non-compliance with R.C. Sections 4906.10(A)(2), (3), and (5), and O.A.C. Rule 4906-4-07(C).[21]

(12) Pollution and mitigation, alleging non-compliance with R.C. 4906.10(A)(2), (3), and (5), and O.A.C. 4906-4-07(C).[22]

(13) The potential impacts on wildlife and plants, alleging non-compliance with R.C. 4906.10(A)(2) and (3), and O.A.C. 4906-4-08(B).[23]

(14) Local roads, alleging non-compliance with R.C 4906.10(A)(3) and (6).[24]

(15) Drain tiles and surface waterways, alleging non-compliance with R.C. 4906.10(A)(3) or (6).[25]

(16) Food production, alleging non-compliance with R.C. 4906.10(A)(6).[26]

(17) Economic impact, alleging non-compliance with R.C. 4906.10(A)(6) and O.A.C. 4906-4-06(E)(4).[27]

As detailed in Yellow Wood's Initial Brief, with the provisions in the Stipulation, along with the many commitments set forth in the Application and record in this case, there is no doubt

[16] *Id*. at 13-16.
[17] *Id*. at 16-18.
[18] *Id*. at 18-19.
[19] *Id*. at 20-21.
[20] *Id*. at 21.
[21] *Id*. at 22-23.
[22] *Id*. at 24-26.
[23] *Id*. at 26-29.
[24] *Id*. at 29.
[25] *Id*. at 29-30.
[26] *Id*. at 30-32.
[27] *Id*. at 32-33.

that the Board has all the information necessary to determine that the appropriate safeguards are in place to support a finding that all of the information required under the Board's administrative rules has been provided on the record in this case. Thus, as required under R.C. 4906.10(A)(2), (3), (5), and (6), the Board is authorized to issue the Certificate to Yellow Wood because it is able to determine: the probable environmental impact of the facility; that the facility represents the minimum adverse environmental impact considering the state of available technology and the nature and economics of various alternatives, and other pertinent considerations; impacts, if any, regarding aviation, waste, and pollution; and that the facility is in the public interest, convenience, and necessity.

1. Contrary to Clinton County's assertion the Project is in the public interest, convenience, and necessity in compliance with R.C. 4906.10(A)(6).

Initially, Yellow Wood notes that it is evident in Clinton County's Initial Brief that they believe the County, rather than the Board should be the governmental body to determine if the Certificate should be issued. This belief is not only an attempt to circumvent the General Assembly's 50-year statutory dictate for the Board to be the sole objective authority to determine if a major utility facility should be sited in Ohio, but totally disregards Yellow Wood's grandfathered status under Substitute Senate Bill 52 ("SB 52"). SB 52 modified certain procedural requirements for obtaining a certificate of environmental compatibility and public need, namely by requiring that certain projects seeking development in Ohio after October 11, 2021, would first be reviewed at the county level before going through the Board process under R.C. 4906. However, under SB 52, the General Assembly determined that, as a matter of public policy, certain solar projects (including Yellow Wood) are not subject to the requirements of SB 52, and should instead continue to be evaluated and approved by the Board in accordance with the standards and procedures historically undertaken by the Board.[28] That being said, it should be noted (reference place in my testimony) that Yellow Wood **does** meet the design criteria subsequently published

[28] Yellow Wood is grandfathered and exempt from the requirements of SB 52 because: the Project was pending at the Board before Oct. 11, 2021, and received its letter of in compliance before that date; and the Project was in the PJM Interconnection, LLC ("PJM") new service queue, received its System Impact Study from PJM, and paid the PJM Facilities Study application fee by Oct. 11, 2021 [*See* 2021 Sub. S.B. No. 52, Sections 4(A) and 4]. By grandfathering these projects, as a matter of policy, the legislature determined that these projects should proceed under the criteria set forth in the statute and Board precedent prior to Oct. 11, 2021.

after the passing of SB 52 by the April 2022 Comprehensive Plan issued by the Clinton County Planning Commission regarding land uses of this type.[29]

In support of its assertion that the facility is not in the public interest, convenience, and necessity, Clinton County points to three things:

(1) Clinton County Resolution 22-645 issued May 25, 2022 ("Resolution");

(2) Testimony at the local public hearing on October 20, 2021; and

(3) Non-record comments filed in the docket.

An analysis of each of these points reveals that Clinton County's arguments are without merit.

First, Clinton County points to the Resolution and a list of concerns stated in the press release attached to the Resolution to support its statement that "as the local government with general jurisdiction over the facility's proposed location, the County believes that the proposed facility would not serve the public interest, convenience, and necessity… [a]nd the applicant has not proven that it would."[30] Clinton County states that it "articulated the grounds for its opposition…by its adoption of Resolution 22-645 on May 25, 2022."[31] However, a thorough review of Clinton County's Resolution exposes that Yellow Wood has gone above and beyond what is required under the statute to address and resolve the grounds "articulated" by Clinton County in its Resolution. The facts reveal that the Application, as enhanced by the Stipulation, address all of the concerns stated by Clinton County as follows:

- solar projects in other counties lack accountability (**Contrary to this concern, Yellow Wood is not an affiliate or otherwise associated with other nearby solar projects and Yellow Wood has committed to more stringent conditions than older nearby projects**.);[32]

- noise during construction (**The facts on the record prove that Yellow Wood has committed to limit hours for construction and to maintain limited noise levels during construction and operation.**);[33]

- ongoing drainage and erosion that affect neighboring properties (**The facts on the record prove Yellow Wood has made extensive commitments regarding**

[29] www.clintoncountyrpc.org/uploads/1/2/4/4/124485524/cc-plandocument220518-small.pdf
[30] County Ex. 1 at 1.
[31] County Br. at 7, *citing* County Ex. 1.
[32] App. Ex. 18 at 4.
[33] Jt. Ex. 1 at 9, Conditions 28-29.

drainage, including, but not limited to: not adversely impacting non-participating parcels; obtaining approval from the Clinton County Soil and Water Conservation District ["Clinton County S&W District"] for ditch or tile work within the County maintenance program; and a <u>$50,000 fund to inspect perceived drainage issues, along with the commitment to fix any issues that are found</u>.);[34] In addition, the Applicant notes that Ohio courts have long held that landowners cannot unreasonably interfere with the flow of surface water to the detriment of their neighbor.[35]

- reduction in neighboring property values (**Contrary to this concern, studies by experts and the record in this case prove that the Project, if developed as proposed, would not have a negative impact on adjoining property value**.);[36]

- lack of oversight over life of the Project (**Contrary to this concern, the Board's Compliance Division will be responsible for monitoring the Project and enforcing all Certificate conditions and, <u>as detailed in the Stipulation conditions, Yellow Wood will work closely with the local government officials and community</u>**.);[37]

- decommissioning and disposal of the facility (**Contrary to this concern, the facts on the record prove that the Project will be bonded at all times for the decommissioning, removal, and restoration of the Project Area back to its existing condition as it stands today and Yellow Wood has committed to proper disposal of the facility components**.);[38]

- agreement has not been reached with Clinton County regarding its authority to approve or deny stormwater mitigation plans (**Contrary to this concern, the facts on the record prove that, while the Board has plenary jurisdiction over the Project, Yellow Wood made significant commitments including: design and construction coordination with the Clinton County S&W District; obtaining**

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34 *Id*. at 10-11, Conditions 30-31.

35 In *McGlashan v. Spade Rockledge Terrace Condo Dev. Corp.*, Ohio St.2d 55, (1980), the Ohio Supreme Court ("Supreme Court") set forth the reasonable use test as the appropriate rule to be used in resolving surface water disputes and specifically rejected other common-law theories of liability for surface waters. Further, in *McGlashan*, the Supreme Court provided detailed guidance as to how a factfinder should determine reasonableness, finding a developer liable for damages due to construction impacts that altered drainage that lead to flooding and damage to neighboring residences. The Court explained how to determine reasonableness and specifically stated the trier of fact should be guided by the rules stated in 4 Restatement on Torts 2d 108-142, Sections 822-831: " (A) possessor of land is not unqualifiedly privileged to deal with surface water as he pleases, nor is he absolutely prohibited from interfering with the natural flow of surface waters to the detriment of others. Each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others. He incurs liability only when his harmful interference with the flow of surface water is unreasonable." See *McGlashan* at *60.

36 App. Ex. 1, Ex. E; App. Ex. 23 at 5.

37 App. Ex. 18 at 4-5; Jt. Ex. 1.

38 App. Ex. 18 at 6; Jt. Ex. 1 at 11-12, Conditions 32-33.

an Ohio Environmental Protection Agency ("Ohio EPA") Stormwater Pollution Prevention Plan ("SWPPP") and permit for the design and construction of its earthwork and drainage infrastructure components; and setting up a $50,000 third-party investigatory fund for any future drainage issues while also completely reimbursing any damages from any issues discovered as a result of the Project.);[39]

- the need for increased setbacks (**Contrary to this concern, the facts on the record prove that Yellow Wood will implement the following increased minimum setbacks from panels: at least 300-feet from non-participating residences; at least 150-feet from non-participating parcel boundaries; and at least 150-feet from the edge of pavement of any state, county, or township road.**);[40] and

- taking farmland out of production (**Contrary to this concern, the record proves that the Project represents approximately only 2,397 acres of land use compared to approximately 896,600,000 acres of total farm land in the state, which is a .000267 percent use of the approximate total and is not sited within an area that is designated as Farmland of Statewide importance**.[41] Additionally, none of the Project Area was found to be strategic farm land of Ohio as required by the Clinton County's subsequent design criteria after the passing of SB 52.

As proven throughout the evidentiary record, and as summarized in Yellow Wood's Initial Brief, all of the concerns express in the May 25, 2022 resolution have been addressed through the Application and the Stipulation.

