

BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Application)	
of Border Basin I, LLC for a)	
Certificate of Environmental)	Case No. 21-277-EL-BGN
Compatibility and Public Need)	

**APPLICATION FOR REHEARING OF INTERVENORS ROBIN L. GARDNER,
MICHAEL J. GARDNER 2011 MARITAL TRUST #1, GARDNER BROTHERS, LLC,
RICHARD SCOTT LEWIS, SARAH LEWIS, THE RICHARD S. LEWIS REVOCABLE
TRUST, DEIDRA L. NOEL, JEFF OVERMYER, AND SHIRLEY OVERMYER**

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Intervenors Robin L. Gardner, Michael J. Gardner 2011 Marital Trust #1, Gardner Brothers, LLC, Richard Scott Lewis, Sarah Lewis, The Richard S. Lewis Revocable Trust, Deidra L. Noel, Jeff Overmyer, and Shirley Overmyer (collectively, the “Residents”) hereby file their Application for Rehearing pursuant to R.C. 4903.10.¹

As their grounds for rehearing, the Residents submit that the Opinion, Order, and Certificate (“Opinion”) of the Ohio Power Siting Board (“Board”) of February 16, 2023 granting a certificate to Border Basin I, LLC (“Border Basin”) is unlawful and unreasonable for the reasons expressed in the following grounds for rehearing:

1. The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Issuing A Certificate To Border Basin Solar Without Receiving The Information Required By OAC 4906-4-08(D)(4)(a) & (e) And R.C. 4906.10(A)(2), (3), and (6) Regarding The Project’s Visual Impacts.

¹ This Application for Rehearing and Memorandum in Support use the following abbreviations for citations: (1) “Application” refers to Applicant’s Exhibit 1, the Application submitted by Border Basin on June 15, 2021; (2) “Narrative” refers to the narrative of the Application; (3) “Application Exh.” refers to the exhibits attached to the Application; (4) “Applicant’s Exh.” refers to the Applicant’s exhibits introduced at the hearing; (5) “Tr.” refers to the transcript of the hearing, which is preceded by the name of the witness and followed by the transcript’s volume, page numbers, and line numbers; and (6) “OAC” refers to the Ohio Administrative Code.

2. The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Issuing A Certificate To Border Basin Solar Without Requiring Mitigation Of Adverse Visual Impacts As Mandated By OAC 4906-4-08(D)(4)(f) And R.C. 4906.10(A)(2), (3), And (6).

3. The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Approving the Project Without Requiring Border Basin To Provide The Information Required By OAC 4906-4-07(C) And R.C. 4906.10(A)(2), (3), (5), And (6) About The Project's Drainage Impacts And Associated Mitigation To Prevent Flooding.

4. The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Failing To Require Border Basin Solar To Provide The Information Required By OAC 4906-4-07(C) And R.C. 4906.10(A)(2), (3), (5), And (6) About The Project's Pollution Impacts And Associated Mitigation.

5. The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Finding That Border Basin Solar Has Provided The Information About The Project's Potential Impacts On Wildlife And Plants Required By OAC 4906-4-08(B) And R.C. 4906.10(A)(2), (3), And (6).

6. The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Erroneously Finding That The Project Provides For Water Conservation Measures As Required By OAC 4906-4-07(C)(3)(e) And R.C. 4906.10(A)(2), (3), (6), and (8).

7. The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Issuing A Certificate To Border Basin Solar Without Obtaining The Information Required By OAC 4906-4-08(A)(3), R.C. 4906.10(A)(2), And R.C. 4906.10(A)(3) Concerning The Project's Potential Operational Noise Impacts.

8. The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Issuing A Certificate To Border Basin Solar Without Identifying Mitigation Measures For Construction Noise Required By OAC 4906-4-08(A)(3)(d), R.C. 4906.10(A)(2), (3), and (6).

9. The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Issuing A Certificate To Border Basin Solar Without Evaluating The Project's Negative Economic Impacts As Required By OAC 4906-4-06(E)(4) And R.C. 4906.10(A)(6).

10. The Board Acted Unlawfully And Unreasonably By Issuing A Certificate Lacking A Deadline For Decommissioning, Because Such A Deadline Is Necessary To Comply With R.C. 4906.10(A)(3).

The bases for this Application for Rehearing and more detailed descriptions of the Board's errors are set forth in the Memorandum in Support below, which is incorporated in its entirety as part of this Application for Rehearing.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

I. Standards for Certification Of Major Utility Facilities

No person may construct a major utility facility without first obtaining a certificate for the facility. R.C. 4906.04. The proposed Project would be a "major utility facility" as defined by R.C. 4906.01(B)(1)(a), because it is designed to generate in excess of 50 megawatts of

electricity. In order for the Board to issue a certificate for a major utility facility, OPSB must hold a hearing on the application. R.C. 4906.07. The Board must render a decision on the record either granting or denying the certificate based on the application as filed, or granting it on such terms, conditions, or modifications as the Board considers appropriate. R.C. 4906.10(A). The Board may not grant a certificate unless it finds and determines, *inter alia*, the following:

- (a) “The nature of the probable environmental impact.” R.C. 4906.10(A)(2).
- (b) “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.” R.C. 4906.10(A)(3).
- (c) “That the facility will comply with Chapters 3704., 3734., and 6111. of the Revised Code and all rules and standards adopted under those chapters....” R.C. 4906.10(A)(5).
- (d) “That the facility will serve the public interest, convenience, and necessity.” R.C. 4906.10(A)(6).
- (e) “That the facility incorporates maximum feasible water conservation practices as determined by the board, considering available technology and the nature and economics of the various alternatives.” R.C. 4906.10(A)(8).

R.C. 4906.10(A)(3) prohibits OPSB from issuing a certificate unless “the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations.” Emphasis added. The dictionary meaning of “minimum” is “the least quantity assignable, admissible, or possible.” The Merriam-Webster Dictionary, “Minimum,” <https://www.merriam-webster.com/dictionary/minimum> (accessed April 8, 2022). Whether R.C. 4906.10(A)(3) requires zero impact or allows some adverse impact depends on how much community damage is the least quantity assignable, admissible, or possible adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations. That is, R.C.

4906.10(A)(3) prohibits OPSB from issuing a certificate unless the facility poses the least quantity assignable, admissible, or possible adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations. As explained below, Border Basin has not demonstrated that its Project achieves the standard in R.C. 4906.10(A)(3) with respect to the many harms that the Project will cause.

Border Basin also has not provided the information required by the Board's rules and R.C. 4906.10(A)(2) that is necessary for the Board to determine the nature of the Project's probable environmental impact under R.C. 4906.10(A)(3). Similarly, Border Basin has not provided the information required by OPSB's rules that is necessary for the Board to determine compliance with R.C. 4906.10(A)(5), (6), and (8).

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

Administrative regulations issued pursuant to statutory authority have the force and effect of law, so an administrative agency such as OPSB is required to follow its own rules. *State ex rel. Cuyahoga Cty. Hosp. v. Ohio Bureau of Workers' Comp.*, 27 Ohio St.3d 25, 27–28, 500 N.E.2d 1370, 1372–73 (1986); *Parfitt v. Columbus Corr. Facility*, 62 Ohio St.2d 434, 436, 437, 406 N.E.2d 528, 530 (1980); *Clark v. Ohio Dep't of Mental Retardation and Developmental Disabilities*, 55 Ohio App.3d 40, 42 (6th Dist. 1988). A citizen is entitled to enforce such an agency's rule against the agency if the citizen is a member of the class which the rule was intended to benefit. *Parfitt*, 62 Ohio St.2d at 436.

R.C. 4906.03(C) requires OPSB to “[a]dopt rules establishing criteria for evaluating the effects on environmental values of proposed and alternative sites.” R.C. 4906.06(A)(6) provides:

(A) An applicant for a certificate shall file with the office of the chairperson of the power siting board an application, in such form as the board prescribes, containing the following information: ... (6) Such other information ... as the board by rule or order may require.

This statutory mandate requires an applicant to submit the information required by OPSB's rules. OPSB has no discretion to allow an applicant to get away with not complying with the rules. OPSB has promulgated OAC Chapter 4906-4 to implement R.C. 4906.03(C) and R.C. 4906.06. Consistent with R.C. 4906.06(A)(6), OAC 4906-2-04(B) requires an application to include the information required by OAC Chapter 4906-4. Notably, OAC 4906-4-01(B) provides that "[t]he board may, upon an application or motion filed by a party, waive any requirement of this chapter other than a requirement mandated by statute." This rule allows OPSB to waive a requirement in that chapter only if a party has filed an application or motion justifying such a waiver.

OAC 4906-3-06(A) requires OPSB's chairman to determine whether an application is complete and complies with the content requirements of the Board's rules, including OAC Chapter 4906-4, before the application can be processed. Border Basin has not obtained waivers of the rule requirements at issue in this case pursuant to OAC 4906-4-01(B). OPSB cannot ignore its own rule-required procedure for granting waivers, nor did it grant any such waivers of the requirements at issue.

Neither R.C. 4906.10(A) nor OAC Chapter 4906-4 allows OPSB to pick and choose which rule requirements it will consider in deciding whether the criteria in R.C. 4906.10(A) are met. Just because an application contains thousands of pages of information on some potential Project impacts does not mean that the applicant or OPSB is allowed to ignore or gloss over other harms. For example, OPSB cannot find that a facility complies with R.C. 4906.10(A)(2) or (3) if an applicant has neglected to demonstrate pursuant to OAC 4906-4-08(A)(3) that the project will not cause a noise nuisance, even if the applicant has shown that no other types of

harm are of concern. In this case, the gaps in rule-required information are myriad and substantial.

