

BEFORE  
THE OHIO POWER SITING BOARD

In the Matter of the Application of Scioto Farms	)	
Solar Project, LLC for a Certificate of Environmental	)	
Compatibility and Public Need for the Construction	)	Case No. 21-868-EL-BGN
Of a Solar-Powered Electric Generation Station in	)	
Wayne Township, Pickaway County, Ohio	)	

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INITIAL POST-HEARING BRIEF OF INTERVENORS SCARLETT EBENHACK,  
SUZANNAH M. EBENHACK, THOMAS E. EBENHACK, THOMAS J. EBENHACK,  
WESLEY EBENHACK, AND THE BOARD OF TRUSTEES OF WAYNE TOWNSHIP

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Robert A. Chamberlain (0091955)  
Assistant Prosecuting Attorney  
P.O. Box 910  
Circleville, OH 43113  
Tel: (740) 474-6066  
Fax: (740) 474-7475  
Email: [tchamberlain@pickawaycountyohio.gov](mailto:tchamberlain@pickawaycountyohio.gov)  
*Attorney for Intervenor Wayne*  
*Twp. Board of Trustees*

Jack A. Van Kley (#0016961)  
Van Kley Law, LLC  
132 Northwoods Blvd., Suite C-1  
Columbus, OH 43235  
Tel: (614) 431-8900  
Fax: (614) 431-8905  
Email: [jvankley@vankley.law](mailto:jvankley@vankley.law)  
*Attorney for Ebenhack Intervenors*

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Intervenors Scarlett Ebenhack, Suzannah M. Ebenhack, Dr. Thomas E. Ebenhack, Thomas J. Ebenhack, Wesley Ebenhack, and the Board of Trustees of Wayne Township, Ohio (collectively, “Intervenors”) hereby submit their initial post-hearing brief. For the reasons explained below, Intervenors request that the Ohio Power Siting Board (“OPSB” or “Board”) deny the certificate requested by Scioto Farms Solar Project, LLC (“SFS”) for its solar-powered electric generation station (the “Project”).<sup>1</sup>

**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

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<sup>1</sup> This brief uses the following abbreviations for citations: (1) “Application” refers to Applicant’s Exhibit 2, the Application submitted by SFS on December 13, 2021, including its exhibits and modifications; (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) “Project Area” refers to the project area for the Project as defined in the Application; (6) “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; (7) “OAC” refers to the Ohio Administrative Code; and (8) “Conditions” refer to the proposed conditions in the Joint Stipulation and Recommendation as to Certificate Conditions, Jt. Exh. 1.

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).

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, SFS 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.

SFS also has not provided the information required by OPSB'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. Similarly, SFS 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) and (6).

## **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 litigant is entitled to enforce such an agency's rule against the agency if the litigant 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. SFS 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 harmful impacts. 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. The Intervenor has no access to the participating landowners’ land to 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 Intervenor 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 Intervenor. The Intervenor is prejudiced by OPSB’s



failure to comply with these rules, and they have standing to seek OPSB's compliance with its rules.

Many of SFS's rule violations stem from its failure to provide definitive designs and mitigation plans for the various types of damage its Project can cause. SFS'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 design plans so that the approving authority, with public input, could tell what it is approving. In this case, SFS's disregard for the Board's rule requirements has produced a Project design that is not approvable.

**III. Overwhelming Public Opposition To The Project, As Well As Evidence Of The Project's Harm, Show That The Project Does Not Serve The Public Interest, Convenience, And Necessity Under R.C. 4906.10(A)(6).**

For the reasons expressed below, the Board should deny a certificate for SFS' Project for the failure to comply with R.C. 4906.10(A)(6).

**A. Local Government Officials And Their Constituents Overwhelmingly Oppose This Project.**

The OPSB has recognized that its determination of public interest, convenience, and necessity under R.C. 4906.10(A)(6) must be examined through a "broad lens" that balances a project's projected benefits against the magnitude of potential negative impacts on the local community. *In re Republic Wind*, OPSB Case No. 17-2295-EL-BGN, 2021 WL 2667132, at \*1, \*18, ¶ 91 (June 24, 2021). For example, in the *Republic Wind* case, the "especially prominent

and one-sided” local opposition to the disapproved wind project was an important factor in OPSB’s determination that the Republic Wind project did not serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6). *Id.*, at \*18, ¶ 91. OPSB has denied certificates for solar facilities in several other cases on the same basis. See *In re Cepheus Energy Project, LLC*, OPSB Case No. 21-293-EL-BGN, 2023 WL 370719, at \*30-\*34, ¶¶ 121-131 (Jan. 19, 2023); *In re Kingwood Solar I LLC.*, OPSB Case No. 21-117-EL-BGN, 2022 WL 17850954, at \*36-39, ¶¶ 142-152 (Dec. 15, 2022); *In re Birch Solar I, LLC*, OPSB Case No. 20-1605-EL-BGN, 2022 WL 15476256, at \*12–15, ¶¶ 68-72 (Oct. 20, 2022). In these cases, the Board has concluded that the “unanimous opposition of every local government representing the area in which the Project is to be located is controlling as to whether the Project is in the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6),” taking into account the vigor and rationale of the local government opposition. *Cepheus*, 2023 WL 370719, at \*32, ¶124, citing *Birch* and *Kingwood*.

The public opposition to SFS’ Project has been especially prominent and one-sided. The Pickaway County Commissioners and the Wayne Township Board of Trustees have passed resolutions opposing the Project. Wayne Township’s resolution recounts that the trustees had “heard from a large group of residents in objection to the project.” Wayne Twp. Exh. 1, Direct Testimony of Brenna Gibson (“Gibson Testimony”), Exh. B. The county commissioners’ resolution opposes the Project as being contrary to the general health, safety, and welfare of the county’s residents. Wayne Twp. Exh. 2. The Staff noted that among the public officials filing public comments in opposition to the Project was the Pickaway County Director of Emergency Management, whose letter “detail[ed] the negative effects to the environment and human health the project would have on the community.” Staff Exh. 1, Staff Report, pp. 44-45; Ebenhacks’

Exh. 7, Letter from Gary Cameron, Pickaway County EMA Director, to County Commissioners, dated Apr. 5, 2022. The Staff also cited a letter from the Pickaway County Park District expressing concerns with potential impacts to waterfowl migration, the historic Ohio-Erie Canal, and road traffic and wildlife crossings. Staff Exh. 1, Staff Report, p. 44; Ebenhacks' Exh. 6, Letter from Tom Davis, Director of the Pickaway County Park District, to OPSB, dated Oct. 13, 2021.