As to Clinton County's second point, Clinton County supposes that the testimony provided by local residents at the local public hearing agrees with its objection to the Project.[42] However, contrary to Clinton County's recollection, the facts of the case reveal that, at the local hearing in this case held on October 20, 2021, 36 individuals offered testimony – 25 residents spoke in support of the Project and only 9 residents spoke against the Project.[43] Thus, the facts at the local public hearing weigh in favor of the Project by the vast majority of those who testified. Clinton County has chosen to ignore the testimony at the local hearing from their constituents that support the Project who cited benefits from the Project including, to name a few: the economic

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39 App. Ex. 18 at 5-6.
40 App. Exs. 12 and 18 at 6.
41 App. Ex. 18 at 6. https://www.nass.usda.gov/Statistics_by_State/Ohio/Publications/Ag_Across_Ohio/2021/aao2103.pdf.
42 County Br. at 4.
43 App. Ex. 18 at 9; Local Public Hearing Tr. filed Nov. 1, 2021.

development and increased tax base and school funding; the desire for a cleaner electric grid; minimal impact to community resources; the support of farmer's private property rights; the incorporation of diverse native plantings and pollinators that do not get harvested or tilled every year; and the jobs created by the Project,.

The third point cited by Clinton County to support its assertions are the unauthenticated hearsay correspondence in the public comments section of the docket card.[44] These public comments relied on by Clinton County are not part of the evidence of record in this case, and have not raised a legitimate potential negative impact with respect to the Project that was not considered the Signatory Parties in the Stipulation. However, even if these comments were taken into consideration, the record shows that, of the public comments posted on the docket as of September 18, 2022, when all of the comments that were electronically filed from a given household were combined with the individual comments that were not filed electronically: a total of 77 independent comments were submitted in the docket in support of the Yellow Wood Project; and only 72 households and individuals submitted comments that can be characterized as opposing the Yellow Wood Project. Furthermore, it is significant that the Clinton County Trails Coalition and Wilmington-Clinton Chamber of Commerce each submitted a letter/comment in support of the Project.[45]

Clinton County submits that the "[r]evenue from the taxes…associated with the project do not outweigh the Commissioners' opposition to the project or show that it serves the public interest, convenience, and necessity."[46] This statement makes it clear that regardless of the record evidence Clinton County believes that its position takes precedence over the Board's statutory obligation to objectively review and consider the record. Clinton County presented one exhibit – the Resolution that parrots 'concerns' with the Project that are resolved or unfounded as noted above. Clinton County did not sponsor any witnesses and did not attend or participate in the evidentiary hearing, except to move the admission of its sole exhibit (the Resolution) at the beginning of the hearing – after which counsel for Clinton County left and did not participate in

[44] County Br. at 4.
[45] App. Ex. 25 at 4.
[46] County Br. at 5.

cross examination of the expert witnesses. Presumably because it believed the only thing it had to do was submit the Resolution and the Project would be denied.

Accordingly, the commitments in the Application, as enhanced by requirements in the Stipulation, enable the Board to determine that the manifest weight of the evidence supports approval of the Stipulation and the issuance of a Certificate to Yellow Wood.

2. The Residents' theory that "minimum" under R.C. 4906.10(A)(3) equates to zero or no impact is unreasonable, nonsensical, and contrary to law.

R.C. 4906.10(A)(3) requires the Board to determine that "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 Residents, in reaching for a definition of minimum, look solely to the dictionary definition, without providing any legal justification for their assumptions. To the Residents, minimum equates to "the least quantity assignable, admissible, or possible,"[47] which essentially means zero or no impact, since the least possible would be if the Project was not built.

However, although the Ohio General Assembly does not define the term "minimum" or "minimum adverse environmental impact" in the context of R.C. 4906.10(A)(3), Ohio courts have made it clear that minimum is not synonymous with no impact – and minimum does not require that projects result in zero impact as the Residents suggest. If the Ohio General Assembly intended to require that certificates be granted only with a showing of no impact, it would not have used the term minimum. Cases addressing the jurisdiction and authority of the Board further substantiate that R.C. 4906.10(A)(3) authorizes the Board to grant certification as long as a project does not have greater than a minimum adverse environmental impact, not that that applicants must demonstrate no impact.

In *Ohio Edison*, the Supreme Court upheld a Board order requiring a utility to either overbuild one of its existing electric lines on the north and south edges of its right-of-way or route the facility somewhere to the south of the existing right-of-way of a golf course because the Board determined a utility's transmission line expansion plans would have greater than minimum adverse

[47] Residents Br. at 2.

recreational impact.[48] The Supreme Court, in *Ohio Edison*, upheld the holding by the Board as proper, and clarified that minimum adverse impact does not require a showing of no impact at all, stating:

> under…R.C. 4906.10(A)(3), the commission must determine merely whether the proposed expansion represents the minimum adverse recreational impact, not whether it represents any adverse impact at all. (Under the facts of the instant cause, the fact that the [Board] considered minimum adverse impact led it to restrict the utility's use of unused portions of the easement, but not to prohibit the utility from building its new power line along the route the older one had taken even though evidence revealed that any power line additions along the easement would have some environmental impact.). (*emphasis added*).[49]

Similarly, in *Middletown Coke*, the Supreme Court held that the Board had jurisdiction to consider the entirety of a proposed cogeneration facility, as to both coke (a purified form of coal used in steel making) and electricity generation aspects, when assessing minimum adverse environmental impact.[50] In that case, the Supreme Court explained that it is essential to look to the entire requirement encapsulated in R.C. 4906.10(A)(3) when evaluating a project's impact. Namely, R.C. 4906.10(A)(3) requires the Board to determine "[t]hat the facility represents the minimum adverse environmental impact," but then tempers this minimum-impact requirement by requiring the siting board to "consider[ ] the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations." The Supreme Court reasoned that the "statute broadly authorizes the siting board to *balance* just the sort of concerns raised by this case." (*emphasis added*)[51]

Notably, Ohio courts have held that "minimum" does not mean "any" in a procedural context. For example, the Tenth District Court of Appeals of Franklin County held that *in personam* jurisdiction over out-of-state defendants was impermissible under the due process standard. The court reasoned that "minimum contacts" does not mean "any contacts," and to so determine would be inconsistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[52]

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48 *Ohio Edison Co. v. Power Siting Commission*, 56 Ohio St.2d 212, 383 N.E.2d 588 (1978).
49 *Id*. at 592.
50 *In re Application of Middletown Coke Co*., 127 Ohio St.3d 348, 2010-Ohio-5725, 939 N.E.2d 1210, ¶ 26.
51 *Id*.
52 *Culp v. Polytechnic Institute of New York*, 7 Ohio App.3d 352, 355, 455 N.E.2d 698, 701 (10th Dist.1982).

While they quote the statute correctly, the Residents actually conveniently ignore the latter part of R.C. 4906.10(A)(3), which requires the Board, in making its determination on the impact, to consider: the state of technology; the nature and economics of various alternatives; and, importantly, other pertinent considerations. Rather, the Residents are selectively deciding their own standard by picking and choosing what portions of the statute they will actually apply in order to suit their position.

The statutory scheme in R.C. 4906.10 has been in place for decades, well before the commercial viability of the new solar technology that is being proposed in this case. However, the Ohio General Assembly, in enacting R.C. 4906.10, during a time when coal was the primary source of energy for power plants, had the foresight to recognize that new and innovative technology would be forthcoming. Yellow Wood represents the new state of electricity generation technology that: does not produce harmful emissions; will not introduce harmful chemicals into the environment; has no water pollutants; no impacts to public or private wells or water supplies; and provides energy security and clean air resulting from the transition from fossil fuels to renewable energy sources.[53]

Moreover, the positive economic impacts resulting from Yellow Wood, as recognized explicitly in R.C. 4906.10(A)(3), are also important factors for the Board to consider. It is undisputed on the record that Yellow Wood will, among other things, result in minimal consumption of community services, provide financial benefits to landowner families, and result in payments to the taxing units in the Project Area of approximately $2.1 million annually over the estimated 35-year life span of the Project, as follows:

- County General Fund - **$555,001**
- Blanchester School District - **$150,960**
- Lynchburg-Clay School District - **$581,198**
- Wilmington School District - **$401,399**
- Great Oaks JV School District - **$119,880**
- Clark Township Road and Bridge - **$23,310**
- Jefferson Township - **$73,815**
- Clark Township - **$101,565**
- Warren-Clinton Community Health - **$44,400**
- Blanchester Library District - **$8,510**

[53] App. Ex. 1 at 33-37; App. Ex. 18 at 16.

- Wilmington Public Library - **$39,960**[54]

These increased tax revenues are significantly higher than the current tax revenues received in this area and will benefit the local taxing units in the Project Area.

Further, R.C. 4906.10(A)(3) requires the Board to contemplate "other pertinent considerations" when making its determination on issuing the Certificate. With regard to Yellow Wood, those considerations include, but are not limited to, information such as:

- Commitments to maintain or repair drain tile commitment and funding a $50,000 fund related to drain tile;[55]
- Guarantee to maintain liability insurance;[56]
- Guarantee to maintain a decommissioning bond ensuring the financial means to remove the equipment and return the land to substantially its current condition;[57]
- Maintaining a complaint resolution process throughout the life of the facility;[58]
- Implementation of community requests and feedback, including, but not limited to, setback, screening, drainage protections, noise limitations, vegetation management protocols, and fencing styles;[59]
- Coordination with the County on perceived concerns – as explained below, all of Clinton County's concerns have been addressed and resolved through the comprehensive and all-encompassing Stipulation – regardless of the fact that Clinton County did not join in the Stipulation, throughout the Stipulation conditions, the Stipulating Parties honored the County's request that it play a significant role in coordination and communication regarding Yellow Wood's compliance with the condition requirements – the only exception to this is that the Stipulation does not circumvent the statute that provides the Board with the sole approval authority over the siting, construction, operation, and maintenance of electric generation facilities by surrendering the Board's approval authority to Clinton County;[60]

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54 App. Ex. 1, Ex. F at 40. These tax revenue figures are based on a tax payment of $7,000 per MW under R.C. 5727.75. However, it is important to note that increased annual tax revenues to the Project Area would be $2.7 million if the payment under R.C. 5727.75 is based on $9,000 per MW.