OAC Chapter 4906-4 is an integral component of the process set up by R.C. 4906.06 and R.C. 4906.07 to provide members of the public with the information they need to provide the Board with informed input on a project that could impact them. The applicant is required to publish public notices notifying the public about the application and where to find a copy of the application for review. R.C. 4906.06(C); OAC 4906-3-06(C)(4) & (5), 4906-3-07, & 4906-3-09. R.C. 4906.07(A) instructs OPSB to schedule the hearing only after receiving a complete application “complying with section 4906.06 of the Revised Code.” Thereafter, the Board must conduct a hearing to obtain evidence from the parties and the public, including intervenors. R.C. 4906.07(A). The fairness and accuracy of this process depend on the applicant’s provision of rule-compliant information.

An intervenor’s right to conduct discovery cannot compensate for an applicant’s failure to comply with OAC Chapter 4906-4. Many of the studies required by these rules do not exist until an applicant generates them, so intervenors are unable to obtain this information through discovery. For example, the field surveys for plants and wildlife in the Project Area required by OAC 4906-4-08(B) ordinarily do not exist unless the applicant conducts them. Citizen intervenors have no access to the participating landowners’ land, so they cannot conduct these surveys themselves. That is why the rules require the applicants, not the Staff or intervenors, to produce the necessary information. Moreover, it is only fair to require applicants to produce the information necessary to prove that the developments from which they will benefit financially will not harm the public.

In this case, the evidentiary record lacks much of the information required by OAC Chapter 4906-4. The Board may not issue a certificate without this information. The missing information is necessary for the Residents to participate meaningfully in the hearing process. This information is also needed for the Board to make sound decisions under the R.C. 4906.10(A) criteria, namely, whether to approve the Project, and if so, how it should be designed to minimize the Project's impacts on the Residents. The Residents would be prejudiced by OPSB's failure to comply with these rules, and they have standing to seek OPSB's compliance with its rules.

Many of Border Basin's rule violations stem from its failure to provide definitive designs and mitigation plans for the various types of damage its Project can cause. Border Basin's widespread lack of commitments stem from its failure to include final design plans in the Application for the public to review and test and for the Board to act on. This strategy, if allowed by the Board, would eviscerate the public's right to meaningful input into the Board's decision-making on this Application.

Few, if any, other government entities approve building projects without first reviewing final design plans. This procedure is all the more egregious given that the OPSB process supplants local zoning that most certainly would have required final design plans so that the approving authority, with public input, could tell what it is approving. In this case, Border Basin's disregard for the Board's rule requirements has produced a Project design that is not approvable.

III. PROCEDURAL FLAWS IN THE PROCEEDING

Border Basin's notice of the first public information meeting did not go out to all of the neighbors it should have. Metcalf, Tr. I 38:21-23. Applicant witness Metcalf acknowledged that

Border Basin held a second public information meeting on August 16, 2022 in order to make sure everyone who did not receive the notice for the first public information meeting had a chance to participate. Metcalf, Tr. I 37:5-12, 38:21-24.

Border Basin's faulty notice deprived some of the Residents of the time necessary for them to find counsel. Lewis, Tr. I 144:22 – 145:1, 145:11-17; Gardner, Tr. I 176:8 – 177:21 (explaining that an attorney helped her out by filing her petition to intervene and written direct testimony, but that he was not representing her in this case); Gardner, Tr. I 178:16-24 (explaining that, although her name is on Border Basin's list of persons purportedly served with notice of the August 16, 2021 public information meeting, she received no notices until January 18, 2022); Gardner, Tr. I 180:8-10 (advising that she was deprived of the time necessary to find counsel for the case). As a consequence of the delay of notice, Ms. Gardner lacked the time necessary to find an attorney who would represent her prior to filing her written direct testimony, which was excluded from admission upon Border Basin's request due to the fact that it was filed on behalf of Ms. Gardner's trust as well as herself. Tr. I 175:7 – 177:21.

Border Basin's flawed service of these notices adversely impacted the Residents' ability to find lawyers in time for the hearing and impaired their testimony and cross-examination at the evidentiary hearing despite the bench's professionalism in guiding them at the hearing. Nevertheless, their testimony and questions from them and the bench, along with Border Basin's deeply flawed Application, have exposed numerous grounds for denying the certificate.

The contents of Sections I, II, and III above are incorporated by reference into the Grounds for Rehearing in Section IV below.

IV. GROUNDS FOR REHEARING

Grounds for Rehearing No. 1:

The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Issuing A Certificate To Border Basin Solar Without Receiving The Information Required By OAC 4906-4-08(D)(4)(a) & (e) And R.C. 4906.10(A)(2), (3), and (6) Regarding The Project's Visual Impacts.

One of the most critical issues in this case is the Project's visual impact on the Residents from the solar arrays and substation.² This grounds for rehearing pertains to the substation's visual impact, while the second grounds for rehearing deals with aesthetic problems from both the solar arrays and the substation.

Eight nonparticipating residences are clustered in close proximity around the substation site. These eight residences are depicted as reddish dots on the corrected version of the Project Constraints Map in Figure 4-1. Applicant's Exh. 10, Response to Fourth Data Request from Staff, Attachment 1, Figure 4-1.

One of these residences is located at 4160 Township Road 238, Arcadia, Ohio, which is the home of Jeff and Shirley Overmyer. Overmyer Exh. 9, Jeff Overmyer Direct Testimony, pp. 2-3. Border Basin failed to include the Overmyers' home on the original Project Constraints Map for the Project until the Overmyers brought this omission to the Staff's attention. *Id.*, p. 3; Applicant's Exh. 10, Response to Fourth Data Request from Staff, p. 1 and Attachment 1, Figure 4-1. This oversight is remarkable given Mr. Overmyer's discussions with Border Basin about the impact of the substation on the Overmyers' residence. Overmyer Exh. 9, Jeff Overmyer Direct Testimony, p. 3. However, Border Basin's acoustics consultant did identify the Overmyers' residence as noise sensitive receptor 443 in the acoustics report. Applicant's Exh.

² All references to the “substation” in this brief are to the “Project substation” as identified on Page 10 of the Application Narrative, and not to the “collector substation.”

10, Response to Fourth Data Request from Staff, Attachment 2; Application Exh. N, Figure 9, pdf p. 32. A comparison of the original and corrected versions of the Project Constraints Map in Figure 4-1 reveals that the reddish circle added to depict the Overmyers' residence in the corrected version is located across the road from the substation site to the east.

Despite the Overmyers' requests that the substation be moved farther away from them, Border Basin has moved it only 300 feet further away for a total distance of only 600 feet. Overmyer Exh. 9, Jeff Overmyer Direct Testimony, pp. 3-4; Metcalf, Tr. I 29:10-15. Figure 1 of Applicant's Response to the Fifth Data Request portrays the new location for the substation, and shows that this location is situated slightly to the northeast of the Overmyers' residence.

The Overmyers have a recreational pond between their house and the Project Area, currently with a scenic view of the sunset and a farm field. Overmyer Exhs. 3, 4, 7, 8. Corrected Application Figure 4-1 and Figure 1 of Applicant's Response to the Fifth Data Request show that there is no tree screen between the substation site and the Overmyers' property. Obviously, the substation's visual appearance will impair the enjoyment of the Overmyers' residence and yard, as well as injure other nearby nonparticipating residents.

Border Basin points out that it moved the substation 300 feet further away from the Overmyers' residence after discussions with them. Metcalf, Tr. I 29:10-15. However, the previous design had sited the substation only a little more than 300 feet from Overmyers' house. *Id.* Even with the added distance, the substation site is only a little more than two football fields away from the Overmyers' house. The substation's imposing structure with its ugly view and intrusive lights will destroy the Overmyers' quality of life. It is too close to the homes of the Overmyers and other neighbors and should not be approved for that location.

The Application provides scant detail on the dimensions or appearance of the substation. Border Basin's Response to First Data Request states that the highest structure on the Project will be 60 to 90 feet high, which might refer to the substation, but that is not stated. Applicant's Exh. 6, p. 15, answer 23. The report of Border Basin's history/architecture consultant, Kramb Consulting, LLC, complained about the lack of information about the substation's projected appearance, stating:

The project will include a substation with lighting that may be 50-feet in height; however, no additional details of the substation design or other project specifics are known at this time.

Application Exh. R, p. 1. Border Basin has not provided even the most rudimentary information about the appearance of the Project substation, not even its height. The Application does reveal that the substation will occupy 2.7 acres (Application Narrative, p. 10), so its presence will be substantial and imposing. However, without knowing anything about the substation's appearance, the Board cannot assess its impacts on the views of nearby residents, motorists, or anyone visiting the vicinity, whether those views are from residents' homes and yard, the public roads, historic or cultural venues, or anywhere else.

OPSB's rules are designed to provide the information needed to assess the aesthetic impacts of a solar facility. To evaluate a project's visual impacts, OAC 4906-4-08(D)(4)(e) requires an applicant to do the following:

(4) Visual impact of facility. The applicant shall evaluate the visual impact of the proposed facility within at least a ten-mile radius from the project area....The applicant shall:

(e) Provide photographic simulations or artist's pictorial sketches of the proposed facility from public vantage points that cover the range of landscapes, viewer groups, and types of scenic resources found within the study area. The applicant should explain its selection of vantage points, including any coordination with local residents, public officials, and historic preservation groups in selecting these vantage points.

Emphasis added. The purpose of this requirement is clear on its face: an applicant must provide a visual image of its project so that the public and the Board can visualize its appearance and figure out measures to mitigate its visual impacts.