Wayne Township has intervened in the case and participated in the evidentiary hearing in order to further emphasize its opposition. Although Wayne Township Trustee Brenna Gibson acknowledged that the number of township residents expressing their views at the township's public meeting about the Project was limited to six people (Gibson, Tr. I 18:19 – 19:7), that public meeting was only a small component of the trustees' assessment of local public opinion. Ms. Gibson also testified that the trustees oppose the Project due to their constituents' opposition expressed in phone calls, letters, and meetings. Wayne Twp. Exh. 1, p. 1, lines 1-3. It would be naïve of SFS to claim that the trustees, whose constituents are their neighbors, would be aware of the opinions of only the six citizens who spoke at the public meeting. For example, Ms. Gibson has been a township trustee for 17 years (Gibson, Tr. I 15:19-22), so she has considerable familiarity with the township and its residents. Ms. Gibson testified that she heard her constituents' statements opposing the Project "everywhere I went." Gibson, Tr. I 47:1-8. "If they lived in my Township, they brought it up." *Id.* "[T]here were a lot of people concerned about it." *Id.*

Ms. Gibson testified that the Ebenhacks had informed the trustees at the public meeting about petitions being signed in opposition to the Project. Gibson, Tr. I 46:13-22. The Ebenhacks have submitted these signed petitions as exhibits to a public comment they filed on the docket on

March 28, 2023 at the direction of the administrative law judge (“ALJ”) so that the Board can “afford the appropriate weight to these signatures.” Tr. 496:12-20. SFS’ counsel also asked Thomas E. Ebenhack some questions at the hearing to discuss the procedures used for collecting these signatures, with follow-up by the Ebenhacks’ counsel. This testimony highlighted the care taken by the Ebenhacks to ensure the signatures are authentic signatures of Pickaway County residents opposed to the Project.

Suzannah Ebenhack, Thomas E. Ebenhack, and Wesley Ebenhack collected the signatures on these petitions. Ebenhacks’ Public Comment of March 28, 2023 (“Ebenhacks’ Public Comment”), p. 1. To collect signatures for these petitions, they traveled to the homes of residents in Pickaway County, asked these residents whether they would like to sign the petitions, watched them sign the petitions, and verified the home addresses the signers wrote next to their signatures. *Id.*; T.E. Ebenhack, Tr. III 538:25 – 539:3. The petitions were signed after SFS held its public information meeting to inform the public about the Project (T.E. Ebenhack, Tr. III 538:5-21), so SFS had had ample opportunity to educate the public and advocate for its Project before the petitions were circulated.

On these petitions in Exhibit A of the Ebenhacks’ Public Comment, Thomas E. Ebenhack, Suzannah Ebenhack, and Wesley Ebenhack have marked the petition signatures that they witnessed with their initials to verify that they were present to see the signers write the signatures and their addresses on the petitions. Ebenhacks’ Public Comment of March 28, 2023, p. 1; T.E. Ebenhack, Tr. III 538:25 – 539:3, 539:14-22. Dr. Ebenhack personally knew about half of the persons who signed petitions in his presence. T.E. Ebenhack, Tr. III 8-13. The signatures witnessed by Suzannah Ebenhack are marked with an “S” or “SE”, the signatures witnessed by Thomas E. Ebenhack are marked with a “T” or “TE”, and the signatures witnessed

by Wesley Ebenhack are marked with a “W” or “WE”. Ebenhacks’ Public Comment, p. 1; T.E. Ebenhack, Tr. III 540:8-19. Where two of them witnessed a signature, the initials for both of them are marked on Exhibit A with “/” between each person’s initials. Ebenhacks’ Public Comment, p. 1. All of the addresses of persons signing these petitions are located in Pickaway County, except for the addresses of Tom and Mary Harp whose house is in Ross County near its border with Pickaway County and who own land adjacent to the Project Area. *Id.*, pp. 1-2. A total of 168 people have signed these petitions. *Id.*, p. 2. In contrast, only four individuals declined to sign the petitions. Ebenhacks’ Public Comment, p. 1; T.E. Ebenhack, Tr. III 540:20 - 541:4. Wesley Ebenhack determined that the addresses for 123 of the 169 signatures on Exhibit A are located in Wayne Township. Ebenhacks’ Public Comment, p. 2.

Exhibit B of the Ebenhacks’ Public Comment contains true and accurate copies of additional petitions signed by 24 residents of Ross County, Ohio in the presence of Wesley Ebenhack while he visited them at their homes. *Id.* In addition to writing his initial (“W”) next to the signatures to show that the signers signed the petitions in his presence, Wesley Ebenhack also wrote the distances between their homes and the Project Area using Google maps. *Id.* Because the Project Area is near the boundary between Pickaway County and Ross County, he obtained these signatures from Ross County residents who live no farther than 13 miles from the Project Area. *Id.* Exhibits A and B of the Ebenhacks’ Public Comment are a persuasive demonstration of the local community’s opposition to the Project.

Ms. Gibson testified that the opposition of the trustees and the township’s residents resulted from concerns about the replacement of farmland with industrial facilities, threats of fire, impairment of drainage, groundwater pollution, wildlife displacement, removal of vegetation, destruction of valuable topsoil, reductions in property values, and road damage.

Wayne Twp. Exh. 1, Gibson Testimony, pp. 1-2.<sup>2</sup> Road damage is a big concern, because Wayne Township has some of the best township roads in the county. *Id.*, p.1, lines 15-16.