55 App. Ex. 18 at 17; Jt. Ex. 1 at 11, Condition 31(b).

56 App. Ex. 1 at 31-32, Ex. I; App. Ex. 18 at 17.

57 *Id*.

58 *Id*.

59 *Id*.

60 *Id.* at 10-13; R.C. 4906.13.

- Meeting subsequent local design standards for such projects as explained above;[61]

- Implementation of pollinator friendly planting and prevention of the establishment and/or further propagation of invasive plant species and noxious weeds;[62]

- Maintaining vegetative screening for the life of the facility and replacement of failed plants so that at least 90% of the vegetation has survived;[63] and

- The creation of over 300 new jobs in Clinton County and 1,235 new jobs in the State of Ohio, These workers, and the Project, have direct and in-direct (ancillary services) economic benefits.[64]

Further, the Applicant emphasizes that the Project will significantly reduce, and in some cases eliminate, the negative environmental impacts associated with the current land use in the Project Area, which is large-scale agricultural operations. Unlike solar facilities, agricultural operations use significant amounts of fertilizers, pesticides, monocrop farming (i.e., sowing one crop every year in a similar piece of land – not rotating crops), and annual tilling operations. Under their theory of "minimum" equals zero adverse environmental impact, the Residents should be more concerned about the current agricultural operations in the area because the current operations definitely do not represent zero environmental impact.

Therefore, the arguments throughout the Residents' Initial Brief on the interpretation of R.C. 4906.10(A)(3) and the term "minimum" regarding the environmental impact are erroneous and self-serving. The Board has before it thousands of pages of documentation and expert testimony that supports a determination that the Project represents the "minimum adverse environmental impact, considering the state of available technology and the nature and the nature and economics of the various alternatives, and other pertinent considerations." The Residents' argument that minimum means zero or no impact is neither reasonable nor legally sustainable given the full context of R.C. 4906.10(A)(3) and all of the information the statute requires the Board as a package to consider in reaching its decision. What is evident in the record of this case is that the manifest weight of the evidence supports the Board's determination under R.C. 4906.10

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61 App. Ex. 18 at 17;
62 *Id*.; Jt. Ex. 1 at 8, Condition 25.
63 App. Ex. 18 at 17; Jt. Ex. 1 at 6, Condition 17.
64 App. Ex. 18 at 17; App. Ex. 24.

to approve the Application, as enhanced by the numerous conditions in the Stipulation, and issue the Certificate to Yellow Wood.

3. Yellow Wood has complied with all requirements in the Board's O.A.C. rules.

Throughout the Residents' Initial Brief, they make a number of claims that Yellow Wood has not complied with various O.A.C. rules developed by the Board.[65] These allegations are without merit.

The Residents point to R.C. 4906.06(A)(6), which calls for applicants to file information prescribed by the Board in its rules contained in O.A.C. 4906. However, the Residents fail to acknowledge that the Board's rules apply to a vast array of technology and energy sources from fossil fuels and nuclear, in addition to renewable resources such as solar. The Board's rules cover the gambit; thus, some rules, such as those pertaining to potential pollution and hazardous waste, apply more specifically to the pollution resulting from fossil fuel emissions and the waste from nuclear reactors, whereas renewable resources do not emit pollution or create hazardous waste. In fact, as evidenced by the Residents attempt in their initial brief to require solar projects to comply with the Board rules that apply strictly to wind projects regarding operational sound,[66] it appears that the Residents do not differentiate the applicability of the Board's rules from one generation technology to another. The Residents further calculatedly misrepresent the rules by claiming O.A.C. 4906-4-08(A)(3) requires that the applicant demonstrate "that the project will not cause a noise *nuisance*" (*italics added*).[67] However, nowhere in the O.A.C. rules is word "nuisance" present and there is definitely no requirement that an applicant demonstrate that a project does not cause a noise nuisance. Applicants are required to submit noise studies and analysis, but the inflammatory language used by the Residents to describe the purpose of the rules is disingenuous at best. As responded to below, this type of misleading references to the Board's rules is replete throughout the Residents' Initial Brief.

While the Residents discount the numerous studies and evidence presented on the record in this matter, the fact is Yellow Wood provided thousands of pages of documentation responding to each and every applicable question posed by the Board's rules and Staff's data requests.[68] Staff

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65 Residents Br. at 3-5.
66 *Id*. at 18.
67 *Id.* at 4.
68 App. Exs. 1-12.

then completed a thorough and exhaustive investigation of all of the information provided and issued its Staff Report.[69] The requirements contested by the Residents are set forth in the O.A.C. and not the statute. The rules illuminate the information the Board is looking for in order to make its determinations under R.C. 4906.10(A), but the rules referred to by the Residents are not as exacting as the Residents assert. The Board and its Staff apply the proper meaning to the rules to ensure that applicants provide all of the information necessary for the Board to make its decision regarding the issuance of a certificate for the applicable generation resource. As a package, Yellow Wood's Application provides all of the requisite information for the Board's consideration of this solar facility. The Residents claim the Applicant should have submitted a request for waiver of certain rules that they claim are not fully responded to. However, as detailed below, such waivers were not necessary, because the Applicant provided the information supporting issuance of a certificate to the solar facility. As the Staff Report documents, Staff had all of the information necessary and required under the O.A.C. rules to make its recommendations and for the Board to subsequently make its determination and issue the Certificate in compliance with R.C. 4906.10(A).[70]

Furthermore, Yellow Wood emphasizes that the case law cited by the Residents in support of their unsubstantiated argument that the Board has not followed its own rules and, thus, cannot issue a Certificate to Yellow Wood are not applicable here.[71] The Residents provide no explanation in their initial brief as to why or how these cases relate to the instant matter – they just string cite these cases claiming the cases support their theory regarding the Board's issuance of the Certificate to Yellow Wood. However, a review of the cases cited by the Residents reveals that they address the rights of employees or regulated entities that sought enforcement actions against administrative agencies due to alleged violations of administrative agency rules and due process violations. These cases are not apposite to the determination of whether an administrative agency should grant a certificate to an applicant.

One case the Residents attempt to rely on, in fact, supports a contrary interpretation of whether administrative agencies are required to follow their own rules when such rules are not mandatory.[72] In *Parfitt*, the Supreme Court reversed a Franklin County Court of Appeals decision,

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69 Staff Ex. 1, Staff Report (Oct. 4, 2021).
70 *Id*. at 27-28, 31.
71 Residents Br. at 3.
72 *Parfitt v. Columbus Correctional Facility*, 62 Ohio St.2d 434, 406 N.E.2d 528 (1980).

holding that the termination of corrections officers would not be invalidated due to failure of an agency to follow its own administrative rules that delineated a procedure for removing officers and did not establish prejudice on the part of the agency. The Supreme Court explained that "in the absence of prejudice, a public employee in challenging his removal from employment may not assert the employer-agency's procedural rules, unless that employee is a member of the class which the rule was intended to benefit."[73] The Residents' analogy does not hold up here. The provisions in O.A.C. 4906-4 ensure that the Board and its Staff have appropriate information needed to evaluate and determine whether a certificate should be issued to an applicant requesting to construct and operate a generation facility in Ohio. The Residents' narrow interpretation of the purpose of the Board's rules neglects a comprehensive understanding that the Board's rules are promulgated in conformity with the Board's duty to issue certificates to applicants that can demonstrate that the documents and information submitted on the record in a given case, as a package, satisfy all requirements in R.C. 4906.10(A) such that the Board can determine whether a certificate should be issued. The information is not interpreted by the Board in a vacuum on a piecemeal basis. All information is evaluated and considered by the Board when it arrives at its decision.

Another case the Residents cite is likewise inapplicable.[74] In *Cuyahoga*, the Supreme Court denied a writ of mandamus and motion for summary judgment, holding that a county hospital, which had treated an injured employee in a nonemergency situation, but which failed to show good cause for not obtaining prior approval for payment of bills from the Bureau of Workers' Compensation ("BWC"), was not entitled to payment of bills from BWC under the BWC's administrative rules.[75]

The final case cited by the Residents similarly lacks relevancy for the Yellow Wood case.[76] In *Clark*, the Sixth District Court of Appeals affirmed the trial court's holding that a state department's revocation of a license to operate a residential care facility was proper due to mismanagement as established by continuous failure of an operator to meet minimal standards set by the department's rules and where correction of the situation was not possible; thus, no warning letter was required to be sent prior to revocation of the license.[77] Thus, none of the three cases

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[73] *Id*. at 436.
[74] *State ex rel. Cuyahoga Cty. Hosp. v. Ohio Bureau of Workers' Comp.*, 27 Ohio St.3d 25, 500 N.E.2d 1370 (1986).
[75] *Id*.
[76] *Clark v. Ohio Dep't of Mental Retardation and Developmental Disabilities*, 55 Ohio App.3d 40 (6th Dist. 1988).
[77] *Id*.

cited by the Residents are relevant for purposes of the Board's review of the Application and ultimate decision in this matter.

As explained below, the Residents have misconstrued the Board's rules to suit the issue they are arguing – denial of the Certificate no matter what. The Residents conveniently ignore the importance and detail set forth in the thousands of pages of extensive analysis, studies, and reports submitted by the Applicant that are on the record in this case and supported by expert witnesses, all of which were admitted into the record in this proceeding with no objection from the Residents or any other party in this matter. What is more, the Residents disregard the robust safeguards to manage the Project that are provided in the Stipulation, which require close coordination and interaction with Clinton County.