The evidentiary record in this case contains no photographic simulation or pictorial sketch of the substation. Metcalf, Tr. I 26:14 – 27:5. Border Basin’s project manager thought that the system impact study report by PJM might contain “initial single line drawings” of the substation, but it does not. Metcalf, Tr. I 26:25 – 27:5; Applicant’s Exh. 1, Exh. F.2. Nor would a single line drawing actually depict the substation’s appearance, since that is just a flow diagram for the transmission of electricity. Border Basin’s post-hearing briefs identify any simulation or sketch, even though the Residents’ initial post-hearing brief discussed this deficiency. Instead, Border Basin’s brief is an exercise of misdirection concerning the lack of simulation or sketch for the substation, seeking to divert OPSB’s attention away from this omission by discussing other aspects of the company’s visual impact analysis. See Border Basin’s post-hearing reply brief at pages 7-11.

The Staff’s post-hearing reply at least acknowledges the issue, but argues that the lack of a sketch or simulation of the substation does not violate OAC 4906-4-08(D)(4)(e). See the Staff’s post-hearing reply brief at page 8, asserting that the rule does not require an applicant to “specifically study substations for visual impacts.” Regrettably, this is the rationale that the Board’s Opinion adopts, opining:

There is no requirement that the probable environmental impacts specifically assignable to the substation be presented and analyzed. Instead it is this Board’s obligation to find and determine the nature of the probably visual impact of the Facility as a whole.

Opinion, p. 70, ¶ 152. The Opinion then discusses other aspects of the visual impact analysis, ignoring the fact that Border Basin chose not to provide a simulation or sketch to reveal the planned appearance of the substation.

The Staff's position as adopted by the Board misinterprets and misapplies the requirement in OAC 4906-4-08(D)(4)(e) that an applicant "[p]rovide photographic simulations or artist's pictorial sketches of the proposed facility."³ Emphasis added. The rule does not state that an applicant need only simulate or sketch just part of the facility, and it certainly does not state that an applicant need only simulate or sketch whatever part of the facility it wishes to portray. This rule language requires Border Basin to simulate or sketch the entire facility, rather than providing misleading portrayals of certain, less impactful aspects of the facility while hiding the facility's worst features.

The term "facility" as used in OAC 4906-4-08(D)(4)(e) is defined by OAC 4906-1-01(W) to mean "the proposed major utility facility and all associated facilities." A "major utility facility" is "a facility that meets the definition of major utility facility set forth in section 4906.01 of the Revised Code." OAC 4906-1-01(A)(A). The "associated facilities" of an electric power generation plant include "rights-of-way, land, permanent access roads, structures, tanks, distribution lines and substations necessary to interconnect the facility to the electric grid, water lines, pollution control equipment, and other equipment used for the generation of electricity." OAC 4906-1-01(F)(3) (emphasis added). Thus, the requirement in OAC 4906-4-08(D)(4)(e) to simulate or sketch the proposed "facility" mandates a visual portrayal of the entire facility, including substations.

³ The Opinion specifically adopts the findings of the Staff Report as the findings of the Board. Opinion, p. 64, ¶ 138.

The Board's legal position on this issue allows an applicant to pick and choose what Project features it will visually portray. In this case, the Board is allowing Border Basin to get away with concealing the appearance of the most visible, imposing, and intrusive component of the facility from evaluation by the public and the Board. Allowing an applicant to conceal the appearance of the Project's most injurious view does not, contrary to the Opinion's statement, enable the Board to "find and determine the nature of the probably visual impact of the Facility as a whole." See Opinion, p. 70, ¶ 152.

Border Basin has no good excuse for refusing to portray the substation's appearance. It could have easily provided a sketch or simulation of the substation. Yet the Application contains only five simulations of the Project's appearance, none of which depict the substation.⁴ Visual Impact Analysis, Application Exh. T, Appx. A, pdf pp. 21-26. Border Basin has deprived the public and the Board of the information necessary to show how the substation will appear to and affect the citizens most impacted by it, such as nearby residents and motorists on the road next to the substation. Surely Border Basin has the resources to create another simple simulation or draw a sketch to depict the substation. The Board should not tolerate the company's concealment of this important information. Without this information, the Board lacks the information necessary to comply with OAC 4906-4-08(D)(4)(e). The Board erred by finding the Project to comply with R.C. 4906.10(A)(2), (3), or (6) in the absence of this information.

⁴ Border Basin's post-hearing reply brief contains an irrelevant discussion about 16 photographs that were taken in the vicinity of the Project Area, perhaps seeking to confuse the Board into thinking that more than five simulations were created. These 16 photographs contain no simulations or portrayals of the Project. See Applicant's Exh. 1, Application Exh. T, Visual Impact Analysis, Appx. B, pp. B-1 to B-16, pdf pp. 27-43. The direct testimony of Border Basin witness Shaun Brooks also admitted that only five simulations were done. Applicant's Exh. 32, p. 5, answer 13. Also see the Application's Narrative, refers to the "location of the 16 viewpoints, of which five were chosen to proceed with simulations for." Applicant's Exh. 1, Narrative, p. 67.

Grounds for Rehearing No. 2:

The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Issuing A Certificate To Border Basin Solar Without Requiring Mitigation Of Adverse Visual Impacts As Mandated By OAC 4906-4-08(D)(4)(f) And R.C. 4906.10(A)(2), (3), And (6).

The Board's Opinion accurately notes that "the Project is likely to be visible in the immediate vicinity from locations where vegetation does not screen the views." Opinion, p. 66, ¶ 145. This is consistent with the Application's admission that "[v]iewers in close proximity to the Project may have unobstructed or partially screened views and include adjacent rural residences and travelers along the local roads and highways." Application Narrative, p. 66. As explained above in the first grounds for rehearing, the Overmyers will be exposed to view of the substation, which could be 50 feet high, 60 to 90 feet high, or some other height that the Application does not disclose. Currently, no vegetation blocks the Overmyers' view of the substation site. Overmyer Exhs. 7-8 (photograph showing the view of the substation site); Overmyer, Tr. I 161:14 – 162:14 (identifying the photographs).

Attachment 1 of Border Basin's post-hearing reply brief aptly portrays the visibility of the substation site from the Overmyers' property.⁵ The map in this attachment shows that there is no screening between the Overmyers' property and the substation site. The inset for "existing" "viewpoint" starkly drives this reality home, showing a wide open field between the Overmyers and the substation site. Motorists on Route 238 between the Overmyers' property and the substation also have an unobstructed view of the substation site. The same is the case for motorists on Route 216 to the north of the substation site, as shown by the green line for "Proposed Vegetative Screening" on Attachment 1.

⁵ In response to a motion to strike by the Gardner intervenors, Border Basin's memorandum in opposition and the Board's Opinion (at pp. 39-40, ¶¶ 116, 118) advised that Attachment 1 is not new evidence but is based on evidence admitted during the hearing.

In addition to views of the substation, the Residents will have to endure the awful sight of the solar arrays from their residences and the public roads. For example, Richard and Sarah Lewis live in a house that is directly across the street from the Project Area. Lewis Exh. 1, Lewis Direct Testimony, p. 2. They also have a 20 acre field that will be surrounded on three sides by the Project, and their land has almost 5,100 feet of frontage along the Project Area. *Id.* The Project Area can be seen from every angle and location of their house and land, including everywhere they conduct their farming activities. *Id.* Richard Lewis has lived in this house for most of his life. *Id.* The Lewises were planning to build a new home for them and another residence is planned there for their daughter and her family. *Id.*, pp. 2-3. The Lewis family spends a considerable time outdoors on their property, including picnics under a tree, working in the flower beds, gardening, play softball, driving around the fields in a utility terrain vehicle, cutting firewood, and farming. *Id.*, p. 3. Mr. Lewis spends more time outside than inside. *Id.* Border Basin's Project will ruin the Lewis' enjoyment of these activities unless the Project is disapproved or its views are blocked.

The solar arrays will be as high as 15 feet. See Application Narrative, Page 65, stating that the viewshed analysis assumed the solar arrays could be 15 feet high, "which is the maximum height of the solar modules under consideration by the Applicant for the Project." The short setbacks approved for the Project guarantee that the community will be exposed to unavoidable views of the solar arrays and other Project components, since the setbacks are only 40 feet from public road rights-of-way edges, 50 feet from nonparticipating property lines, 300 feet from nonparticipating residences separated from the Project by a road, and 500 feet from nonparticipating residences not separated by a road. Opinion, pp. 30-31, ¶ 99. These setbacks are inadequate to protect the community's aesthetic values.

Without effective mitigation, the Residents will be exposed to objectionable views of the solar panels and substation for 30 years, and likely longer. To minimize a project's visual impacts, OAC 4906-4-08(D)(4)(f) requires an applicant to do the following:

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

Emphasis added. This provision is a vital component in ensuring that the Project poses the least quantity assignable, admissible, or possible adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations as required by R.C. 4906.10(A)(3) and serves the public interest, convenience, and necessity under R.C. 4906.10(A)(6).

During its fact-finding process, the Staff expressed its concern that “this project is proposed in a more densely populated area than other projects that have been proposed to the Board.” Applicant’s Exh. 6, Response to First Data Request, p. 12. The Staff asked Border Basin to describe its best management practices regarding setbacks and aesthetic mitigation for nonparticipating residents. *Id.* Border Basin’s response included a discussion of fences, setbacks, and vegetative screening. *Id.* Its commitment to vegetative screening is disappointing. Border Basin promised only to “partially screen the Project in views from the nearby residences and roadways” using evergreen trees. *Id.* The company noted that the evergreen trees in the screening will grow only eight feet tall at maturity. *Id.*

However, Border Basin thumbed its nose at the Staff’s request for a landscape plan, refusing to provide OPSB with a landscape plan depicting the locations and species of vegetation to be used at each location until after certification and final design. Applicant’s Exh. 6, Response to First Data Request, pp. 23-24, answer 44. Border Basin represented that it had to

first consult with affected neighbors about the design. *Id.* However, there is no good reason why Border Basin could not have completed this task prior to hearing, since the company has been developing this Project since mid-2018 and has been meeting with “multiple landowners and resident to discuss the Project” since that time. Application Narrative, p. 24.