The displacement of agriculture with industrial solar facilities in the Project Area is especially concerning to Wayne Township. It is “a proud agricultural township with a great history of family owned farms and businesses.” Wayne Twp. Exh. 1, Gibson Testimony, Exh. B. The Project would replace 723 acres of farmland with an industrial facility for 40 years. Application Narrative, pp. 1, 84. The Project would be inconsistent with Wayne Township’s land use plan as embodied in its Zoning Resolution attached to Ms. Gibson’s written direct testimony. Wayne Twp. Exh. 1, Gibson Testimony, Exh. A. The Project Area is zoned as Farm Residential District (FR). See the zoning map on the last page of Exhibit A, showing the land surrounded by Dungan Road, Westfall Road, and State Route 104 as “FR,” i.e., Farm Residential. Land zoned for agriculture can be used only for agriculture. *Id.*, Exh. A, p. 2, § 203.00. Although SFS claims that placing an industrial solar facility on farmland for 40 years will protect it from housing subdivisions and other development, Wayne Township’s zoning law already accomplishes this purpose. In fact, no such developments, other than the Project, are known to be planned for the Project Area. Woodruff, Tr. I 146:8-24. Currently, the farmland in the Project Area is protected against destruction by the Township’s Zoning Resolution not only to protect its agricultural use, but to “keep our rich multigenerational farm community intact.” Wayne Twp. Exh. 1, Gibson Testimony, p. 1, lines 3-6. Ms. Gibson testified that younger families would no longer return to Wayne Township to build new homes and raise children for

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<sup>2</sup> At the hearing, SFS’ counsel asked Ms. Gibson a long series of questions attempting to show that Ms. Gibson had not independently investigated the technical bases of these concerns. Gibson, Tr. I 28:4 – 42:10. However, Ms. Gibson was not presented as an expert on these issues, so SFS’ questions to her were misdirected. Moreover, the testimony from SFS’ own experts revealed that there are substantial technical justifications for the trustees’ and their constituents’ concerns.

fear that the Project's industrial facilities would reduce the value of their investments in the community. *Id.*, p. 1, lines 16-19. *Id.*, p.1, lines 3-6.<sup>3</sup>

With respect to the widespread opposition from local governmental bodies, the Staff noted that “[t]hese entities have the responsibility for preserving the health, safety, and welfare within their respective communities, and their documented opposition to the project is especially compelling.” Staff Exh. 1, Staff Report, p. 45. The Staff Report observes “that there is general opposition to the project from the local citizens and local governmental bodies” based on these government resolutions, public comments filed on the docket, and other evidence. *Id.*, p. 44. Staff Project Lead Thomas Crawford confirmed these observations at the hearing. Crawford, Tr. IV 697:5-22. The Staff saw the prevalence of public comments against the Project on the docket. Crawford, Tr. IV 697:5-16. The Staff also noted that the public comments identified numerous potential threats from the Project to the public's interests:

Commenters opposed to the proposed project expressed concerns about issues including impacts to agricultural land use, farmland preservation, and agricultural production and livestock; fire hazard; impacts to wildlife; impacts to drinking water; erosion and flooding; runoff and drainage; construction traffic, noise, and dust; operational noise; property values; cultural resources; decommissioning; public health; aesthetics; recreation; and fencing.

Staff Exh. 1, Staff Report, p. 44. The Staff also noticed that the public opposed the Project at the local public informational meetings. *Id.*, p. 45.

The Staff Report of May 10, 2022 does not discuss the views of attendees at the local public hearing, because the public hearing occurred later on May 25, 2022. The speakers at OPSB's local public hearing overwhelmingly opposed the Project, outnumbering supporters by

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<sup>3</sup> Thomas E. and Scarlett Ebenhack leased 225 acres of their land in Ross County to Yellowbud Solar, of which 70% had been farmed, but that land was not productive for agriculture. T.E. Ebenhack, Tr. III 502:1-15; W. Ebenhack, Tr. III 576:4-9. Dr. Ebenhack described it as “the worst of the land I had.” T.E. Ebenhack, Tr. III 537:21-25. Much of it was unproductive due to its wetness during years when the weather did not cooperate. T.E. Ebenhack, Tr. III 538:1-4.

19 to three.<sup>4</sup> See the Transcript of the Public Hearing. In addition, OPSB provided the attendees of that hearing with the opportunity to sign sheets to sign expressing their support of or opposition to the Project. Butler, Tr. III 634:13 - 635:6. These sheets also indicated one-sided opposition to the Project, disclosing that 33 attendees oppose the Project while only two support it. Ebenhacks' Exh. 14. Thus, the local public hearing further confirmed the Staff's conclusion that public opposition to the Project outweighs any benefits the Project might serve.

SFS even hired a consultant on public relations and political advocacy named Swing State Strategies to promote the Project. Woodruff, Tr. I 157:7 – 158:15. SFS' project team also solicited letters of support from the community for the case docket. Woodruff, Tr. I 164:23 – 165:12. Even these strategies did not overcome the Project's unpopularity.

The Project Lead for the Staff's investigation of this Project, Thomas Crawford, testified that the Staff recommended denial of the certificate, because SFS has failed to establish that the facility would serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6). Staff Exh. 10, Direct Testimony of Thomas Crawford, p. 5, lines 4-18; Crawford, Tr. IV 695:3-14. Overwhelming local community opposition, as demonstrated by local government opposition, public comments, petitions, and testimony at the local hearing, justifies the denial of SFS's application for a certificate under R.C. 4906.10(A)(6).

**B. The Board Should Overrule The Administrative Law Judge's Ruling That Struck The Ebenhacks' Testimony About The Petitions Opposing The Project And That Declined To Admit Those Petitions As Hearing Exhibits.**

During the hearing, the ALJ ruled that the petitions attached as Exhibit A to Thomas E. Ebenhack's testimony, Exhibit A to Suzannah Ebenhack's testimony, and Exhibits A and B to Wesley Ebenhack's testimony would not be admitted into evidence as part of the evidentiary

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<sup>4</sup> These numbers do not include Thomas J. Ebenhack, who opposes the Project, and three other persons whose testimony did not explicitly indicate whether they support or oppose the Project.



hearing record. Tr. III 495:18 – 496:24. The ALJ also struck the portions of these witnesses’ written direct testimony describing the petitions and their procedures for collecting citizens’ signatures on these petitions. *Id.* Intervenor request that the Board overrule these rulings and admit the testimony and exhibits that were struck.

Thomas E. Ebenhack, Suzannah Ebenhack, and Wesley Ebenhack collected the signatures on these petitions using meticulous procedures to ensure that the signatures were authentic. As shown by the Ebenhack testimony that should have been admitted, the Ebenhacks were physically present when the signers signed the petitions attached to their testimony. Ebenhacks’ Exh. 1, Direct Testimony of Dr. Thomas E. Ebenhack (“T.E. Ebenhack Testimony”), p. 4, lines 8-13, 17-19; Ebenhacks’ Exh. 2, Direct Testimony of Suzannah Ebenhack (“S. Ebenhack Testimony”), p. 1, lines 18-20; Ebenhacks’ Exh. 3, Direct Testimony of Wesley Ebenhack (“W. Ebenhack Testimony”), p. 13, lines 8-13. The Ebenhacks personally verified the signers’ identities. T.E. Ebenhack Testimony, p. 4, lines 17-19; S. Ebenhack Testimony, p. 10, lines 18-20; W. Ebenhack Testimony, p. 13, lines 9-13. The Ebenhacks personally drove to the residences of the persons who signed the petitions, watched them sign, and verified the residential addresses the signers wrote on the petitions. T.E. Ebenhack Testimony, p. 4, lines 8-13; S. Ebenhack Testimony, p. 10, lines 11-15; W. Ebenhack Testimony, p. 13, lines 1-5. Wesley Ebenhack drove to the residences of the signers of the petitions in Exhibit B of his testimony and watched them sign their names. *Id.*, p. 14, lines 1-7.