Importantly, the Applicant also stresses that the commitments in the Application and the Stipulation are the minimum commitments. Understanding that the Board has the responsibility under R.C. 4906.10(A) to make determinations, including the probable environmental impacts and that the facility will represent the minimum adverse environmental impact considering the state of available technology, the nature and economics of various alternatives, and other pertinent considerations, Yellow Wood is obligated to comply with all of the commitments in the Application as enhanced by the Stipulation.

The bottom line is the Residents simply do not want the Project built and there is no amount of information that will change the Residents' position. In taking this position, it is believed the Residents then popularized fear of the Project, which then, even though all concerns have been addressed and resolved in the Stipulation, also led to the Clinton County Commissioners taking a similar, position. Yellow Wood provided and filed in the record in this case all of the information that is required under both the statute and the rules, and the information is supported by expert witness testimony. As detailed below, the Application, as enhanced by the Stipulation, addresses and resolves all of the issues raised on the record in this case.

The Residents may not like the results of the studies and surveys authenticated in the record or the fact that knowledgeable parties entered into a Stipulation supporting the Project, but such dislike does not equate to evidence in the record. The manifest weight of the evidence, as detailed in the Applicant's Initial Brief, supports the Board's approval of the Stipulation and issuance of the Certificate.

4. The Stipulation and record in the case enable the Board to determine that the Project has support and is in the public interest under R.C. 4906.10(A)(6).

The Residents and Clinton County cite to a past Board decision to support their claims that the Project is not in the public interest.[78] Clinton County states that the "broad lens" used by the Board to make its determination in a given matter "encompasses the general 'public interest in energy generation that ensures continued utility service and the prosperity of the state of Ohio' as well as 'the local public interest….'"[79] Clinton County goes on to acknowledge that the Board "must balance projected benefits against the magnitude of potential negative impacts on the local community."[80] Despite Clinton County's acknowledgement of the importance of the Board's objective weighing of the facts and balancing of interests for the State of Ohio and the community, Clinton County advocates that the Board only consider the debunked concerns raised in Clinton County's May 25, 2022 Resolution and ignore the manifest weight of the evidence, including the overwhelming benefits the Project will bring, and the support of numerous community members the County is supposed to represent. Likewise, citing *Republic*, the Residents claim that "the 'especially prominent and one-sided' local opposition to the disapproved wind project was an important factor in [the Board's] determination that the Republic Wind project did not serve the public interest, convenience, and necessity."[81] However, unlike *Republic*, the record in this case does not reflect "prominent or one-sided" opposition. In fact, the record evidence shows that, at the local hearing in this case held on October 20, 2021, two-thirds of the witnesses (25 of 36 witnesses) testified in support of the Project.[82] Thus, the facts at the local public hearing weigh in favor of the Project by the vast majority of those who testified.

Further, the attempt by Clinton County and the Residents to analogize a wind case that was before the Board with the Yellow Wood solar case is inappropriate and misleading. The *Republic* case is distinguishable from Yellow Wood in many respects, not the least of which is that the type of equipment utilized for a wind and solar facility are vastly different and such distinction is clear from the comments and opposition posed in *Republic*. However, perhaps the most notable distinction is the fact that there was not a Stipulation between any of the parties in *Republic*; unlike

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78 County Br. at 4; Resident Br. at 6.

79 County Br. at 4, *citing In re Application of Republic Wind, LLC*, Case No. 17-2295-EL-BGN, Opinion and Order (June 24, 2021) at 28 ¶ 91.

80 *Id.*

81 Resident Br. at 6.

82 App. Ex. 18 at 9; Local Public Hearing Tr. filed Nov. 1, 2021.

this case where Yellow Wood, Staff, and OFBF all recommend the Board adopt the Stipulation and issue a Certificate to Yellow Wood subject to the 34 Conditions set forth in the Stipulation.[83]

Clinton County has chosen to ignore the testimony at the local hearing from their constituents that support the Project who cited to benefits from the Project including the economic development and increased tax base and school funding, the desire for a cleaner electric grid, minimal impact to community resources, the support of farmers' private property rights, and the jobs created by the Project, to name a few. Contrary to Clinton County's and the Residents' views, the Board must factually look at the entire Application package, including: the impact of the facility on the environment and agricultural land; whether the facility will result in the minimum adverse environmental impacts; whether the facility is consistent with the regional plans for the electric grid; and whether it incorporates water conservation and complies with certain state regulations on pollution, waste, and air navigation. In addition, the Applicant notes that the Court has upheld determinations by the Board that a project satisfies the public interest requirements under R.C. 4906.10(A)(6) by fulfilling the renewable energy mandate and serving electric utility needs, maintaining a competitive marketplace, as well as promoting employment benefits.[84]

Finally, Clinton County and the Residents opine that the public opinion survey presented on the record is flawed and unreliable theorizing that the survey specifically and intentionally selected respondents to minimize the number of answers that would be received in opposition to the Project.[85] This argument is not well made and chooses to take out of context testimony during cross-examination of Yellow Wood's expert witness. The purpose of the survey, as supported by the expert witness, was to memorialize that opposition to the Project is not unanimous as Clinton County and the Residents suppose. Thus, the survey coupled with the fact that the vast majority of witnesses testifying at the local public hearing are in favor of the Project (25 of 36 witnesses), disprove the theory espoused by Clinton County and the Residents that opposition to the Project is widespread or unanimous in the area.

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[83] Jt. Ex. 1 at 3-12.

[84] *See In re Application of Buckeye Wind, LLC*, 131 Ohio St.3d 449, 2012-Ohio-878; *In re Application of Champaign Wind, LLC*, 146 Ohio St.3d, 489, 2016-Ohio-1513*; In re Application of Duke Energy Ohio, Inc*. 166 Ohio St.3d 438, 2021-Ohio-3301 ("*Duke Case*").

[85] County Br. at 6; Residents Br. at 6-7.

5. As supported by the Stipulation the and the record, the setbacks comply with R.C. 4906.10(A)(3) and enable the Board to determine the minimum adverse environmental impact.

Because the Residents do not believe the setbacks stipulated to in this case are sufficient, they argue the Board cannot determine that "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*), under R.C. 4906.10(A)(3). Apparently, the Residents' believe that the minimum 150-foot setbacks to property lines and roads, minimum 300-foot setbacks to residences, wildlife-friendly aesthetically suitable fencing, solar panels that will be no taller than 15 feet (which is a significantly conservative estimation of the panel height), and extensive landscape screening "will expose nearby residents and motorists to the unavoidable and unsightly views of the solar equipment and reduce their pleasure of living there."[86] Presumably, the Residents are utilizing their theory that Yellow Wood needs to "prove that the project's impacts are 'the least quantity assignable, admissible, or possible' under the dictionary meaning of [minimum]."[87] As explained above, the Residents' assertion is nonsensical and would be impossible to quantify at anything less than zero or no impact whatsoever.

Importantly, the Residents neglect to mention that what they complain about are the Project's minimum setbacks, but in many locations along the perimeter of the Project the setbacks will be considerably larger. The Applicant will have vegetative screening modules installed at locations where there are sensitive receptor points (homes, etc.).[88] In accordance with Stipulation Condition 17, Yellow Wood has committed to prepare a landscape and lighting plan in consultation with a landscape architect licensed by the Ohio Landscape Architects Board that addresses the aesthetic and lighting impacts of the facility. The plan will: place an emphasis on any locations where an adjacent non-participating parcel contains a residence with a direct line of sight to the Project Area; address potential aesthetic impacts to nearby communities, the travelling public, and recreationalists by incorporating appropriate landscaping measures such as shrub plantings or enhanced pollinator plantings; and include measures such as fencing, vegetative screening, or good neighbor agreements. Further, Yellow Wood will: maintain vegetative screening for the life of the

[86] *Id*. at 8.
[87] *Id.* at 2, 8.
[88] App. Ex. 18 at 7.

facility and replace any failed plantings so that, after five years, at least 90% of the vegetation has survived; maintain all fencing along the perimeter of the Project; ensure that lights in the array will narrowly focus light inward toward the solar equipment, be downlit and shielded, be motion-activated, and result in a maximum horizontal illuminance level of 1 foot-candle; ensure that substation lights will narrowly focus light inward toward the solar equipment, be downlit and fully shielded, be motion-activated, and result in a maximum horizontal illuminance level of 1 foot-candle, except at times of necessary or emergency.[89] The Project will also have a local and onsite staff to manage the facility, perform vegetative management and weed control duties, and ensure the facility is in good working order.[90]

The record in this case supports a determination that, as a package, the setbacks coupled with all of the other pertinent considerations and commitments in the Application (*e.g.*, Landscape Plan, Vegetation Management Plan, Lighting Plan, wildlife-friendly fencing, stormwater commitments), as further enhanced by the Stipulation, ensure that the facility represents the minimum adverse environmental impact. Throughout their brief, the Residents ignore the totality of the commitments agreed to by Yellow Wood and, instead, attempt to isolate specific topics for complaint. Contrary to the Residents' interpretation, R.C. 4906.10(A)(3) requires the Board to consider the Application and "the facility" as a whole, along with all pertinent considerations, including the overall commitments made by Yellow Wood.

6. The Stipulation and record enable the Board to determine the probable impacts on groundwater and water supplies R.C. 4906.10(A)(2), that the facility represents the minimum adverse environmental impact in compliance with R.C. 4906.10(A)(3), and the record contains the information required by O.A.C. 4906-4-08(A)(4)(a).

O.A.C. 4906-4-08(A)(4)(a) provides that the applicant shall "[p]rovide an evaluation of the impact to public and private water supplies due to the construction and operation of the proposed facility.