Importantly, OAC 4906-4-08(D)(4)(f) requires the applicant to describe the measures such as visual screening that “will” be taken to minimize a project’s adverse visual impacts. A promise to provide this information after certification, as required by Condition 23 of the Stipulation, does not satisfy this mandate. Of particular concern is the wording of Condition 23, which provides no assurance that Border Basin’s landscape and lighting plan will satisfactorily mitigate the community’s views of the Project. Condition 23 vaguely states that the plan will “enhance the view from the residence and be in harmony with the existing vegetation and viewshed in the area” and will “address aesthetic impacts to the traveling public, nearby communities, sensitive institutional land uses and recreationalists.” This language provides no objective standards for Border Basin to achieve. This language appears to be designed to let Border Basin plant do whatever it wants with the landscape and lighting plan and requires no more. The public has a right to vet the landscape screening proposed for the Project, and the Board has a duty to evaluate it, rather than delegating this task to the Staff after certification.

Border Basin’s commitment to plant trees that only grow eight feet tall is hardly an effective way to mitigate the Residents’ views of the Project. After all, the solar panels could be as high as 15 feet, and the substation may be 50 to 90 feet high or perhaps some greater height, since Border Basin has not yet revealed its design. Notably, Border Basin did not include a depiction of the substation structure in its “Proposed (at maturity)” inset on Attachment 1 of its post-hearing reply brief. If this had been done, the substation would have loomed high above the

eight-foot trees depicted in the inset. Moreover, Mr. Metcalf admitted that Border Basin has no control over what lighting will be installed on the substation, which is governed by an electrical code and AEP standards. Metcalf, Tr. I 29:21 – 30:8. Border Basin’s lack of authority to design the lighting to reduce its public impact makes the design of an effective vegetative screen paramount in importance.

Surely, Border Basin can do better than planting short trees. Taller species of trees must be available. In addition, the company has provided no definitive information on where the trees will be planted so that the Board and the Residents can figure out whether the vegetative screening will preserve the Residents’ currently pleasant views. A promise to plant short trees at undisclosed locations does not satisfy OAC 4906-4-08(D)(4)(f) or ensure that the Project poses the least quantity assignable, admissible, or possible adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations as required by R.C. 4906.10(A)(3).

OPSB’s decision fails to address any of the foregoing deficiencies. Instead of figuring out and adjudicating a screening plan that will protect the public, OPSB’s Opinion provides only a bare requirement that Border Basin comply with a vague provision in Condition 23 to prepare a landscape plan for the Staff after certification. This final plan is not subject to the current adjudicatory process, but is given over to the unfettered discretion of Border Basin and the Staff. The uncertainty of Border Basin’s screening plans is illustrated by the discussion on Pages 9-10 of Border Basin’s post-hearing reply brief about Attachment 1 to that brief, in which the company advises that it has been “working with AEP to come up with a workable plan for vegetative screening” in the right-of-way for AEP’s transmission line in order to provide screening for the Overmyers and other nearby residents from the substation. This discussion

reveals that, without a final Board-approved landscape and lighting plan, Border Basin's promises for screening are uncertain and meaningless. A binding landscaping plan should have been included in the record, since OAC 4906-4-08(D)(4)(f) requires the Application to "[d]escribe measures that will be taken to minimize any adverse visual impacts created by the facility, including ... visual screening." Then the neighbors could adjudicate the details and adequacy of the vegetative designs chosen for their homes and land. Instead of complying with this rule, Border Basin and OPSB are collaborating to describe these measures in a final, post-certificate plan instead. Border Basin has provided no good reason for not producing a final plan in the Application for public scrutiny and input. OPSB's refusal to require it is inexcusable.

The vague promise in Condition 23 for a future landscape plan does not comply with R.C. 4906.10(A)(2), R.C. 4906.10(A)(3), or R.C. 4906.10(A)(6). The Board's finding that this scheme complies with the R.C. 4906.10(A) criteria is erroneous. Opinion, pp. 10, 59-60, 62, 70, ¶¶ 43, 131, 136, 153. The Board should rehear and correct this issue to provide effective mitigation, or deny the certificate if effective mitigation cannot be accomplished.

Grounds for Rehearing No. 3:

The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Approving the Project Without Requiring Border Basin To Provide The Information Required By OAC 4906-4-07(C) And R.C. 4906.10(A)(2), (3), (5), And (6) About The Project's Drainage Impacts And Associated Mitigation To Prevent Flooding.

Border Basin's hydrologic report notes that the Project Area's soils are "primarily" of the soil types on groups C and D. Applicant's Exh. 1, Exh. O, Hydrologic Assessment, p. 3. The infiltration rates for Type C and Type D soils are "slow" and "very slow," respectively, when thoroughly wet. *Id.*, Appx. B, pdf p. 50. Not surprisingly, then, the report finds that areas of the Project Area may be subject to occasional flooding. Applicant's Exh. 1, Exh. O, Hydrologic Assessment, p. 3. The neighborhood around the Project Area, especially near the proposed

substation site, is already subject to chronic flooding, as revealed in the testimony and photographs of Jeff Overmyer and Deidre Noel. Tr. I 149:1 -153:14, 155:9-20, 183:8 - 185:16; Noel Exh. 1, Noel Direct Testimony, answer 4. In one area, water flows over a public road after a precipitation event of only a couple of inches. Tr. I 153:6-10.

Although the Federal Emergency Management Agency (“FEMA”) delineates floodplains for streams, it does not perform this exercise for smaller streams such as those in the Project Area. Hynes, Tr. I 79:6-13. The Project Area contains no streams large enough to be classified by FEMA, so Border Basin’s consultant performed a computer analysis to delineate the floodplains for those streams. Hynes, Tr. I 79:6-13. Border Basin’s hydrology consultant recommended against constructing solar arrays and associated infrastructure in those floodplains to avoid flooding them during heavy rainfall events and identified some mitigation measures in locations “where avoidance cannot be achieved.” Applicant’s Exh. 1, Exh. O, Hydrologic Assessment, p. 7.

Nevertheless, Border Basin’s hydrology study found that the company is planning to install solar arrays in the 100-year floodplains of these streams flowing through the Project Area. *Id.*, p. 7, ¶ 5.1 and Appx. C, Fig. 3, Site Solar Panel Locations Map, pdf p. 59. When asked whether any construction was anticipated in these floodplains, Border Basin’s consultant falsely testified that he did not know because he “just looked at existing conditions strictly.” Hynes, Tr. I 79:21-25. However, Mr. Hynes’ knew that solar panels are planned for these floodplains, because his own map depicts solar arrays to be located in floodplains throughout the Project Area. Applicant’s Exh. 1, Exh. O, Hydrologic Assessment, Appx. C, Fig. 3, Site Solar Panel Locations Map, pdf p. 59.

Recognizing the hazards of constructing solar facilities in a floodplain, the parties to the Stipulation proposed Condition 34 that stated:

Any construction within the FEMA delineated 100-year floodplain shall be coordinated with the local floodplain program administrator.

Jt. Exh. 1, p. 8. However, this condition is pointless window dressing, since the Project Area has no FEMA-delineated floodplains. The Stipulation does not prohibit construction in the floodplains that are actually in the Project Area, nor does it require Border Basin to consult with government floodplain authorities during that construction.

Applicant witness Metcalf testified that Border Basin will continue to study hydrology and drainage “extensively” and that it will follow Ohio EPA’s guidance on post-construction stormwater management for solar panel arrays and the agency’s stormwater permit. Metcalf, Tr. I 34:14-21. Border Basin also stated that it will work with the county engineer and Soil and Water Conservation District to benchmark current conditions for drainage tiles, streams, and ditches. Metcalf, Tr. I 35:6-11. However, Border Basin’s Application does not identify the specific measures that may be taken to avoid flooding, choosing to wait on that task until it implemented the certificate conditions. Hynes, Tr. I 78:7-18.

OPSB’s Opinion shrugs off these harbingers of future drainage problems for the Project. Opinion, pp. 60, 62-63, 70-71, ¶¶ 132, 136, 153. The Opinion surmises that the Project may improve the area’s existing drainage problem if Border Basin uses best management practices required by a stormwater construction permit. *Id.*, p. 60, ¶¶ 132, 136. The Opinion recites the Staff’s belief that no construction will occur in a 100-year floodplain as support for its finding that drainage will not be a problem (*id.*, p. 71, ¶ 153), thus failing to recognize Border Basin’s trickery concerning the distinction between FEMA’s delineation of 100-year floodplains and the reality that the Project will be built in the 100-year floodplains of the Project Area.

To enable the Board to diagnose and address drainage problems from a project, OAC 4906-4-07(C) requires the Board to obtain data about a project's potential for surface water runoff from an applicant prior to approving a project. Rather than making uninformed guesses about whether a project's design and construction will increase the runoff of stormwater from a site by altering the terrain, the Board has promulgated this rule to answer this question ahead of construction rather than finding out when flooding damages the community.

OAC 4906-4-07(C) provides:

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

(2) The applicant shall provide information regarding water quality during construction.

(b) Provide an estimate of the quality and quantity of aquatic discharges from the site clearing and construction operations, including runoff and siltation from dredging, filling, and construction of shoreside facilities.

(c) Describe any plans to mitigate the above effects in accordance with current federal and Ohio regulations.

(d) Describe any changes in flow patterns and erosion due to site clearing and grading operations.

(3) The applicant shall provide information on water quality during operation of the facility.

(d) Provide a quantitative flow diagram or description for water and water-borne wastes through the proposed facility, showing the following potential sources of pollution, including:

(vii) Run-off from soil and other surfaces.