In moving to strike the petitions and supporting testimony, SFS cited another Board decision as precedent for its request that the Board should exclude the Ebenhacks’ petitions. *In re Harvey Solar*, OPSB Case No. 21-164-EL-BGN (Oct. 20, 2022), ¶ 158. However, the two cases are not at all similar. In *Harvey Solar*, the intervenors submitted spreadsheets of names of persons who had

electronically signed a petition on the intervenors' website. *Id.*, ¶ 157. Except for a few signatures on paper (13 paper signatures out of a total of 760 signatures), the signers' signatures were not offered into evidence. The intervenors in *Harvey Solar* were not present to watch those persons sign their names or to verify their identities. Harvey Solar pointed out that some of the signatures were obviously false, such as those signing in the names of "Anonymous Pickle," "PandaCake," and "YesYes." See Page 11 of its brief on OPSB's website at <https://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A22E31B64325F00228>. The Board's decision excluded these spreadsheets not because they were hearsay, but because the "Board finds that the reliance on petitions for which the identity of the denoted individuals cannot be confirmed is not appropriate for consideration relative to the ultimate determination in this case." *Id.*, ¶ 158. That is, OPSB did not accept the spreadsheet lists of petition signers, because the intervenors could not verify their identities.

Unlike *Harvey Solar*, the Ebenhacks verified the identities of the petition signers and their home addresses. The ALJ correctly declined to rely on *Harvey Solar* as a basis for its ruling. Tr. 496:12-20. Instead, the ALJ directed the Ebenhacks to file the petitions as public comments so that the Board can "afford the appropriate weight to these signatures." *Id.* However, the ALJ should have admitted the petitions into evidence in the evidentiary hearing record.

The signatures on the Ebenhacks' petitions are important evidence about the local community's opposition to SFS' Project. The petitions speak for themselves in that regard, since their every page clearly spells out the signers' opposition. The petitions are an important gauge of the community's opposition, since almost everyone approached for a signature agreed to sign. This information is important for the Board's consideration of local support and opposition under

R.C. 4906.10(A)(6) and should be admitted. Accordingly, the Intervenor request that the Board admit the petitions and the Ebenhacks' supportive testimony.

**C. Construction And Operation Of The Project Would Cause Considerable Harm To Wesley Ebenhack, Suzannah Ebenhack, And Their Customers, As Well As Harm The Entire Ebenhack Family, Wayne Township, And Other Township Residents.**

Intervenor Wesley and Suzannah Ebenhack and their daughter live on and farm at a 29-acre farm ("Ebenhack Farm") located adjacent to the Project Area. S. Ebenhack Testimony, p. 1, lines 18-22; W. Ebenhack Testimony, p.1, lines 17-21; S. Ebenhack, Tr. III 562:10. One side of the farm is located along Dungan Road, which runs in a northwestern to southeastern direction from west to east. W. Ebenhack Testimony, p. 1, lines 22-24; S. Ebenhack Testimony, p. 1, lines 22-23. Ebenhack Road runs along the west side of Ebenhack Farm. *Id.*, line 24; W. Ebenhack Testimony, p. 1, line 24. Ebenhack Farm is adjacent to the Project Area, which is located across Dungan Road to the north and to the east of Ebenhack Farm. *Id.*, p. 5, lines 1-2; S. Ebenhack Testimony, p. 6, lines 19-20. Thomas E. Ebenhack, Scarlett Ebenhack, Wesley Ebenhack, and Thomas J. Ebenhack share in the fee simple ownership of Ebenhack Farm. W. Ebenhack Testimony, p. 2, lines 7-9.

Ebenhack Farm has been owned by the Ebenhack family for generations. Thomas E. Ebenhack inherited Ebenhack Farm from his parents. T.E. Ebenhack Testimony, p. 2, line 20. Prior to that time, the farm had been in the Ebenhack family since around 1899. *Id.*, lines 20-21. Dr. Ebenhack's parents, grandparents, and great grandparents all owned this land. *Id.*, lines 21-22. His great grandfather, Frank Ebenhack, donated some land from the farm and other land to the township so that about half of Ebenhack Road could be constructed. *Id.*, p. 2, line 22 to p. 3, line 1. He and Scarlett Ebenhack have shared the farm's ownership since 2000. *Id.*, p. 3, line 1. In 2018 and 2019, they transferred partial ownership interests in the farm to their sons Wesley

Ebenhack and Thomas J. Ebenhack as a generational transfer. *Id.*, lines 1-3. Starting in 2018, they arranged for Wesley Ebenhack and Suzannah Ebenhack to assume responsibility for the fruit and vegetable growing and marketing operations on that farm as a business of their own to support their family. *Id.*, lines 3-6. SFS' Project threatens this venture.

Yellowbud Creek flows through this property, and a recreational pond also is located on the parcel. S. Ebenhack Testimony, p. 1, line 24 to p. 2, line 1. Ebenhack Farm contains the house in which they live, a residential cabin used by guests, a barn and a shed used for storing equipment, produce, and supplies, and an events barn used for produce sales and social events. *Id.*, p. 2, lines 2-4; W. Ebenhack Testimony, p. 3, lines 8-10. Ebenhack Farm has about five acres of orchards and about 14 additional acres of fruit and vegetable fields. *Id.*, p. 2, lines 5-6; S. Ebenhack Testimony, p. 2, lines 4-5.