Contrary to the assertions from the Residents, Yellow Wood provided the "evaluation of the impact to public and private water supplies" as part of the Application and as supported by expert testimony.[91] As the record reflects, there are 6 water wells within the Project Area;

[89] Jt. Ex. 1 at 6, Condition 17.
[90] App. Ex. 18 at 7.
[91] App. Ex. 1, Ex. L; App. Ex. 28; App. Ex. 28A.

however, there will be no water wells within the fence line of the Project.[92] Local private well systems are typically located near residences and Project construction is not anticipated to physically damage private wells or affect well yields. Yellow Wood does not anticipate any impacts to public or private wells or water supplies during the construction and operation of the Project, as the Project allows for rainwater to clean the panels and will not have a well to obtain water from at the site. In addition, the Project is not subject to any aeronautical requirements.[93] In their brief, the Residents attempt to discredit the facts on the record regarding the probable impacts to wells and underground hydrology by posing unproven hypotheticals and misrepresenting the facts in the record. Neither the Residents nor their counsel are hydrology experts and they did not present expert testimony on the record to refute the facts – for them to try to prove their unsupported hypothetical by misrepresenting the facts is disingenuous. The facts on the record show that the facility will be constructed so as not to have an impact on wells and underground hydrology.[94]

The Residents request that the Board "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'…[o]therwise, the Project will not comply with R.C. 4906.10(A)(3) or (6)."[95] However, such a statement by the Board is not necessary as the record reflects that, per the terms of the Stipulation and further emphasized in testimony, Yellow Wood has committed that, should karst features be identified during additional geotechnical exploration or during construction, in accordance with Stipulation Condition 9, Yellow Wood will avoid construction in these areas when possible and if remedial measures are considered, it will be submitted to Staff for review and concurrence prior to implementation.[96] Further, Yellow Wood has committed to: requiring that the contractor implement adequate dewatering measures; and, based on the risk assessment of the karst features, the areas categorized as very low risk sites will be graded per the construction plans and monitored and the three locations of the karst features will be marked with survey grade GPS prior to grading activities.[97]

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92 App. Ex. 6.
93 App. Ex. 1 at 33-37; App. Ex. 18 at 16.
94 App. Ex. 1 at 33-37; App. Ex. 21.
95 Resident Br. at 13.
96 Jt. Ex. 1 at 4, Condition 9.
97 App. Ex. 1, Ex. L; App. Ex. 28 at 4; App. Ex. 28A at 3-4, Att. RS-1.

Contrary to the unfounded arguments of the Residents, the record in this case supports a finding that the record contains the information required by O.A.C. 4906-4-08(A)(4)(a), and a determination by the Board that the Applicant has demonstrated the probable impacts on groundwater and water supplies per R.C. 4906.10(A)(2) and that the facility represents the minimum adverse environmental impact in compliance with R.C. 4906.10(A)(3). Thus, the Residents' allegations are without merit.

7. The Stipulation and record enable the Board to determine that construction sound of the facility represents the minimum adverse environmental impact in compliance with R.C. 4906.10(A)(3), and the facility is in the public interest, convenience, and necessity in compliance with R.C. 4906.10(A)(6).

It is estimated that construction of the Project will take 18 months. The Residents complain that the construction noise from the driving of piles during this time will be "obnoxious and bothersome."[98] Contrary to the unfounded accusations of the Residents, the Applicant did not attempt to conceal that there will be additional noise during the 18-month period when the Project is under construction. The record reflects that the required sound study was conducted and submitted with the Application, fully considered by the Staff in the Staff Report, and supported by expert testimony.[99] While additional noise from construction may be heard by adjacent residents through some parts of the 18-month construction period, such noise will not be continuous or even necessarily loud during that short period, as the construction crews will be working throughout an approximate 2,397-acre site.[100] The record reflects that construction noise levels range from 37 to 75 A-weighted decibels ("dBA") for most activities, with up to 82 dBA (instantaneous) when pile driving is taking place in the immediate area. At the Project boundary, construction noise levels are predicted to be up to 93 dBA during solar pile driving. However, it is important to note that these are the levels expected when construction equipment is nearby and fully operational.[101] Thus, the Residents' concern that the noise from pile driving will be "long lasting and prominent" is unfounded.[102]

Yellow Wood has committed to implement best management practices ("BMPs") for sound

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98 Residents Br. at 15.
99 App. Ex. 4; App. Ex. 6, Att. 5; App. Ex. 27.
100 App. Ex. 18 at 17.
101 App. Ex. 4; App. Ex. 6, Att. 5; App. Ex. 27 at 5-6.
102 Residents Br. at 15.

abatement during construction and operation of the facility, including use of appropriate mufflers, proper vehicle maintenance, and adherence of all local speed limits.[103] Noise from construction activities will be controlled primarily through the time-of-day restrictions outlined in Stipulation Condition 28, which requires that general construction and decommissioning activities be limited to the hours of 7:00 a.m. to 7:00 p.m., or until dusk when sunset occurs after 7:00 p.m.; impact pile driving be limited to the hours between 9:00 a.m. and 6:00 p.m.; and construction and decommissioning activities that do not involve noise increases above ambient levels at sensitive receptors are permitted outside of daylight hours when necessary.[104] To alleviate any concerns regarding sound at the Project site, the Applicant has committed to use of ambient controlled broadband backup alarms versus tonal alarms, using well-maintained equipment (particularly with respect to mufflers), and maintaining communication with affected residents.[105]

As with any construction activity, there will be some additional noise during the daytime hours, but it will be limited to the area directly adjacent to the location where the activity is occurring on the 2,300-acre plus Project site and will not be for the full 18-month period of construction. Nothing concerning the sound from the construction of the Project was concealed or deceptive as the Residents imply. Rather, construction sound will be limited and mitigated, as committed to in the Application and required by the Stipulation.

Thus, contrary to the Residents' allegations, the Board has ample information to make the determinations under R.C. 4906.10(A)(3) and (6) regarding the impacts of sound from the facility and to issue the Certificate to Yellow Wood.

8. The Stipulation and record enable the Board to determine the probable environmental impact of the operational sound from the facility and that the sound level represents the minimum adverse environmental impact in compliance with R.C. 4906.10(A)(2) and (3), and the record contains the information required by O.A.C. 4906-4-08(A)(3).

Contrary to the assertions of the Residents, the Application clearly sets forth the information required pursuant to O.A.C. 4906-4-08(A)(3) describing the operational noise levels expected at the nearest property boundary. Further, the Application indicates the location of any noise-sensitive areas within one mile of the facility, and the operational noise level at each

[103] App. Ex. 1 at 53-54.
[104] App. Ex. 27 at 5; Jt. Ex. 1 at 9, Condition 28.
[105] App. Ex. 27 at 5.

habitable residence, school, church, and other occupied building, under both day and nighttime operations.[106]

The primary operational time for a solar facility is during the daytime. The inverters used for solar facilities do not produce electricity at night and any reactive power operation that could result in sound would represent a low fraction of the daytime operational sound resulting from the inverters, as the cooling fans for the inverters do not run at night.[107] Further, manufacturers of inverters do not provide data regarding sound from reactive power because such sound is zero or insignificant. In actuality, the nighttime sound was assessed finding that, since the inverters do not make noise at night, there is nothing to model. Thus, a separate analysis of potential nighttime sound from the inverters is not necessary to meet the requirements of the rule. Rather, since only the substation step-up transformers will operate at night, the Applicant properly provided information on the record, based on a conservative analysis, that reflects that the predicted nighttime noise levels at non-participating residences are 35 dBA or less, all of which are below the limit of 38 dBA established for the Project.[108]

Yellow Wood has made two important commitments regarding sound that the Residents has neglected to note. First, in accordance with Stipulation Condition 29, the facility must be operated such that the sound levels emitted to non-participating receptors are limited to no higher than the closet Long-Term Monitoring Station's area ambient Leq level plus five dBA as referenced and, if the facility is found to be above these limits, the Applicant will install additional noise mitigation measures.[109] With the Complaint Resolution Plan, if adverse sound impacts are identified, the process set forth in the plan will ensure that any complaints regarding construction or operational sounds are adequately investigated and resolved.[110] Further, to alleviate any concerns regarding sound at the Project site, the Applicant has committed to use of ambient controlled broadband backup alarms versus tonal alarms, using well-maintained equipment (particularly with respect to mufflers), and maintaining communication with affected residents.[111] Second, also pursuant to Stipulation Condition 29, if the inverters or substation transformer chosen for the facility have a higher sound power output than the models used in the noise

106 App. Ex. 4; App. Ex. 6, Att. 5; App. Ex. 27 at 6.
107 App. Ex. 1, Ex. at 19.
108 *Id.*, Ex. K; App. Ex. 4; App. Ex. 27 at 6.
109 App. Ex. 1, Ex. K at Table 4-3; Jt. Ex. 1 at 9, Condition 29.
110 App. Ex. 1 at 54.
111 App. Ex. 27 at 5.

model, Yellow Wood will show that sound levels will not exceed the 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.[112]

Thus, contrary to the Residents' allegations, the Board has ample information consistent with O.A.C. 4906-4-08(A)(3) to make the determinations under R.C. 4906.10(A)(2) and (3) regarding the impacts of sound during operation of the facility and to issue the Certificate to Yellow Wood.

9. Contrary to the Residents' assertions solar facilities are not required to comply with the operational sound level for wind facilities set forth in O.A.C. 4906-4-09(F)(2).

The Applicant is perplexed by the Residents' misplaced assertion that the Board should impose on this solar Project the nighttime operational sounds level set forth in O.A.C. 4906-4-08(A)(3) that is strictly applicable only to wind facilities. The operations of a wind facility is vastly different from a solar facility, as a wind facility operates 24 hours a day, where as a solar facility does not operate at night. As explained above, the only component of the Project that will operate at night is the substation step-up transformers. The nighttime noise levels of the transformers at non-participating residences were found to be 35 dBA or less, which are below the limit of 38 dBA established for the Project, which Yellow Wood has committed to not exceed.[113] Thus, the Residents' proposal is nonsensical and unnecessary and should be rejected.