(Emphasis added.) The underlined language requires Border Basin to quantify the amount of water that will flow off the Project Area during construction and operation. For construction, OAC 4906-4-07(C)(2)(b) requires “an estimate of the ... quantity of aquatic discharges from the site clearing and construction operations.” Emphasis added. For construction, OAC 4906-4-

07(C)(2)(d) requires descriptions of any “changes in flow patterns and erosion due to site clearing and grading operations.” Emphasis added. For operation, OAC 4906-4-07(C)(3)(d) requires “a quantitative flow diagram or description for water ... through the proposed facility.” Emphasis added. These water flow estimates and flow patterns are necessary to determine whether site clearing and the existence of impervious solar panels will increase stormwater runoff that could flood downstream properties during and after construction.

Nevertheless, Border Basin’s Application does not provide any of this data. The Application’s section on OAC 4906-4-07 is supposed to provide this information, but a review of this section reveals that no such data were provided. See the Application’s Narrative, pp. 27-36. The only evaluation that Border Basin did of drainage was to determine what segments of the Project are located in the 100-year floodplains of the streams in the Project Area. See Application Exh. O, Hydrologic Assessment, p. § 5.1, describing the study’s results, which are limited to assessing 100-year floodplains.

The Board’s rule requires the numeric calculations necessary to define the differences in drainage volumes before and after construction. Notably, OAC 4906-4-07(C)(2)(b) does not exempt an applicant from providing this data just because a project is assumed not to worsen an area’s drainage. The Board needs, and the Board’s rule requires, volumetric calculations of stormwater so that OPSB can make an independent judgment as to whether the Project will cause flooding and identify any mitigation measures necessary to prevent flooding. Border Basin has ignored those requirements. Instead, Border Basin assumes that no calculations are necessary, because the Project supposedly will not cause drainage problems. However, the very point of producing the rule-required stormwater calculations is to demonstrate whether the Project will create drainage problems. Moreover, if the Project Area already causes flooding or drainage

problems, Border Basin as the lessee of that land has the duty to fix those problems. The data required by rule is necessary to figure out what mitigation Border Basin needs to undertake in order to address these problems.

The welfare of the Project's neighbors depends on the development of water quantity data for the construction and operation of the Project. Without this data, the record does not and cannot identify any mitigation measures that may be necessary to protect neighbors from flooding and drainage problems caused by Border Basin's activities as required by OAC 4906-4-07(C)(2)(c). OPSB should have required Border Basin to provide this data pursuant to OAC 4906-4-07(C) and R.C. 4906.10(A)(2), (3), (5), and (6). The Residents request that OPSB rehear this case to obtain this data or add this grounds as an additional reason for denying the certificate.

Grounds for Rehearing No. 4:

The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Failing To Require Border Basin Solar To Provide The Information Required By OAC 4906-4-07(C) And R.C. 4906.10(A)(2), (3), (5), And (6) About The Project's Pollution Impacts And Associated Mitigation.

OAC 4906-4-07(C) requires the Board to obtain data about a project's potential for water pollution from an applicant prior to approving a project, so that potential pollution problems can be diagnosed prior to construction. Rather than making uninformed guesses about whether the Project's disturbance of the soil will increase the runoff of soil-laden water into streams, the Board has promulgated this rule to answer this question ahead of construction rather than finding out after water pollution damages the streams and the community.

OAC 4906-4-07(C)(1)(d) and OAC 4906-4-07(C)(2)(b) and (e) require Border Basin to provide water quality data and mitigation measures so the Board can evaluate these discharges' impacts:

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

(1) The applicant shall provide information regarding preconstruction water quality and permits.

(d) Describe the existing water quality of the receiving stream based on at least one year of monitoring data, using appropriate Ohio environmental protection agency reporting requirements.

(2) The applicant shall provide information regarding water quality during construction.

(b) Provide an estimate of the quality and quantity of aquatic discharges from the site clearing and construction operations, including runoff and siltation from dredging, filling, and construction of shoreside facilities.

(c) Describe any plans to mitigate the above effects in accordance with current federal and Ohio regulations.

(d) Describe any changes in flow patterns and erosion due to site clearing and grading operations.

(e) Describe the equipment proposed for control of effluents discharged into bodies of water and receiving streams.

(Emphasis added.) The emphasized language requires an applicant to submit information about the quality of surface water flows from the Project Area during construction and operation, such as sediment from erosion carried into the streams. In particular, the Project's construction will expose the soils to precipitation and stormwater runoff. The construction process will include stripping the soils of vegetation, grading the site, and moving the dirt around on the site.

Application Exh. L, Preliminary Geotechnical Exploration Report, pp. 9-10.

Nevertheless, Border Basin's Application does not provide any of this data. The Application's section on OAC 4906-4-07 is supposed to provide this information, but a review of this section reveals that no such data were provided. See the Application's Narrative, pp. 27-36.

These failures are revealed by comparing the contents of this section of the application to the pertinent language of OAC 4906-4-07(C):

OAC 4906-4-07(C)(1)(d):

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

(1) The applicant shall provide information regarding preconstruction water quality and permits.

(d) Describe the existing water quality of the receiving stream based on at least one year of monitoring data, using appropriate Ohio environmental protection agency reporting requirements.

Emphasis added. Border Basin declined to provide this water quality data for receiving streams, stating under the heading for “Existing Water Quality of the Receiving Stream” that “[n]o point source water discharge into streams or waterbodies is associated with the Facility; therefore, there will be no receiving streams and no water quality information is provided for those streams.” Application Narrative, p. 31. Border Basin’s attempted justification for its failure to provide this data is based on an erroneous legal analysis. Compliance with this rule provision does not depend on whether the Project will produce point source discharges. The rule requires an applicant to provide baseline water quality data whether or not its project will have point source discharges. Indeed, the term “point source” does not appear in this rule. The purpose of the baseline water quality data is to enable the applicant and government officials to compare the water quality in the streams in and around the project area prior to construction with water quality during construction and operation. Without that data, no one will know whether the project has impaired the streams’ water quality. Non-point discharges can damage a stream just as badly as point source discharges.

OAC 4906-4-07(C)(2)(b): Provide an estimate of the quality and quantity of aquatic discharges from the site clearing and construction operations.

Border Basin declined to provide this water quality and quantity data for aquatic discharges from site clearing and construction, stating under the heading for “Estimated Aquatic Discharges” that “[p]oint source aquatic discharges to streams or wetlands will not occur during construction of the Project.” Application Narrative, p. 32. However, OAC 4906-4-07(C)(2)(b) is not limited to point source discharges, nor does that term appear in the rule. This rule provision is designed to predict the amount of eroded soil that will flow with the stormwater into receiving streams during site clearing and construction. It matters not whether these stormwater discharges are considered to be point sources or non-point sources. Border Basin further seeks to excuse the absence of estimates of water quality and water quantity by stating that it will follow best management practices pursuant to a Storm Water Pollution Prevention Plan (“SWPPP”) to reduce soil erosion and sedimentation into receiving streams. *Id.* But this promise does not provide the Board with any data on the quality and the quantity of stormwater runoff during site clearing and construction. Without that data, the Board lacks the basis for determining whether runoff from site clearing and construction activities will harm the receiving streams. A vague promise to comply with a SWPPP is not data; the Board’s reliance on a SWPPP that does not yet exist is a default of OPSB’s duty to ascertain what water quality damage will occur so it can make an educated judgment on whether to approve the Project and, if so, what mitigation measures will be required.

(2) The applicant shall provide information regarding water quality during construction.

OAC 4906-4-07(C)(2)(e): Describe the equipment proposed for control of effluents discharged into bodies of water and receiving streams.

Border Basin declined to describe the equipment to be used for controlling stormwater discharges from construction, stating under the heading for “Equipment Proposed for Control of

Effluents” that “[n]o point source water effluent is associated with construction of the Project; therefore, no equipment is necessary for the control of effluent discharge.” Application Narrative, p. 35. Here, again, Border Basin makes the inaccurate assumption that this requirement applies only to point sources. The company is required to identify the equipment to be used to control soil-laden stormwater from leaving the Project Area during construction, but it has made no effort to do so.

Border Basin may argue that supplying the data required by this rule is unnecessary, because the Project will discharge only stormwater. However, stormwater carries eroded soil into streams, and soil is a harmful pollutant. That is why Border Basin is required to obtain a stormwater discharge permit from Ohio EPA for construction, as the Application acknowledges. Application Narrative, p. 30. Also see Applicant’s Exh. 75, the direct testimony of Greg Hynes, pp. 4-5. OAC 4906-4-07(C)(1)(d) and 4906-4-07(C)(2)(b) and (e) provide no exception for stormwater pollution. Moreover, even if Border Basin wants to claim that the Project will not harm water quality, the rule requires Border Basin to prove that assertion by producing water quality data. The very point of producing the rule-required water quality calculations is to demonstrate whether or not the Project will create water quality problems. Telling the Board it does not need these calculations fails to satisfy these legal requirements.

OPSB should have found that Border Basin’s failure to provide this data violated OAC 4906-4-07(C) and R.C. 4906.10(A)(2), (3), (5), and (6). The Residents request that OPSB rehear this case to obtain this data or add this grounds as an additional reason for denying the certificate.

Grounds for Rehearing No. 5:

The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Finding That Border Basin Solar Has Provided The Information About The Project’s Potential Impacts On Wildlife And Plants Required By OAC 4906-4-08(B) And R.C. 4906.10(A)(2), (3), And (6).

OAC 4906-4-08(B) requires an applicant to conduct literature and field surveys of the plant and animal species in the Project Area to assess and mitigate a project's potential ecosystem impacts:

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

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

(c) Provide the results of a literature survey of the plant and animal life within at least one-fourth mile of the project area boundary. The literature survey shall include aquatic and terrestrial plant and animal species that are of commercial or recreational value, or species designated as endangered or threatened.