Wesley Ebenhack and Suzannah Ebenhack started a business named The Farmstead Market, LLC ("Farmstead Market") at Ebenhack Farm in 2018 as a means to support their family financially. *Id.*, p. 2, lines 19-21. This business grows and sells fruit and vegetables and markets social events at Ebenhack Farm, as well as growing strawberries on land south of Ebenhack Road owned by Thomas E. Ebenhack and Scarlett Ebenhack. *Id.*, p. 2, lines 3-4, p. 3, lines 10-17, & p. 5, line 22 to p. 6, line 6; W. Ebenhack Testimony, p. 2, lines 19-23. Suzannah Ebenhack is the sole member of The Farmstead Market, LLC, but both she and Wesley Ebenhack work for the business along with part-time employees who live in the area. *Id.*, p. 2, lines 17-18; S. Ebenhack Testimony, p. 2, lines 6-9. Suzannah Ebenhack's typical workday for Farmstead Market starts at 6:30 a.m. and ends at 10 p.m. from May to mid-November. *Id.*, p. 2, lines 10-13; S. Ebenhack, Tr. III 562:15-25. She also performs duties for Farmstead Market at other times of the year. S. Ebenhack Testimony, p. 2, lines 6-9. Wesley Ebenhack takes care of

the crops, including planting, tilling, and other work, and along with Suzannah Ebenhack, sells produce at farmers' markets. W. Ebenhack Testimony, p. 3, lines 2-3. He has been planting and taking care of fruit trees, blackberries, and other crops on the farm since 2011. *Id.*, p. 3, lines 5-7.

In addition to Suzannah and Wesley Ebenhack, Farmstead Market had 14 part time employees in 2020, 14 part time employees in 2021, and nine part time employees in 2022. S. Ebenhack Testimony, p. 5, 14-16. Primarily, these employees assist in harvesting fruit and vegetables. *Id.*, lines 16-17. Farmstead Market expects to employ approximately the same number of people in 2023 and future years, unless Project damages its business. *Id.*, lines 17-19. These employees will be financially harmed if the Project reduces or destroys Farmstead Market's business.

Farmstead Market's continued success depends on its customers' willingness to travel to Ebenhack Farm to pick and buy fruit and vegetables and to attend social events there. The only entrance to Ebenhack Farm is on Ebenhack Road just south of its intersection with Dungan Road. S. Ebenhack Testimony, p. 4, lines 21-22; W. Ebenhack Testimony, p. 3, lines 18-19. Customers arriving from the north use Dungan Road to reach Ebenhack Road. *Id.*, lines 19-20; S. Ebenhack Testimony, p. 4, lines 22-23. State Route 104 and Westfall Road are the main roads that provide access to Dungan Road. *Id.*, p. 4, line 23 to p. 5, line 1; W. Ebenhack Testimony, p. 3, lines 20-21. Most of the customers who pick and/or purchase fruits and vegetables at Farmstead Market come from the north. *Id.*, p. 4, lines 7-8; S. Ebenhack Testimony, p. 5, lines 10-11. The easiest route to reach Ebenhack Farm from areas in and near Columbus and Circleville is to take State Route 104 south to Dungan Road. *Id.*, p. 5, lines 1-3; W. Ebenhack Testimony, p. 3, lines 21-23. Consequently, avoiding damage to the surfaces of State Route 104,

Westfall Road, and Dungan Road and preventing the impairment of the views seen by customers traveling these lifelines to the farm are of paramount importance to Farmstead Market's business.

As explained below, the planned intrusion by SFS' Project threatens to damage and destroy the business that Wesley and Suzannah Ebenhack have worked so hard to establish, as well as to harm the entire Ebenhack family, Wayne Township, and other township residents.

**1. The Project's Construction And Operation Would Seriously Damage Wesley and Suzannah Ebenhack's Fruit And Vegetable Business.**

Farmstead Market grows blackberries, apples, peaches, plums, pears, cherries, raspberries, garlic, onions, pumpkins, gourds, squash, watermelons, lettuce, tomatoes, and sweet corn at Ebenhack Farm and grows strawberries on land south of Ebenhack Farm owned by Thomas E. Ebenhack and Scarlett Ebenhack. S. Ebenhack Testimony, p. 2, lines 14-18; W. Ebenhack Testimony, p. 2, lines 19-23. Farmstead Market sells produce grown on Ebenhack Farm at the events barn to customers who travel there. S. Ebenhack Testimony, p. 3, lines 1-2; W. Ebenhack Testimony, p. 3, lines 9-10. In 2022, Farmstead Market also sold its produce at six farmers' markets that it operated in Columbus, Ohio. *Id.*, p. 3, lines 12-13; S. Ebenhack Testimony, p. 3, lines 2-3; S. Ebenhack, Tr. III 547:18-23. In previous years, Farmstead Market sold some of its produce at farmers markets in Columbus, Chillicothe, and Circleville, Ohio. *Id.*, lines 3-5; W. Ebenhack Testimony, p. 3, lines 13-14. Much of the produce from Ebenhack Farm is sold to customers who travel there to pick the produce for themselves, an activity known as "U-Pick." S. Ebenhack Testimony, p. 3, lines 5-7.

U-Pick sales constitute about 10% of Farmstead Market's income. S. Ebenhack, Tr. III 547:11-14. Farmstead Market had 145 and 252 U-Pick customers in 2020 and 2021, respectively. *Id.*, lines 8-9. Records of the number of U-Pick customers were not kept in 2022, but the number appeared to be less than in 2021. *Id.*, lines 9-11. Farmstead Market had

approximately 100 additional customers in each of 2020, 2021, and 2022 who purchased produce at Ebenhack Farm that Farmstead Market had harvested itself. *Id.*, lines 11-13.

The U-Pick trade is an indispensable component of Farmstead Market's survival. U-Pick customers enable Farmstead Market to sell more produce. S. Ebenhack Testimony, p. 4, lines 1-2. Farmstead Market would not be able to find enough employees to harvest the produce if it had to pick all of its produce, so some produce would rot in the fields without the U-Pick trade. *Id.*, lines 2-4. Selling produce to U-Pick customers reduces the expenses of employing workers to pick and package the produce. *Id.*, lines 4-6.

Suzannah and Wesley Ebenhack are in the process of transitioning their U-Pick sales to make it a much larger portion of their business. S. Ebenhack, Tr. III 547:14-17. The marketing plan for Farmstead Market since its inception in 2018 has been to develop and expand the U-Pick trade. S. Ebenhack, Tr. III 563:1-13. Besides increasing revenue as explained above, more U-Pick sales would improve the quality of life for Wesley and Suzannah Ebenhack. In particular, Suzannah Ebenhack would be able to spend more time with their one-year old daughter at Ebenhack Farm instead of spending long days for six days per week working at Columbus farmers' markets or making wholesale product deliveries without her. S. Ebenhack, Tr. III 561:25 – 562:25.