10. The record contains the necessary information for aviation under O.A.C. 4906-4-07(E), and the Stipulation and record enable the Board to determine the compliance with R.C. 4906.10(A)(2), (3), (5), and (6).

O.A.C. 4906-4-07(E) provides that an applicant will "[p]rovide confirmation that the owners of [airports within five miles of the project] have been notified of the proposed facility and any impacts it will have on airport operations." The record reflects that Yellow Wood did inform the two private airports.[114] However, the Residents attempt to mislead the Board by skewing the Applicant's response to a data request that stated it was "engaging with these private facilities

[112] Jt. Ex. 1 at 9, Condition 29.
[113] App. Ex. 1, Ex. K; App. Ex. 4; App. Ex. 27 at 6.
[114] App. Ex. 6 at 2.

regarding the Project and will also notify these private facilities at least 60 days prior to construction commencement."[115]

In addition to this verification, Yellow Wood provided the 14 Determinations of No Hazard from the Federal Aviation Administration ("FAA") confirming that Yellow Wood would not be a hazard.[116] As a governmental entity, the FAA, prior to issuing the DNHs went through a public notification and comment period process that provided an opportunity for stakeholders to comment on the potential effects a project might have on the navigable air space. This process, couple with the Applicant's outreach to the airports, evidences that the Applicant is in compliance with the O.A.C. requirements.

Thus, the Residents' assertion that Yellow Wood did not comply with O.A.C. 4906-4-07(E) is misguided, at best, and, based on the record evidence, the Board is able to determine compliance with R.C. 4906.10(A)(2), (3), (5), and (6).

11. The record contains the information required by O.A.C. 4906-4-07(D) regarding the volume and disposal destinations for solid waste and debris, and the Stipulation and record enable the Board to determine compliance with R.C. 4906.10(A)(2), (3), and (5).

The Residents asserts that Yellow Wood has not provided sufficient information in response to the questions posed by O.A.C. 4906-4-07(D)(2) for the Board to make its decision in this matter. The rules complained of by the Residents request information estimating the amount of solid waste the Project will generate during construction and operation, as well as information on the "proposed method of storage, treatment, transport, and disposal of the wastes" (*emphasis added by the Residents in their Initial Brief*).[117]

Initially, the Applicant notes that the rules contained in O.A.C. 4906-4-07(D)(2), as with all the rules in O.A.C. 4906-4, apply to all types of generation facilities, including nuclear, coal, combined cycle gas, solar, and wind. Each generation type has unique characteristics and components that are known to the industry and the regulatory agencies. For example, applicants requesting a certificate for a wind-powered generation facility would need to provide information concerning blade shear, ice throw, and shadow flicker, whereas such information is not applicable

[115] *Id.*
[116] App. Exs. 6 and 8.
[117] Residents Br. at 21.

or required for a solar facility.[118] Similarly, the type and extent of the information required in response to the O.A.C. rules varies based on the type of generation facility proposed in a given application. Based on the emphasis added by the Residents in their brief, the Residents seem to suggest that Yellow Wood will be storing, treating, and transporting hazardous waste.[119] However, while this information may be applicable to such generation facilities as nuclear and coal, the regulatory agencies are well aware of the fact that solar facilities do not generate hazardous waste.

With regard to the Residents' search for an estimate of the amount of solid waste, which is far less of a concern than hazardous waste, one has only to review the Application to know that all of the essential information in response to this query is contained therein. The Application reflects that the following components will be used for the Project: over 740,000 solar panels; metal racking for the panels; metal piles that will be mounted on the racking; several groups of electronic components, including inverters, step-up transformer, and combiner boxes; collection lines; and a collector substation.[120] As also documented in the Application, these facility components will generate the types of solid waste materials typically found during construction, including "primarily plastic, wood, cardboard and metal packing/packaging materials, construction scrap, and general refuse." The Application goes on to explain that facility operations will not result in generation of debris or solid waste and the small mount generated by the operations and maintenance facility will be nonhazardous and will be managed and disposed of in accordance with federal, state, and local regulations.[121] The Application is a package and the information therein must be reviewed and read in total. Moreover, in the Staff Report, Staff verifies that "[t]he Applicant's solid waste disposal plans would comply with solid waste disposal requirements set forth in R.C. Chapter 3734."[122] Thus, contrary to the Residents' view, the Applicant has provided and the record contains all of the information needed for the Board's review and consideration of the volume and disposal of solid waste.

Additionally, the Residents claim that the Board somehow cannot assess the environmental impact of the Project and is unable to issue a certificate, because Yellow Wood failed to (1) include "an estimate of the . . . amounts of debris and other solid waste" generated during construction and operation; and (2) "[d]escribe the proposed method of storage and disposal" of such

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118 *See* O.A.C. 4906-4-08((A)(7) through (9).
119 Residents Br. at 21.
120 App. Ex. 1 at 5-10.
121 *Id*. at 43.
122 Staff Ex. 1 at 36.

wastes.[123] To the contrary, as noted previously, the Board is fully capable, based on the totality of the record, to determine the Project's probable impacts with respect to waste and issue a Certificate for the Project.

The truth is that the rules do not require, as the Residents suggest, that the Application include the "volume" of waste or that its "estimate of the . . . amounts" of waste be numerical. Similarly, a plain reading of the rules shows that they do not require that the Application identify the "destinations of disposal" of the waste. What the Application does, in fact, provide are estimates of the amount of waste and Yellow Wood's plans or "proposed methods" to manage the waste. Such information in the record is more than sufficient for the Board to assess the Project's environmental implications with respect to waste. For example, Yellow Wood estimated that some amount of solid waste would be generated during construction, but it would be very limited.[124]

Finally, as committed to in the Application, all waste will be reused, recycled, or disposed of in accordance with applicable law. Notably, construction and operation of the Project will generate no hazardous waste.[125] Regardless, Yellow Wood has committed that, at the time of Project decommissioning and removal, retired panels and their components that are not recycled or repurposed, which are then marked for disposal, will be sent to an engineered landfill with various barriers[126]

Therefore, the Residents' assertion that Yellow Wood did not comply O.A.C. 4906-4-07(D) regarding the volume and disposal destinations for solid waste and debris is unfounded and the Stipulation and record enable the Board to determine compliance with R.C. 4906.10(A)(2), (3), and (5).

[123] Residents Br. at 26-27.
[124] App. Ex. 1 at 43.
[125] *Id*. at 43-45.
[126] Jt. Ex. 1 at 12.

12. The Stipulation and record enable the Board to determine the probable environmental impacts from the facility regarding drainage and flooding and that the facility represents the minimum adverse environmental impact in compliance with R.C. 4906.10(A)(2), (3), and (5), and the record contains the information required by O.A.C. 4906-4-07(C).

The Residents claim that the Board cannot issue a certificate without certain information enumerated in O.A.C. 4906-4-07(C) regarding the Project's compliance with water quality regulations.[127] The Residents contend Yellow Wood has not provided the information pursuant to O.A.C 4906-4-07(C), namely:

- During construction: an estimate of the quality and quantity of aquatic discharges and plans to mitigate the effect.

- During operation: a quantitative flow diagram or description for water and water-borne waste through the facility that shows the potential sources of pollution.

On the contrary, the Application included the information relative to the applicable water quality requirements in accordance with the requirements of O.A.C. 4906-4-07, as the rule expressly allows an applicant to substitute all or portions of documents filed to meet federal, state, or local regulations. In the Application, the Applicant specifically identified the permits it needs for the Project to demonstrate compliance with water quality issues. As explained further below, those permits are comprised of nationwide and general permits issued pursuant to state and federal water quality regulations. For example, the Project will comply with and obtain the Ohio EPA Stormwater Pollution Prevention Plan ("SWPPP"), National Pollutant Discharge Elimination System ("NPDES") OH000005 general permit.[128] The SWPPP permit application, as well as the other applications, which will be reviewed by the state and federal agencies charged with determining compliance with water quality regulations, do not require submission of the categories of information that the Residents are seeking. Because that information is not relevant to the agencies' determination of compliance with applicable water quality regulations, it should not be deemed a necessary element of this Application.

Further, the Residents' contention that no information was provided regarding the quantity of water is incorrect. For construction, the record reflects that, while water will be used for site

[127] Resident Br. at 22-23.
[128] App. Ex. 1 at 37.

preparation and grading activities, during earthwork for the grading of roads and other components, the main use of water will be for compaction and dust control. All water used will be brought in from off-site sources as needed. Water for site preparation, grading, concrete, and dust control will be brought by 3,500-gallon water trucks. Operation of the facility will not require the use of water for cooling or any other activities, nor will the facility operation involve the discharge of water or waste into streams or water bodies and is not expected to impact water quality.[129]

Further, this is a good example of how the Residents have confused how this rule applies to this renewable energy solar Project versus how its applicability to historic fossil fuel and nuclear facilities. There is no dispute that the construction and operation of fossil fuel and nuclear facilities result in aquatic discharges and sources of pollution. Where, as the record in this case confirms, solar facilities, such as Yellow Wood, do not result in aquatic discharges and do not create a source of pollution.[130] Once again the Residents confuse this solar facility with other generation facility types, such as fossil fuels and nuclear, whose responses to these questions would be more in-depth because they actually utilize water for cooling and other activities, whereas solar facilities do not.

Thus, contrary to the unsubstantiated claims of the Residents, the record reflects that Yellow Wood has complied with O.A.C. 4906-4-07(C) and the Board is able to determine the environmental impacts from the facility regarding flooding and that the facility represents the minimum adverse environmental impact in compliance with R.C. 4906.10(A)(2), (3), and (5).

13. The Stipulation and record enable the Board to determine the impact of pollution from the Project in compliance with R.C. 4906.10(A)(2), (3), and (5), and the record contains the information required by O.A.C. 4906-4-07(C).