(d) Conduct and provide the results of field surveys of the plant and animal species identified in the literature survey.

(Emphasis added.) Without this information, OPSB can neither determine the nature of the probable environmental impact under R.C. 4906.10(A)(2) nor find that a project represents the minimum adverse environmental impact under R.C. 4906.10(A)(3).

The Board's Opinion observes:

The presence of four species of bat five types of freshwater mussels, and one fish identified as threatened or endangered are noted as either present in or having known range within the project area. Applicant did not, however, identify any listed plant or animal species during field surveys.

Opinion, p. 22, ¶ 71, summarizing the Staff Report's discussion at Pages 28-29. The Opinion also notes that Applicant witness McCluskey had opined that "most migrating birds would not be affected by the Project." *Id.*, p. 71, ¶ 154. The Opinion further states that "while there is evidence of eagles being present in the vicinity of the project area, neither bald nor golden eagles were identified in the wildlife survey (Staff Ex. 1 at 28-29)." *Id.* The foregoing findings all suffer from the same inaccurate assumption that a field survey was actually done for birds and other animals. Actually, Border Basin did no field survey. The Board's Opinion implies that

Border Basin performed field surveys for listed plants and wildlife and could not find any, but actually Border Basin found no listed species because it did not look for them.

The Staff based its identification of listed species present or potentially present on the species listed in letters to applicant's consultant Tetra Tech from the Ohio Department of Natural Resources ("ODNR") and the U.S. Fish and Wildlife Service ("USFWS"), which are contained in Application Exhibit Q. ODNR's letter warns that "Ohio has not been completely surveyed and we rely on receiving information from many sources. Therefore, a lack of records for any particular area is not a statement that rare species or unique features are absent from that area." Application Exh. Q, Part 1, Response letter of December 2, 2019 from Mike Pettegrew of ODNR to Will Campbell of Tetra Tech. Thus, the correspondence with ODNR and USFWS is not an adequate substitute for the applicant's performance of its own field surveys to look for wildlife.

In order to informedly identify and avoid Project harm to plants and wildlife, it is first necessary for an applicant to find out what species of plants and wildlife exist in and near the Project Area. That is why OAC 4906-4-08(B)(1) requires applicants to conduct literature searches to identify the species that are potentially present, and field surveys to look for them. Border Basin failed to complete this task.

The Application contains a section labeled "Literature Survey of Plant and Animal Life," but that title mischaracterizes what Border Basin actually did. Application Narrative, p. 52. A review of that section and Application Exhibit P reveals that Border Basin searched only for a list of threatened and endangered species from ODNR and USFWS, rather than conducting a literature search for all species. *Id.*, pp. 52-63; Application Exh. P, p. 5; Application Exh. P, Appx. D.

Thus, Border Basin did not provide a literature survey for all plant and animal life in and near the Project Area as required by the first sentence of OAC 4906-4-08(B)(1)(c). Border Basin obtained literature only for rare plant and animal species as required by the second sentence of OAC 4906-4-08(B)(1)(c). Although Border Basin may contend that the second sentence of the rule limits the scope of the first sentence, such an interpretation is contrary to established rules of statutory construction. The word “include” in the second sentence of subsection (B)(1)(c) is a term of enlargement, not limitation. 2A Singer, *Sutherland Statutes and Statutory Construction*, Section 47:7 (7th Ed.). In other words, “the verb *to include* introduces examples, not an exhaustive list.” Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* at Section 15, p. 116 (Thomson/West 2012, Kindle Ed.). *See also Kish v. Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, ¶ 20 (the word “includes” is an indication of expansion rather than constriction, restriction, or limitation); *Diller v. Diller*, 2021-Ohio-4252, 182 N.E.3d 370, ¶ 38 (3rd Dist. 2021). Limiting Border Basin’s literature search to just those species in the second sentence of the rule provision would render the first sentence superfluous. The failure to catalogue and evaluate all other species in the area left a huge gap in the record’s “information regarding ecological resources in the project area” contrary to OAC 4906-4-08(B)(1). Border Basin’s failure to perform a complete literature survey fails to comply with this rule.

Moreover, Border Basin’s literature on plants and animals did not even fulfill the first sentence of OAC 4906-4-08(B)(1)(c). That sentence also requires a list from literature of species of commercial and recreational value, and Border Basin provided no such list.

OAC 4906-4-08(B)(1)(d) requires an applicant to conduct field surveys for the plant and animal species noted as potentially present by the literature searches. By knowing what species may be in the area, an applicant can design field surveys to search the types of habitat and

locations where those species are most likely to be found and to search at times of the year when the species are likely to be there.

Even more serious was Border Basin's failure to conduct field surveys for plant and animal life, even though OAC 4906-4-08(B)(1)(d) requires an applicant to "[c]onduct and provide the results of field surveys of the plant and animal species identified in the literature survey." Instead of looking for the species, Border Basin only looked for habitat suitable for those species:

Field surveys observed potentially suitable habitat for state-listed and federally listed threatened and endangered species within the Project Area within the forested areas, forested wetlands, and streams including the northern long-eared bat, Indiana bat, clubshell, rayed bean, purple lilliput, black sandshell, and pondhorn.

Application Narrative, pp. 53-54. A review of Application Exhibit P confirms the foregoing statement from the Narrative. A habitat survey is all that Border Basin did; it did not bother to survey the wildlife in the Project Area or within one quarter mile of the Project Area as required by rule. Recognizing its vulnerability on this issue, Border Basin had its witness Korey McCluskey make a statement in his direct testimony that "[n]o T&E or BCC species were identified during onsite survey work." Applicant's Exh. 30, p. 6, line 6. However, stating that no listed species were noticed while looking at habitat is not the same as conducting a survey that actually tries to find the species to determine their presence. That is why Tetra Tech saw no bald eagles in the Project Area, even though eagles often visit Deidre Noel's yard and have been sighted in the Project Area. Noel Exh. 1, Noel Direct Testimony, answer 5; Noel, Tr. I 186:3-8; McCluskey, Tr. I 127:16-18. The failure to conduct field surveys is all the more egregious given that Tetra Tech found habitat in the Project Area suitable for threatened and endangered

animal species. Staff Exh. 1, Staff Report, pp. 28-29; Application Exh. P, Biological Resources Technical Memo, pp. 12-13.

Moreover, even if offhand observations about not noticing listed species are considered to be field surveys, Border Basin still failed to conduct a field survey for other species, including the “terrestrial plant and animal species that are of commercial or recreational value” for which field surveys are required by the second sentence of OAC 4906-4-08(B)(1)(d). Nor is there any evidence that Border Basin conducted literature or field surveys for any plant or animal species within a quarter mile outside of the Project Area as required by OAC 4906-4-08(B).

Border Basin has failed to conduct the rule-mandated literature searches and field surveys for plants and wildlife. Without that data, neither Border Basin nor OPSB has a basis for concluding that the Project will not harm wildlife; they do not know what wildlife is there. Nor can Border Basin present mitigation measures to the Board for its consideration in certification without knowing what species need protection. For example, without knowing what bird species will fly over the solar panels, Border Basin cannot predict what effect glare may have on them (and, indeed, the company did not perform such a glare analysis). Border Basin’s failure to provide this information violates OAC 4906-4-07(C)(3)(e), OAC 4906-4-08(B)(1)(c), and R.C. 4906.10(A)(2), (3), and (6). The Residents request that OPSB rehear this case to obtain this information or add this grounds as an additional reason for denying the certificate.

Grounds for Rehearing No. 6:

The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Erroneously Finding That The Project Provides For Water Conservation Measures As Required By OAC 4906-4-07(C)(3)(e) And R.C. 4906.10(A)(2), (3), (6), and (8).

To conserve the State’s water resources, R.C. 4906.10(A)(8) requires the Project to incorporate “maximum feasible water conservation practices as determined by the board,

considering available technology and the nature and economics of the various alternatives.”

Water conservation also is necessary to achieve the criteria in 4906.10(A)(2), (3), and (6). OAC 4906-4-07(C)(3)(e) implements these criteria by requiring an applicant to do the following:

Describe how the proposed facility incorporates maximum feasible water conservation practices considering available technology and the nature and economics of the various alternatives.

Despite this rule’s mandate to describe the Project’s water conservation practices, the Application identifies no such measures. The company represents that, although it assumes that rainfall usually will keep the solar panels clean, it may be necessary to wash the panels if rain does not do the job. Application Narrative, p. 36. Border Basin estimates that one gallon per solar module will be necessary to accomplish each such cleaning. *Id.* The Project will hold 299,040 solar modules. *Id.*, p. 7. Thus, Border Basin could use 299,040 gallons of water in every cleaning. Nevertheless, the Application disclaims any intent to implement any water conservation practices. *Id.*, p. 36. This refusal violates the edict in R.C. 4906.10(A)(8) and OAC 4906-4-07(C)(3)(e) for water conservation, as well as falling short of the requirements of 4906.10(A)(2), (3), and (6).

Grounds for Rehearing No. 7:

The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Issuing A Certificate To Border Basin Solar Without Obtaining The Information Required By OAC 4906-4-08(A)(3), R.C. 4906.10(A)(2), And R.C. 4906.10(A)(3) Concerning The Project’s Potential Operational Noise Impacts.

Solar facilities are noisy during operation. The Project is expected to contain 54 noise-generating inverter stations (each with a noise-generating inverter and a transformer) and a substation (with a noise-generating transformer) based on its preliminary design. Application Exh. N, Acoustic Assessment Report, p. 1. The inverters will be as close as 326 feet from nonparticipating residences. Applicant’s Exh. 6, Response to First Data Request, p. 14, answer

20. As explained above in the first grounds for rehearing, eight nonparticipating residences are clustered in close proximity to the substation site.