A pleasant ambience is essential in selling produce and marketing social events at Ebenhack Farm. S. Ebenhack Testimony, p. 5, line 20 to p. 6, line 10. Wesley and Suzannah Ebenhack endeavor to make every customer's visit to Ebenhack Farm pleasant and enjoyable, because this encourages repeat visits to purchase produce that Farmstead Market has harvested, pick the produce the customers purchase, and book their social events there. *Id.*, p. 5, line 22 to p. 6, line 1. For example, Farmstead Market holds harvest festivals with events such as apple

cider pressing and other family events at Ebenhack Farm to encourage customers to visit and buy produce. *Id.*, p. 6, lines 1-3. Farmstead Market also decorates the events barn and grounds during these events to make the premises attractive. *Id.*, lines 3-5. The visitors to Ebenhack Farm are provided with more than produce; their trips to the farm are recreational experiences in the quiet, scenic countryside. *Id.*, lines 5-6. U-Picking, for example, provides families with opportunities to experience the pleasures of farm activities for a day. *Id.*, lines 6-8. An unpleasant experience at the farm or on the roads to and from the farm would reduce the customers' enjoyment during their visit and discourage them from returning. *Id.*, lines 8-10.

An interruption or reduction of the U-Pick trade at Ebenhack Farm occasioned by the construction and presence of the Project would be devastating for Farmstead Market. Suzannah and Wesley Ebenhack spent years developing relationships with customers at farmers' markets in Circleville and Columbus and through online advertising to build a customer base that visits Ebenhack Farm regularly to pick produce. S. Ebenhack, Tr. III 563:14 – 564:5. Customers who do not visit the farm for six or twelve months likely would not return. S. Ebenhack, Tr. III 564:6-17. In the meantime, crops would rot in the fields. S. Ebenhack, Tr. III 564:18 – 565:1.

The construction and operation of the Project would discourage customer visits to Ebenhack Farm to pick and purchase fruit and vegetables. SFS's solar arrays may be as high as 20 feet, which is the maximum height of solar modules being considered by SFS. Application Narrative, p. 79. SFS' solar arrays would be highly visible from Ebenhack Farm. S. Ebenhack Testimony, p. 7, lines 1-6. Although SFS removed a triangular-shaped piece of land from the solar fields to the north of the Ebenhacks' events barn, this does not alleviate the bad view because Ebenhack Farm is higher in elevation and has a direct downward line of sight to other solar panel areas. S. Ebenhack, Tr. III 552:6-12. Consequently, the Ebenhacks and their visitors



at Ebenhack Farm, including its events barn and U-Pick fields, can easily see fields in the Project Area to the north and to the east of the events barn where SFS is proposing to construct solar fields. S. Ebenhack Testimony, lines 1-2; W. Ebenhack Testimony, p. 7, lines 1-13. SFS' Application does not provide for any vegetative screening to be planted in the line of sight between Ebenhack Farm and the nearby Project areas across Dungan Road. Dohoney, Tr. II 303:13. The unpleasant views during the Project's construction and operation would prevent Farmstead Market's customers from enjoying the experience of picking and buying fruit and vegetables at Ebenhack Farm. S. Ebenhack Testimony, p. 9, lines 10-13.

The Project's solar panels also would be "easily visible" from State Route 104, and SFS has proposed vegetative screening at only three tiny locations along that road and one other small location along Dungan Road. Dohoney, Tr. II 298:8 – 299:5; Application Exh. V, Visual Impact Mitigation and Lighting Plan, Attachment A, pdf p. 6, Drawing No. 1 (showing vegetative screening as four short lines). Because no vegetative screening is planned in the line of sight between Ebenhack Farm and the Project areas across Dungan Road (Dohoney, Tr. II 303:8-13), the solar panels along Dungan Road also will be highly visible from Ebenhack Farm. SFS undoubtedly will state that it has the option under proposed Condition 21 to add more vegetation in agreements with neighbors, but that is not required by the Application or Condition 21. People like to drive to rural areas because they enjoy the scenery. W. Ebenhack, Tr. III 603:8-10. Because Farmstead Market's customers travel to Ebenhack Farm to enjoy the pleasant ambience of the countryside while picking and buying produce, the public's unpleasant views of the industrial facility from the roads while traveling to and from Ebenhack Farm, as well as bad views from Ebenhack Farm, will discourage the customers' return visits.

Unfortunately, the main public roads used by Farmstead Market's customers to reach Ebenhack Farm are the main routes that SFS plans to use for construction. Traffic congestion caused by the vehicles of construction workers and trucks delivering construction equipment and materials could make travel to and from Ebenhack Farm unpleasant and difficult for Farmstead Market's customers. W. Ebenhack Testimony, p. 6, lines 9-11; W. Ebenhack, Tr. III 603:1-11. SFS will employ 200 to 400 employees at a time for construction, with an average of 250 employees at a time. Cook, Tr. I 99:23 -100:3, 101:24 – 102:10. SFS' congestion of State Route 104 during construction is a particular concern, because this road is a major avenue for not only local residents, but traffic from the north and south including Farmstead Market's customers. W. Ebenhack, Tr. III 603:1-8; S. Ebenhack Testimony, p. 4, line 23 to p. 5, line 1; W. Ebenhack Testimony, p. 3, lines 20-21. State Route 104 would be the public road most heavily used by SFS during construction. SFS' construction personnel would use that road to enter the construction laydown areas and employee parking area. Cook, Tr. I 102:25 – 103:14; Woodruff, Tr. I 136:10-13. Construction employees would likely use State Route 104 to reach the Project Area from their overnight lodging areas. Cook, Tr. I 104:21 – 105:6. Trucks delivering all of the Project's solar components are expected to use State Route 104. Cook, Tr. I 103:15-25, 104:4-10.

SFS' congestion of Dungan Road also is of great concern, because this road is widely used by customers to reach Ebenhack Farm. S. Ebenhack Testimony, p. 4, line 23 to p. 5, line 1; W. Ebenhack Testimony, p. 3, lines 20-21. SFS has removed the access points to the Project Area from Dungan Road, thereby making truck deliveries via Dungan Road unnecessary. Applicant's Exh. 11, Modification of Application, pdf p. 4. However, this would not alleviate the congestion from construction employee traffic. S. Ebenhack, Tr. III 550:10-14.

SFS also will access its substation site from Westfall Road, which is another route used by Farmstead Market's customers traveling from the north. Cook, Tr. I 87:12-15.