Here the Residents reiterate their claim that the Board cannot issue a certificate without certain information enumerated in O.A.C. 4906-4-07(C) regarding the Project's compliance with water quality regulations asserting pollution from the facility.[131] On the contrary, the Application included the information relative to the applicable water quality requirements in accordance with the requirements of O.A.C. 4906-4-07, as the rule expressly allows an applicant to substitute all or portions of documents filed to meet federal, state, or local regulations. As noted above, the

[129] App. Ex. 1 at 10-11.
[130] *Id*. at 54-55.
[131] Residents Br. at 24-26.

Applicant specifically identified the permits it needs for the Project to demonstrate compliance with water quality issues.[132] Those are comprised of nationwide and general permits issued pursuant to state and federal water quality regulations.

O.A.C. 4906-4-07 states that it is to be used to determine whether the facility will comply with regulations for, *inter alia*, water pollution and asks that the applicant provide information on compliance with water quality regulations. In order to assess such compliance, it is appropriate to identify what water quality regulations apply to the proposed Project. The Application confirms that the Project will not generate industrial wastewater or storm water from its operations. Rather, the Project will involve application under the Clean Water Act for Section 404 nationwide permits, a Section 401 water quality certification from the Ohio EPA, and, like any construction project where earthwork is involved, the Project will have to comply with, and obtain the Ohio EPA SWPPP, NPDES OH000005 general permit.[133] These are the applicable water quality permits for the Project. Further review of these permits confirms that the categories of information identified in O.A.C. 4906-4-07(C) are not required to be submitted to the environmental agencies tasked with evaluating compliance with water quality regulations, as they are not required to be included in the applications for coverage under these permits. The Applicant again notes that, with regard to the quantity of water, the Residents ignore that Yellow Wood is held to the standard established by the Ohio courts that landowners cannot unreasonably interfere with the flow of surface water to the detriment of their neighbor.[134]

O.A.C. 4906-4-07(A) provides that "[w]here appropriate, the applicant may substitute all or portions of documents filed to meet federal, state, or local regulations." Had the Applicant submitted the documents filed to meet the federal, state, and local water quality regulations, those applications before those other agencies would not have included any of the information the Residents seek. This further confirms that the information the Residents are seeking is not required for the Board to evaluate the Project's compliance with water quality regulations. The Applicant has confirmed that these permit applications will be submitted to the applicable regulatory agencies prior to the commencement of construction with the Project, demonstrating compliance with the applicable water quality regulations.[135]

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[132] App. Ex. 1 at 37.
[133] *Id*.
[134] *See McGlashan* at *60.
[135] App. Ex. 1 at 37.

Because the Applicant has identified all permit requirements applicable to water quality compliance in its Application, has confirmed that it will be timely filing all associated permit applications, and has demonstrated that those applications to do not require the submission of the information sought by the Residents, the absence of such information does not prohibit the Board from determining compliance with R.C. 4906.10(A)(2), (3), and (5) and issuing the Certificate.

14. The Stipulation and record enable the Board to determine the probable environmental impacts on wildlife and plants and that the facility represents the minimum adverse environmental impact in compliance with R.C. 4906.10(A)(2) and (3), and the record contains the information required by O.A.C. 4906-4-08(B).

O.A.C. 4906-4-08(B)(1) required Yellow Wood to:

> [p]rovide the results of a literature survey of the plant and animal life within at least one-fourth mile of the project area boundary…and [c]onduct and provide the results of field surveys of the plant and animals species identified in the literature survey.

O.A.C. 4906-4-08(B)(3) required Yellow Wood to:

> Provide information regarding potential impacts to ecological resources during operation and maintenance of the facility…describe the procedures to be utilized to avoid, minimize, and mitigate both the short- and long-terms impacts of operation and maintenance…and describe plans for post-construction monitoring of wildlife impacts.

The Residents allege that the Applicant failed to conduct the requisite plant and wildlife surveys and failed to provide the required information.[136] This is patently false. The record clearly indicates that the Applicant has fully complied and provided the above requisite information in accordance with O.A.C 4906-4-08(B) pertaining to plants and wildlife.[137] The only support for the Residents' accusations are responses during cross-examination of Applicant Witness Rupprecht, which the Residents misconstrue and misinterpreted phrases from the Application.[138] Mr. Rupprecht's prefiled testimony states that the information on the existing wildlife and plant species in the Project Area was obtained from a variety of sources, including: desktop review and field verification of ecological and environmental resources within the Project Area; observations

136 Residents Br. at 26-29.
137 *See e.g.,* App. Ex. 1, Exs. C, S.
138 *See* App. Ex. 1; Tr. I at 86.

during on-site surveys, and correspondence with federal and state agencies."[139] The fact that the Applicant did conduct a literature review is further supported by the record evidence in the Application itself and the numerous explanations of the surveys and studies conducted for the Project.[140]

With regard to their allegation pertaining to the mitigation and monitoring efforts for the Project, the Residents blatantly ignore the numerous commitments made by the Applicant in the Application, as enhanced by the Stipulation. Specifically, Yellow Wood has committed to, *inter alia*:

- Adhere to seasonal cutting dates of October 1 through March 31 for the removal of trees three inches or greater in diameter to avoid impacts to Indiana bats, Northern Long-eared bats, Little Brown bats, and Tricolored bats, unless coordination with the Ohio Department of Natural Resources ("ODNR") and the United Stated Fish and Wildlife Service ("USFWS") allows a different course of action.[141]

- Contact Staff, the ODNR, and the USFWS within 24 hours if, during construction, Yellow Wood encounters state or federally listed species. In addition, 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.[142]

- Conduct no in-water work in perennial streams from April 15 through June 30 to reduce impacts to aquatic species and their habitat; avoid construction in upland sandpiper preferred nesting habitat types shall during the species' nesting period of April 15 through July 31; and avoid construction in Northern Harrier preferred nesting habitat types during the species' nesting period of April 15 through July 31, unless coordination with the ODNR reflects a different course of action.[143]

- Take steps through appropriate seed selection and annual vegetative surveys to prevent the establishment and/or further propagation of invasive plant species and noxious weeds during implementation of any pollinator-friendly plantings, as well as during construction, operations, and decommissioning activities - if noxious and invasive weeds are found to be present, the Applicant will remove and treat them with herbicide as necessary and allowed by law.[144]

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139 App. Ex. 1, Ex. S; App. Ex. 21 at 18.
140 App. Ex. 1, Exs. C (Site Characterization Study Report), S (Ecological Assessment), and R (Wetland and Waterbody Delineation Report).
141 Jt. Ex. 1 at 6, Condition 18.
142 *Id*. at 7, Condition 19.
143 *Id*. at 7-8, Conditions 22-24.
144 *Id*. at 8, Condition 25.

Accordingly, the Stipulation, along with the information and documentation found in Application Exhibit S (Ecological Assessment), along with the Application Exhibits C (Site Characterization Study Report) and R (Wetland and Waterbody Delineation Report) and of the Application,[145] and the supporting testimony thereto, provides all of the requisite information and more in compliance with O.A.C 4906-4-08(B), thus, enabling the Board to determine the probable environmental impact to species and that the facility represents the minimum environmental impact.

15. The Stipulation and record support that the local public roads will be maintained and returned to equal or better conditions enabling the Board to determine that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternative, and other pertinent consideration, and complies with R.C. 4906.10(A)(3) and (6).

Claiming that construction of the Project will involve various transportation deliveries that will, according to the Residents, "clog" and damage the roads, the Residents take a whole 4 sentences to express their opinion that the Project should not be approved because it will "cause these problems."[146] The Residents cite to no record support for their view and, in fact totally ignore the Stipulation condition that requires Yellow Wood to:

> Prior to commencement of construction activities that require transportation permits, the Applicant shall obtain all such permits. The Applicant shall coordinate with the appropriate authority regarding any temporary road closures, road use and maintenance agreements with the County and applicable townships, as the case may be, driveway permits, lane closures, road access restrictions, and traffic control necessary for construction and operation of the proposed facility. Coordination shall include, but not be limited to, the county engineer, the Ohio Department of Transportation, local law enforcement, and health and safety officials. The Applicant shall detail this coordination as part of a final transportation management plan submitted to Staff prior to the preconstruction conference for review and confirmation by Staff that it complies with this condition. The Applicant shall update the transportation management plan with any transportation permits received after the pre-construction conference.[147]

Further, although discounted by the Residents, Yellow Wood also conducted a Conceptual Construction Route Study that was submitted with the Application to evaluate the

[145] App. Ex. 1, Exs. O, P; Tr. II at 250-256.
[146] Residents Br. at 29.
[147] Jt. Ex. at 8, Condition 9.

anticipated impact of the construction of the Project on roads and bridges, reviewed the need for improvements prior to construction or likely repairs needed following construction, and evaluated the need for any transportation-related permits and the potential impact on local traffic.[148] Per the study, there are no significant environmental concerns for use of the existing roads for the Project from a transportation perspective.[149] The study also reflected that the roadways within the study area are generally well-maintained rural routes, are in fair to good condition, and are wide enough to handle two-way construction traffic.[150] Yellow Wood has committed that all Project impacts to the local roads, including construction access permits, will be included in the Road Use Maintenance Agreement ("RUMA") the Applicant will develop with Clinton County.[151]

Thus, the Application, as enriched by the Stipulation, and supported by expert testimony, provides all of the requisite information regarding the local roads to enable the Board to determine the probable environmental impact and that the facility represents the minimum adverse environmental impact in compliance with R.C. 4906.10(A)(3) and (6).

16. The Stipulation and record support that drain tiles and waterways, if impacted, will be repaired to equal or better conditions enabling the Board to determine that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternative, and other pertinent consideration, and complies with R.C. 4906.10(A)(3) and (6).