As a result, Border Basin is required to identify the operational noise levels of the Project pursuant to OAC 4906-4-08(A)(3) and R.C. 4906.10(A)(2) so that OPSB can determine whether the Project complies with R.C. 4906.10(A)(3). OAC 4906-4-08(A)(3) describes the information that the Application must provide about the anticipated noise impacts from the Project:

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

(b) Describe the operational noise levels expected at the nearest property boundary. The description shall address:

(i) Operational noise from generation equipment....

(c) Indicate the location of any noise-sensitive areas within one mile of the facility, and the operational noise level at each habitable residence, school, church, and other noise-sensitive receptors, under both day and nighttime operations. Sensitive receptor, for the purposes of this rule, refers to any occupied building.

(Emphasis added.)

Border Basin's Application contains errors violative of OAC 4906-4-08(A)(3) that preclude the issuance of a certificate without more data. In particular, Border Basin failed to identify the amount of noise coming from the Project at night in order to predict the noise levels at the Project's property boundaries or neighboring habitable residences. Consequently, Border Basin has failed to fulfill its duties under OAC 4906-4-08(A)(3)(b) and OAC 4906-4-08(A)(3)(c). OPSB cannot issue a certificate without this data.

The Acoustic Assessment Report by Border Basin consultant Tetra Tech notes that OPSB precedent has established that solar facilities must not raise the community's sound level by more than five A-weighted decibels ("dBA"). Application Exh. N, p. 6. Accordingly, Border

Basin was required to identify the community's existing sound levels, known as the "ambient" levels, and then compare those levels to the noise levels resulting from Project operation.

To measure the existing ambient sound levels in and near the Project Area, Border Basin consultant Tetra Tech used five short-term attended monitoring stations (identified as "ML-1" through "ML-5") and one unattended long-term monitoring station (identified as "LT-1").

Application Exh. N, pp. 1, 6, 12. LT-1 was located at the substation site. Application Exh. N, p. 12. ML-1 through ML-5 were spread out throughout and around the Project Area. *Id.*, Figure 9, pdf p. 32.

The acoustics report identifies "nighttime" hours as the time between 10 p.m. and 7 a.m. Application Exh. N, pp. 6, 14. Border Basin's short-term measurements of nighttime ambient sound ranged from 35 dBA to 44 dBA throughout the Project Area. Application Exh. N, pp. 12-13. The average Leq ambient level at LT-1 was 52 dBA.⁶ *Id.*, pp. 13-14, Table 6. The nighttime ambient sound levels in the Project Area are consistently and substantially lower than the daytime ambient sound levels, as follows:

Measurement	Daytime	Nighttime	
<u>Station</u>	<u>dBA</u>	<u>dBA</u>	<u>Difference</u>
ML-1	54	43	11
ML-2	58	40	18
ML-3	50	44	6
ML-4	47	35	12
ML-5	53	38	15
LT-1	57	52	5

Application Exh. N, pp. 12-14. This means that the same volume of Project noise can exceed the nighttime ambient level by more than five dBA even though it is less than five dBA above the

⁶ Tetra Tech's report states that this level is 54 dBA. Application Exh. N, p. 14, Table 6. However, this results from a mathematical error, as the average of the measurements from 10 p.m. to 7 a.m. is 52.1 dBA.

daytime ambient level. Consequently, it is vital that OPSB know the nighttime noise levels for the Project and compare them to the nighttime ambient sound levels.

Tetra Tech's acoustics report states that Border Basin represented that "no noise producing equipment would operate at nighttime will require reduced operations [sic]." Application Exh. N, p. 19. Although this sentence's meaning is unclear, Tetra Tech's report clarified the sentence's intended point elsewhere, stating that "[f]or the purpose of the analysis, it is expected that all sound-producing equipment would operate consistently during the daytime, while nighttime will require reduced operations." *Id.*, p. 21. Similarly, the report also explains that "[f]or the purpose of the acoustic modeling analysis, it is assumed that all Project equipment would operate continuously during the daytime and with reduced power operations during the nighttime." *Id.*, p. 27. Thus, Tetra Tech found the solar equipment will operate at night, but the consultant failed to identify which equipment (e.g., the inverters or substation) will operate at night or how much noise it will produce at night. Tetra Tech did not provide any data to show whether the inverters and the substation during "reduced" operations will produce less, the same, or more noise than under daytime operations. The Staff Report observes that "[t]he step-up transformer at the new substation may operate at night but the noise impact would also be relatively minor." Staff Exh. 1, p. 18. Consequently, the record shows that noise will be emitted by the substation transformer at night, and is silent about whether the inverters and transformers in the inverter stations will operate at night. While Tetra Tech's report identifies the Project's daytime noise levels at the properties and residences of nonparticipating neighbors, the report neglects to provide the nighttime noise levels for either the inverters or the substation. See Application Exh. N, pp. 21-24, Table 9 (listing only daytime noise levels at nonparticipants' residences) and pdf p. 34, Figure 10 (a map showing only daytime noise levels at the boundary

lines of the Project Area). Thus, the Staff had no evidentiary basis for assuming that the Project's nighttime noise impact will be "relatively minor." Border Basin's failure to provide the nighttime noise data for the inverters and substation required by OAC 4906-4-08(A)(3)(b) and (c), and OPSB's failure to require the production of this data, has deprived the Board of the information necessary to determine whether nighttime noise levels will be problematic for nearby nonparticipating residents, especially the substation's neighbors.

Border Basin might argue that the Project's nighttime noise levels will be lower than daytime levels. But the company has provided no actual data to support this position. Nor has the Staff cited any such data in the Staff Report. Thus, OPSB lacks the information necessary to determine whether nighttime noise levels will be problematic.

The Board's Opinion summarizes the Staff's discussion about operational noise, but fails to recognize that the identification of operational noise levels at night is needed to satisfy OAC 4906-4-08(A)(3)(b) and (c) and R.C. 4906.10(A)(2). Opinion, pp. 16-17, ¶ 56. The Board also erred by deciding that the Project complies with R.C. 4906.10(A)(3) and (6), even though it had no data to support those conclusions with respect to noise at night. The Board should reopen the hearing record and require Border Basin to supply the information required by rule and statute about the Project's nighttime noise levels.

Grounds for Rehearing No. 8:

The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Issuing A Certificate To Border Basin Solar Without Identifying Mitigation Measures For Construction Noise Required By OAC 4906-4-08(A)(3)(d), R.C. 4906.10(A)(2), (3), and (6).

The Project's construction will produce long-lasting noises in extreme volumes involving the operation of pile drivers, dump trucks, forklifts, scrapers, compactors, excavators, loaders, backhoes, and graders. Application Exh. N, p. 16, Table 7. Border Basin makes non-credible

arguments in attempts to deflect alarm about these high noise levels, e.g., by stating without evidence that construction machines have become quieter since the U.S. Environmental Protection Agency estimated the machines' noise levels. Application, p. 15. Nevertheless, Tetra Tech's Acoustic Assessment Report admits that construction noise will range up to an enormous level of 91 dBA at nonparticipating property lines, and periodically may be reach even higher. Application Exh. N, p. 15. Notably, the table provided by Tetra Tech to illustrate sounds of "moderate" impression on humans shows that moderate levels are between 60 dBA and 70 dBA, in contrast to the noises of up to 91 dBA to be generated by construction. *Id.*, p. 3, Table 1.

OAC 4906-4-08(A)(3)(d) requires Border Basin to "[d]escribe equipment and procedures to mitigate the effects of noise emissions from the proposed facility during construction and operation, including limits on the time of day at which construction activities may occur." OPSB should not have approved the Project under R.C. 4906.10(A)(2) and (3), without requiring mitigation to address these impacts.

Recognizing the intrusiveness of the Project's predicted construction noise levels, Tetra Tech sought to disguise the actual impact by contending that construction hours will be "limited." Application Exh. N, p. 17. The Board's Opinion notes that the Staff characterized construction as "temporary and intermittent." Opinion, p. 16, ¶ 56. Also see Opinion, p. 24, ¶ 78. Actually, Condition 35 of the Stipulation accepted by OPSB gives the residents little relief from this noise. The condition allows "[g]eneral construction activities" for 12 hours every day between 7 a.m. and 7 p.m. and even longer when dusk occurs after 7 p.m. *Jt. Exh. 1*, p. 8.⁷ OPSB can take judicial notice of the fact that dusk in Findlay, Ohio occurs as late as 9:42 p.m.

⁷ The Application's Narrative repeatedly promises to stop construction activities at 7 p.m. on several pages, but then states that construction may continue between 7 p.m. and dusk on another page. Compare the statements on Pages 40, 41, and 42 with the statement on Page 44.

during the summer. See <https://www.gaisma.com/en/location/findlay-ohio.html>. The “[g]eneral construction activities” allowed by the certificate during those long hours include the operation of dump trucks, forklifts, scrapers, compactors, excavators, loaders, backhoes, and graders. Application Exh. N, p. 16, Table 7. This machinery will produce noise levels of up to 91 dBA at nonparticipating property lines. *Id.* This is an astounding increase of 33-44 dBA in noise levels above the normal ambient daytime averages of 47 dBA to 58 dBA found in Tetra Tech’s ambient noise measurements. Application Exh. N, pp. 12-14. Thus, the certificate allows Project construction to destroy the Residents’ quality of life for 12 to 14.7 hours per day. This construction will last approximately 15 months. Applicant’s Exh. 1, Application, Project Schedule, Figure 3-3 (pdf p. 10).

Condition 35 even allows Border Basin to conduct these intrusive construction activities during weekends and holidays. By enabling loud noise lasting up to 12 to 14.7 hours for seven days per week during 15 months, the certificate hardly restricts Border Basin’s noise to “limited” hours.