Traffic congestion caused by the vehicles of construction workers and trucks delivering construction equipment and materials could make travel to and from Ebenhack Farm unpleasant and difficult for Farmstead Market's customers. W. Ebenhack Testimony, p. 6, lines 9-11.

Dust from Project construction may be blown into the public roads on which Farmstead Market's customers and the Ebenhacks travel, where the dust can strike passing vehicles or can be deposited on the roads' pavement to be stirred up by passing vehicles. W. Ebenhack Testimony, p. 8, lines 20-23. Vehicles and equipment involved in Project construction could track mud onto the public roads traveled by Farmstead Market's customers and the Ebenhacks, which may cause hazardous driving conditions. *Id.*, p. 9, lines 20-22. Damage to the public roads caused by truck deliveries for Project construction may make travel to and from Ebenhack Farm unpleasant for Farmstead Market's customers. *Id.*, p. 7, lines 19-21.

Farmstead Market's customers would be repulsed by Project construction activities that create loud noises from heavy machinery and pile driving, damage roads, place mud, dirt, and dust on public roads, stir up dust clouds from earthmoving activities in the solar panel fields that will cross public roads and reach Ebenhack Farm, its events barn, and its fruit and vegetable fields, cause glare on the public roads, cause traffic congestion on the public roads, and result in views of the ugly Project from public roads. S. Ebenhack Testimony, p. 8, line 20 to p. 9, line 4; W. Ebenhack Testimony, p. 5, line 16 to p. 6, line 6, & p. 11, lines 13-14. Dust from Project construction may be blown into Ebenhack Farm where the events barn, Wesley and Suzannah Ebenhack's house, and the fruit and vegetable fields are located. *Id.*, p. 8, line 23 to p. 9, line 2.

Customer visits to Farmstead Market typically are far more numerous during the weekends, with Sunday usually being the peak sales day of the week. S. Ebenhack Testimony, p. 4, lines 14-17; S. Ebenhack, Tr. III 548:4-15. But proposed Condition 23 would allow impact pile driving and other construction noises even on weekends and holidays. Staff Exh. 1, Staff Report, p. 51. Neither the Ebenhacks nor any other township resident living on land adjacent to the Project Area would be able to enjoy their yards or relax at home during the weekends and holidays. Nor would other citizens residing inside or outside of Wayne Township be able to enjoy themselves while visiting Ebenhack Farm on weekdays and weekends during U-Pick seasons or at other times for picking and buying farm products or for engaging in social activities.

Suzannah Ebenhack testified that U-Pick operations for produce at the farm are conducted during 14 weeks to 18 weeks of the year. S. Ebenhack, Tr. III 540:18 -541:10. She also stated that she did not personally know the months in which construction would occur or where in the construction area the activities would occur at which time. S. Ebenhack, Tr. III 549:5-16. Based on this testimony, SFS may claim that the Ebenhacks do not know for sure that Project construction will occur during U-Pick seasons. However, since the U-Pick seasons occur during much of the time between May and November, it is unlikely that SFS would refrain from construction activities during these seasons when weather is most favorable for construction. Nor has SFS promised to do so pursuant to any legally binding commitment in its Application or elsewhere.

Weed seeds from the Project are also concerning. Weed seeds commonly spread to new areas when blown there by the wind or carried there by birds that eat the seeds and defecate them in the new areas. W. Ebenhack Testimony, p. 11, lines 19-21. If weeds grow in the Project

Area, their seeds will spread through these means to Ebenhack Farm. *Id.*, lines 21-22. Weeds compete with crops such as those grown by Farmstead Market. *Id.*, lines 18-19.

The Ebenhacks are concerned about the surface water runoff from the Project during and after construction, and for good reason as explained in Section VII below, as SFS has not properly evaluated the amount of water that will flow from the Project Area. Yellowbud Creek flows from the Project Area through Ebenhack Farm. W. Ebenhack Testimony, p. 12, line 3. The Ebenhacks are concerned that Project construction activities or the Project's presence may increase the runoff into Yellowbud Creek and overflow its banks on Ebenhack Farm. *Id.*, lines 3-5.

Dust from Project construction in Ebenhack Farm's fruit and vegetable fields would damage the produce by covering it with dust, ruining strawberries, blackberries, and peaches (which if washed prior to sale would be badly bruised and damaged due to their delicate nature), and requiring the other fruits and vegetables to be washed. S. Ebenhack Testimony, p. 9, lines 4-8; W. Ebenhack Testimony, p. 9, lines 7-10. To the extent that washing some types of fruits and vegetables can be done without destroying the products' quality, this washing would substantially increase Ebenhack Farms' costs from buying expensive washing equipment and paying extra labor costs to wash and dry the produce. *Id.*, lines 11-13; S. Ebenhack Testimony, p. 9, lines 8-10.

The Project's use of tall fences to exclude deer from large tracts of land in the Project Area also may result in damage to Farmstead Market's crops. Deer are numerous and ever-present in the land of the Project Area. W. Ebenhack Testimony, p. 10, lines 3-20; T.E. Ebenhack Testimony, p. 3, lines 17-19. SFS undoubtedly will claim that it will include corridors for deer travel in the Project Area. However, the Application noncommittally states only that

SFS will install deer corridors only “[w]here possible,” and the Application identifies no deer corridors in its design. Application Narrative, p. 70; Cook, Tr. I 98:15-19. Thus, SFS has made no unenforceable commitment for deer corridors. Even if deer corridors were added, the locations of the planned panel areas north and east of Ebenhack Farm would still have fences and solar panels that will block the deer’s predominant current pathway between the Scioto River and the fields on the north side of Dungan Road. W. Ebenhack Testimony, lines 9-12. The solar fences will also exclude the deer from the field in this area where they currently feed. *Id.*, lines 12-13.

Deer frequently cross State Route 104 and Dungan Road adjacent to the Project Area, where they create hazards for motorists. W. Ebenhack Testimony, lines 16-20; T.E. Ebenhack Testimony, p. 3, lines 19-21. Deer have collided with Dr. Ebenhack’s vehicle on three occasions as he drove on State Route 104 or Dungan Road in areas adjacent to the Project Area. *Id.* The exclusion of deer from the Project Area will force even more deer onto these roads where they will endanger the township’s residents and visitors.

Deer eat fruits and vegetables, including the twigs of fruit trees. W. Ebenhack Testimony, p. 11, line 1. Currently, Ebenhack Farm experiences some damage to fruit trees from deer browsing on them, but so far most of the deer observed foraging for food have stayed away from Ebenhack Farm. *Id.*, lines 1-4.