For this claim, the Residents expound 3 sentences asserting that "the Application contains generic promises to repair tiles and surface waterways that will be damaged by construction…[but] does not identify the locations of the Residents' tiles or describe specific measures…to avoid damage."[152] From their passing statement, it appears that the Residents failed to review the Drain Tile Mitigation Plan submitted with the Application, the Staff Report, or the expert testimony on the record supporting these documents, all of which delineate the studies conducted regarding drain tile in the Project Area.

[148] App. Ex. 1, Ex. B.
[149] App. Ex. 1 at 32, Ex. B; App. Ex. 20 at 3.
[150] App. Ex. 1, Ex. B; App. Ex. 20 at 3-4.
[151] App. Ex. 1 at 32.
[152] Residents Br. at 29-30.

Further, the Residents continue to discount the requirements in the Stipulation and the Board's authority to enforce those requirements under R.C. 4906.97 through 4906.99. As set forth in Condition 30 of the Stipulation, Yellow Wood is required to:

- Ensure neighboring non-participating drainage (including tile) that is connected to the Project Area drainage be maintain or improved as part of the overall Project stormwater and drainage management.[153]

- If any county maintained or private tile that was not previously known or found to connect to the Project Area is discovered, it must be mapped, inspected (visually), and incorporated into the design, the updated design must be provided to the Engineer of Record for approval. Thus, if Yellow Wood changes, alters, or improves site drainage, it must maintain inflow and outflows and ensure non-participating neighbors drainage is not negatively impacted by Project construction or operation.[154]

- As a function of designing the facility, Yellow Wood will: incorporate benchmark conditions of surface and subsurface drainage systems prior to construction, including the location of laterals, mains, grassed waterways, and county maintenance/repair ditches into the civil design calculations for the Project; make efforts to conduct a perimeter dig utilizing a tile search trench and consult with owners of all parcels adjacent to the property, the Clinton County S&W District, and Clinton County to request drainage system information over those parcels; and consult with the County engineer for tile located in a county maintenance/repair ditch.[155]

- With regard to drainage and the complaint resolution plan, for the 5 years of operations of the Project, Yellow Wood will set aside a fund of $50,000.00 for the purpose of investigating claims regarding drain tile. The $50,000 fund represents an initial commitment and is not be construed as a cap. If a claim is submitted through the complaint resolution plan process regarding potentially modified drainage properties on to an adjacent, non-participating parcel, this fund will be used to hire a civil engineer that has done previous work in Clinton County, or an adjacent county, and who is not the Engineer of Record for the Project, to assess the validity of the claim. If it is found that the design or improvements of the Project have adversely modified drainage properties to the detriment of the non-participating landowner, Yellow Wood will immediately correct the drainage configuration and will compensate parcel owners affected for any damage to crops or other agricultural.[156]

[153] Jt. Ex. 1 at 10-11, Conditions 30-31.
[154] *Id.* at 10, Condition 30.
[155] *Id*. at 11, Condition 31(a).
[156] *Id.*, Condition 31(b).

Therefore, contrary to the unsupported view of the Residents, the Application, as enhanced by the Stipulation, and supported by expert testimony, provides all of the requisite information regarding the drain tile and mitigation of such to enable the Board to determine the probable environmental impact and that the facility represents the minimum adverse environmental impact in compliance with R.C. 4906.10(A)(3) and (6).

17. The Stipulation and record support that the facility will not impact food production and complies with R.C. 4906.10(A)(3) and (6).

The Residents' perception that Yellow Wood significantly reduces productive farmland and contributes to "substantial damage" to the food supply is unfounded.[157] The Yellow Wood Project represents approximately 2,397 acres of land use compared to approximately 896,600,000 acres of total farm land in the State of Ohio, which is a .000267 percent use of the approximate total.[158] Additionally, as required by the April 2022 Comprehensive Plan issued by the Clinton County Planning Commission, the Project is not sited within an area that has been selected as Farmland of Statewide importance as designated by the Natural Resources Conservation Service and the U.S. Department of Agriculture.[159] Moreover, it is noteworthy that 33% of Ohio's corn crop goes to the production of ethanol – not for the provision of food products.[160]

Further, without any record support, the Residents inaccurately claim that upon decommissioning the Project site may no longer be suitable for farming.[161] To arrive at this conclusion, the Residents take information from the Application and misconstrue their meaning, which results in a misleading narrative. In actuality, after multiple decades of hosting deep rooted, diverse native plantings that do not get harvested every year, the nutrients and organic matter existing in the top soil at the end of the Project's life cycle, may be some of the best top soil at that time.

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157 Residents Br. at 30.
158 App. Ex. 18 at 12; https://www.nass.usda.gov/Statistics_by_State/Ohio/Publications/Ag_Across_Ohio/2021/aao2103.pdf
159 *Id.* at 12.
160 https://ohiocornandwheat.org/corn-checkoff/ethanol/#:~:text=A%20thriving%20ethanol%20industry%20is,percent%20of%20Ohio's%20corn%20crop.
161 Residents Br. at 31-32.

Thus, the Residents' issue regarding farm land is without merit and the Board is able to determine the probable environmental impact and that the facility represents the minimum adverse environmental impact and is in the public interest in compliance with R.C. 4906.10(A)(3) and (6).

18. The Stipulation and record enable the Board to properly determine the economic impact in compliance with R.C. 4906.10(A)(6) and the record contains the information required by O.A.C. 4906-4-06(E)(4).

The Residents claim the Board cannot make a determination of the public interest of the facility because Yellow Wood did not conduct a negative economic impact study.[162] The Residents' argument is meritless as there is no requirement that an applicant specifically investigate every possible negative economic impact, only that the impacts be studied and reported. O.A.C. 4906-4-06(E)(4) requires applicants to "provide an estimate of the economic impact of the proposed facility on local commercial and industrial activities." The Economic Impact and Land use Analysis Socioeconomic Report submitted with the Application reflects the facts as they were discovered by the expert in an objective and nonbiased manner showing the socioeconomic impacts associated with the Project.[163] The report thoroughly addresses local impacts of the Project, both from construction and operation. The study employed the widely-accepted National Renewable energy Laboratory's Jobs and Economic Development Impact ("JEDI") model and the IMPLAN regional economic modeling systems, as well as data from the Ohio Department of Taxation, which the Staff Report explicitly verified "were appropriate for [the socioeconomic] study and that the estimated impacts reported by the Applicant are reasonable."[164] These models and methodologies have been used by Applicants and accepted by the Board in rendering its decisions to issue certificates to solar developers in previous cases.[165]

The Residents, being opposed to the Project, obviously view the economics of the Project in a negative light. However, negative perspectives by opponents does not equate to true measurable facts. For example, the Residents complain about the possibility of lost value of the agricultural products that will not be produced if the Project proceeds.[166] But this value would accrue to the landowners who want to participate in the Project, and the socioeconomic study need

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162 *Id.* at 32-22.
163 App. Ex. 1, Ex. F.
164 *Id.*; Staff Ex. 1 at 15.
165 *In re Application of Hecate Energy Highland LLC*, Case No. 18-1334-EL-BGN, Order (May 16, 2019); *In re Application of Hecate Energy Highland 4, LLC,* Case No. 20-1288-EL-BGN -EL-BGN, Order (Mar. 18, 2021)
166 Residents Br. at 33.

not address what is in the best economic interest of those landowners, which they obviously are in the best position to judge. Moreover, the Board has determined that unsubstantiated worries expressed by individuals in the local community are not sufficient to determine that a Project is against the public interest.[167] Thus, while the complaints of the Residents in their Initial Brief reflect their negative attitudes regarding the Project, their perspectives do not negate the fact that the methodology used by the to determine the economic impact of the Project as required by the rule, concluded that the Project's net economic impact on the local community will be overwhelmingly positive.[168] Moreover, the Board has concluded that it "must rely squarely on the evidence presented in this case and no on speculation or [conjecture]."[169] The evidence presented in this record reflects that, when balancing the projected economic impacts of the Project, the impacts are positive. Thus, while the Residents hypothesis that the Project "may have some adverse economic impact due to the potential loss of agricultural activity, there is no evidence on the record support their claim.

The Board's duty is to determine whether the Project will serve the public interest, convenience and necessity as required by R.C. 4906.10(A)(6), a review and analysis of the complete record results in the determination that, as a package, the Application, as enhanced by the Stipulation, more than serves the public interest. Thus, this criteria has been met and the Board may determine the Project is in the public interest, convenience, and necessity.

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[167] *See e.g., In re Alamo Solar I, LLC*, Case No. 18-1578-EL-BGN, Order (June 24, 2021) at 105-106 ¶ 293. (Here the Board concluded that there was no evidence of record to support the opposition's contention that the project would lead to an increase in crime in the project area and the Board recognized the safeguards set forth by the application and the stipulation.); *In re Ross County Solar*, Case No. 20-1380-EL-BGN, Order (Oct. 21, 2021) at 36 ¶ 135 (Here the Board concluded that, despite concerns about reduced property values resulting from the project, the expert evidence on the record supported a finding that property values were not expected to decrease.).

[168] App. Ex. 1, Ex. F.

[169] *In re Application of Harvey Solar I, LLC*, Case No. 21-164-EL-BGN, Opinion, Order, and Certificate (Oct. 20, 2022), *citing In re Complaint of Buckeye Energy Brokers, Inc.,* Case No. 10-693-GE-CSS, Entry on Rehearing (Feb. 23, 2021) at ¶ 40.

III. CONCLUSION

As thoroughly set forth in the Applicant's Initial Brief and supported herein, all of the criteria in R.C. 4906.10 have been addressed by the Stipulating Parties in the Stipulation. In addition, all 3 prongs of the test utilized by the Board in its consideration of a stipulation have been met. Therefore, the Board should adopt the Stipulation without modification and issue a Certificate to Yellow Wood.

Respectfully submitted,

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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 these cases. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below this 9th day of December, 2022.

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