Tetra Tech also sought to disguise the actual impact of its noise by contending that loud construction noises will be “infrequent.” Application Exh. N, p. 17. To the contrary, application Exhibit N shows that numerous types of heavy machinery will be employed, and noises up to 88-91 dBA will occur, in all four phases of construction prior to commissioning the Project. *Id.*, p. 16, Table 7. Although Border Basin might assert that not all of this heavy machinery will be used for 100% of the time, Tetra Tech did not identify the amount of time that each type of machine will be used.

The Opinion recites a Staff statement that construction activities would occur “away from most residential structures.” Opinion, pp. 16, 24 ¶¶ 56, 78. However, Application Figure 4-1

shows 38 residences located on the edges of the Project Area. Applicant's Exh. 10, Response to Fourth Data Request. Moreover, the setback between the Project and nonparticipating residences separated by a road is only 300 feet, and the setback between the Project and nonparticipating residences not separated by a road is only 500 feet. Opinion, pp. 30-31, ¶ 99.

Tetra Tech also pretended that "the implementation of noise control measures" will reduce the impacts of construction noise. Application Exh. N, p. 17. A review of what Border Basin labels "construction noise mitigation" on Page 17 of Exhibit N shows that the company's promise to mitigate construction noise is illusory. Other than avoiding the late night operation of heavy construction machinery, Border Basin's noise "mitigation" measures consist of no more than just having undamaged mufflers, keeping engine doors shut, and mounting insulation on engines consistent with manufacturers' guidelines "if possible." Application Exh. N, 17. These are merely promises to use construction machinery with the usual amount of noise common to the normal operation of noisy machinery, not to mitigate (i.e, reduce) the expected amount of noise. Border Basin also promises to "[u]tilize a complaint resolution procedure" for residents' noise complaints. *Id.* Given the lack of meaningful mitigation, complaints are exactly what will occur.

Tetra Tech concluded that the foregoing factors will result in impacts that are considered to be "less than significant." Application Exh. N, p. 17. This representation is patently false. As Border Basin admits, the noise could be so loud as to "temporarily interfere with speech communication outdoors and indoors with windows open." *Id.*

OAC 4906-4-08(A)(3)(d) requires Border Basin to "[d]escribe equipment and procedures to mitigate the effects of noise emissions from the proposed facility during construction and operation, including limits on the time of day at which construction activities may occur." OPSB

should not have approved the Project under R.C. 4906.10(A)(2) and (3), without requiring meaningful mitigation to address these impacts.

Grounds for Rehearing No. 9:

The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Issuing A Certificate To Border Basin Solar Without Evaluating The Project's Negative Economic Impacts As Required By OAC 4906-4-06(E)(4) And R.C. 4906.10(A)(6).

OAC 4906-4-06(E)(4) provides:

(E) The applicant shall provide information regarding the economic impact of the project.

(4) The applicant shall provide an estimate of the economic impact of the proposed facility on local commercial and industrial activities.

This rule requires an applicant to “provide an estimate of the economic impact of the proposed facility on local commercial and industrial activities.” The purpose of this analysis is to assist the Board in its determination of whether “the facility will serve the public interest, convenience, and necessity” under R.C. 4906.10(A)(6).

Border Basin’s economic impact study is a “rose-colored glasses” exercise that considers the Project’s economic benefits, but not its adverse economic impacts. Border Basin’s Application did not evaluate the economic losses to local businesses and individuals that will result from its Project.

In fact, Border Basin’s economic impact report specifically disclaims any intent to evaluate the losses of the economic benefits from the current agricultural use of the Project Area that will be displaced by solar facilities, stating:

This analysis does not assess net jobs, rather it presents total or gross jobs that would be supported by Project development. A person employed during Project construction could, for example, have been employed elsewhere in the state beforehand, and, as a result, not all gross jobs represent a net additional job. A net jobs analysis would subtract job losses in other areas from the direct job gains of the new project to identify only the net increase in jobs. This type of

analysis is speculative and dependent on numerous interactions and, therefore, it is more reliable and standard practice to limit the analysis to total or gross jobs created by the Project. Similarly, jobs supported elsewhere in the economy (i.e., supply chain and induced jobs), identified as FTEs, are not necessarily additional jobs. Secondary impacts may support workers in their existing positions, helping them retain their jobs or expand their hours.

Application Exh. G, p. 8. A review of the report reveals the truth of this disclaimer. The economic report does not attempt to estimate the job losses that the Project will cause, nor does it state that the Project will result in a net gain in jobs.

The Project is hardly the jobs bonanza that Border Basin advertises. Although Border Basin's economic report estimates the number of construction jobs for the Project, those jobs are one-time, fleeting engagements that will disappear entirely as soon as construction ends. The Project will offer only five full-time equivalent jobs for operating the facility. Application Exh. G, p. 10, Table 4. The report also estimates a small number (nine) of indirect or induced jobs, but as stated in the disclaimer above, these jobs are highly speculative.

What Border Basin's economic report is missing is the number of jobs destroyed by the Project, including the loss of direct, indirect, and induced jobs. Application Exh. G. The Project will remove 953 acres of good farmland from food production. Applicant's Exh. 1, Application Narrative, pp. 68-69; Applicant's Exh. 6, Response to First Data Request, p. 8, Table 8-6. Yet Border Basin did not study the value of the agricultural products that will be lost from shutting down farm production for the 30-year probable lifetime of the project. Applicant's Exh. 1, Application Narrative, p. 27 and Application Exh. G. Border Basin failed to evaluate the economic losses to the farmers who have been farming the fields that will become an industrial facility. *Id.* Nor has the company studied the financial losses to vendors who would otherwise have supplying crop seeds, fertilizer, and other products to the farmers who will no longer farm that land. *Id.* In short, Border Basin did no study to identify and quantify the economic damage

from its Project. Consequently, Border Basin has failed to demonstrate that the Project will have a net economic benefit.

The Opinion notes that the Staff and the Board found the Project to offer some economic benefits. Opinion, pp. 12-13, 63, ¶¶ 49-50, 136. However, the Opinion fails to even mention Border Basin's failure to analyze for economic detriments.

An incomplete, one-sided economic analysis does not comply with the mandate in OAC 4906-4-06(E)(4) to "provide an estimate of the economic impact of the proposed facility on local commercial and industrial activities." Nor can the Board find that the Project "will serve the public interest, convenience, and necessity" as required by R.C. 4906.10(A)(6) without examining the Project's negative economic impacts. The Board should not have issued the certificate in light of Border Basin's failure to conduct a complete economic analysis as required by R.C. 4906.10(A)(6) and OAC 4906-4-06(E)(4).

Grounds for Rehearing No. 10:

The Board Acted Unlawfully And Unreasonably By Issuing A Certificate Lacking A Deadline For Decommissioning, Because Such A Deadline Is Necessary To Comply With R.C. 4906.10(A)(3).

The Application contains no deadline for finishing decommissioning after the Project stops operating. See Application Narrative, p. 27; Application Exh. B.

The Board's Opinion fails to fill this void. Although Condition 36 requires an updated decommissioning plan prior to construction, the condition does not requires the plan to include a deadline for finishing all decommissioning. Jt. Exh. 1, Stipulation, p. 8, Cond. 36. Condition 36 weakly provides only that the plan tell the Staff later how much time it wants to finish removing equipment. *Id.* Subpart (b) of the proposed condition does not require Border Basin to submit a timeframe for finishing the decommissioning tasks, except for equipment removal, such as road

removal, soil decompaction, soil grading, and restoring the soils to their pre-Project state as required by Sections 2.2 and 3.0 of Exhibit B to restore the soil's viability for crop production. Application Exh. B, pp. 2, 3. It appears that subpart (b) of Condition 36 was meant to require an updated deadline for all decommissioning activities, but it requires a timeline only "for removal of the equipment." This allows the completion times for all decommissioning tasks other than equipment removal to be left entirely to Border Basin's whim. Issuing a certificate without such deadlines would allow the facility to lie idle and decay while indefinitely awaiting decommissioning. This scenario does not represent the minimum adverse environmental impact considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations under R.C. 4906.10(A)(3). The Board could easily correct this oversight by replacing "for removal of the equipment" in Subpart (b) of Condition 36 with "for finishing decommissioning activities." The Residents request that the Board make this correction.

V. CONCLUSION

As explained above, there are a multitude of good reasons to deny the certificate sought by Border Basin Solar. Border Basin has failed to provide the information on the Project's adverse impacts and mitigation measurements necessary to minimize them that is required by the Board's rules. The Board cannot violate its own rules by approving the Project without this information, and it should rehear this case for the purpose of obtaining this information. Nor do the criteria in R.C. 4906.10(A)(2), (3), (5), and (6) authorize the issuance of this certificate. Thus, the Stipulation accepted by the Board and the Board's Opinion violates important regulatory principles and practices. The Board should reconsider its decision, rehear the issues briefed in this memorandum above, and deny Border Basin's application for a certificate.

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 this case. In addition, I hereby certify that, on March 20, 2023, a copy of the foregoing Application for Rehearing has been served by electronic mail on the following: Christine Pirik at cpirik@dickinsonwright.com; Jonathan Secrest at jsecrest@dickinsonwright.com; Matthew McDonnell at mmcdonnell@dickinsonwright.com; David Lockshaw, Jr. at dlockshaw@dickinsonwright.com; Robert Eubanks at Robert.eubanks@OhioAGO.gov; Thomas Shepherd at Thomas.Shepherd@OhioAGO.gov; Steven Beeler at Steven.Beeler@OhioAGO.gov; Anthony Core at tony.core@squirepb.com; Lucinda M. Land at LMLand@co.hancock.oh.us; Chad Endsley at ofbf.org; Leah Curtis at ofbf.org; Steve and Tonya Miller at tonyamiller609@gmail.com.

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

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