This may change due to the design of SFS’ Project with its tall fences on the north side of Dungan Road adjacent to Ebenhack Farm. Installing solar fences in the Project Area north and east of Ebenhack Farm may increase the number of deer that may go to Ebenhack Farm to feed, since they would no longer be able to feed in those areas. W. Ebenhack Testimony, p. 11, lines 6-8. Fences in the Project Area may increase the number of deer traveling along or crossing

Dungan Road and State Route 104, since the fences will reduce the acreage in which they can travel in the Project Area. *Id.*, lines 8-11.

SFS' poorly sited Project will jeopardize the fruit and vegetable trade that Suzannah and Wesley Ebenhack have worked so hard to establish. The Project will harm the Township and its residents and visitors. The Board should consider these adverse impacts and decide that this Project does not comply with R.C. 4906.10(A)(6).

**2. The Project's Construction And Operation Would Seriously Destroy Wesley and Suzannah Ebenhack's Venue For Social Events.**

Suzannah and Wesley Ebenhack have built a business that not only sells fruits and vegetables, but also serves the entertainment and social needs of its visitors. S. Ebenhack, p. 3, lines 11-12. They have been using some of the profits from fruit and vegetable sales to fund improvements to Ebenhack Farm that not only support the production of fruits and vegetables, but also make the farm a better entertainment and social venue for customers while buying produce. *Id.*, lines 12-15. They built an events barn there where they sell fruits and vegetables and which is rented for social events. *Id.*, lines 15-17. They have held a variety of social events at this venue, including bridal showers, baby showers, club meetings, church social events, scavenger hunts, and fall harvest festivals. *Id.*, p. 7, lines 12-15. Their wedding was held in the events barn. *Id.*, line 15.

A person standing on the second floor of the events barn or standing outside of the barn, including the location planned for an outdoor pavilion, can see the proposed solar panel fields in the Project Area. *Id.*, p. 7, lines 2-5; W. Ebenhack Testimony, p. 7, lines 6-16. A person with a height of five feet and five inches who is standing on the second floor of the events barn would be 17 feet and 5 inches above the ground. *Id.*, lines 13-14. The elevation of the land at Ebenhack Farm is higher than the elevation of the fields in the Project Area where Scioto Farms

is proposing to construct solar panels to the north and to the east of Ebenhack Farm. *Id.*, lines 7-9. This means that SFS' solar panels will be an eyesore for anyone who came to Ebenhack Farm to enjoy its otherwise pleasant setting, even if SFS planted trees in front of the solar panels. The Ebenhacks are concerned that, after the Project is constructed, the presence of the Project will discourage the public from holding weddings and other social events at the venue, because guests of the recreational venue would see the Project while visiting the venue and while traveling on the public roads to and from the venue. S. Ebenhack Testimony, p. 8, lines 15-19; W. Ebenhack Testimony, p. 7, lines 1-5.

Since proposed Condition 23 would allow weekend construction, the Ebenhacks would not be able to host social events at Ebenhack Farm even on weekends when most such events would otherwise occur. The noise, dust, and views of construction would spoil any social event.

No one would want to hold a wedding while viewing massive solar panel fields under construction or in operation that spoil the venue's ambience. Suzannah Ebenhack has not scheduled weddings for guests at the events barn, for two reasons. First, she wanted to build a commercial kitchen and an outdoor pavilion at the events barn prior to opening the venue to the public for weddings. S. Ebenhack Testimony, p. 7, line 18 to p. 8, line 1. Upon discovering SFS' intent to build the Project, these plans were placed on hold. *Id.*, line 18 to p. 8, line 1. Spending a large sum of money to finish the wedding facilities make little sense if the Project will prevent weddings there. S. Ebenhack, Tr. III 569:6-12. Second, since wedding venues typically are booked a year in advance of the wedding date, Suzannah Ebenhack has not scheduled any weddings at the events barn for fear that Project construction might be underway when the wedding occurs. S. Ebenhack Testimony, p. 8, lines 2-4; S. Ebenhack, Tr. III 553:10-16, 565:2-21. Otherwise, a booking for a wedding would have to be cancelled if construction



starts prior to the wedding, and this would result in unfavorable customer reviews that would quash future bookings. S. Ebenhack, Tr. III 553:10-16, 565:2-21. Suzannah Ebenhack does not plan to open the recreational venue to the public for weddings as long as solar farm construction is occurring, because she is concerned that construction noise, damaged roads, dust, dirt, and dust on the roads, glare, dust blowing from the Project Area onto public roads and onto Ebenhack Farm, views of the ugly Project from public roads and the social venue, and traffic associated with Project construction may threaten and impair the visitors' enjoyment of these events. S. Ebenhack Testimony, p. 8, lines 4-10. She can only host graduation parties, birthday parties, and similar social events this year as long as Project construction has not started. S. Ebenhack, Tr. III 569:13 – 570:1.

SFS' initial concealment from the public of its plans to build the Project not only jeopardizes the future livelihood of Wesley and Suzannah Ebenhack, but it also threatens to cost them the loss of their investment in the events barn. SFS started developing the Project in mid-2018. Application Narrative, p. 28. Prior to finishing Farmstead Market's construction of the events barn in 2020, the Ebenhacks did not know about the Project. *Id.*, p. 7, lines 7-11; W. Ebenhack Testimony, p. 5, lines 11-15; T.E. Ebenhack Testimony, p. 3, lines 12-14. Yet SFS' representatives and the participating landowners, including the participating Tootle landowners on the adjacent Project Area land to the north, said nothing to the Ebenhacks while barn construction was underway to warn them about their plans to construct SFS facilities that would ruin the events business planned for the venue. SFS did not discuss its Project with the Ebenhacks until August 3, 2021, and even that conversation was initiated by the Ebenhacks. W. Ebenhack, Tr. III 579:17-25; Ebenhacks' Exh. 4, SFS Interrogatory Answers, p. 8, Response to Interrogatory 13. SFS treated all other adjacent landowners with that same disregard, since it did

not discuss the Project with any of them prior to August 2021. *Id.*, pp. 8-9, Response to Interrogatory 13. The Board should not reward such irresponsible misconduct with a certificate.

SFS' poorly sited Project will shut down the social event venue in which Suzannah and Wesley Ebenhack have invested. This would ruin Farmstead Market as a social venue for the Township's residents and visitors. The Board should consider these Project impacts and decide that this Project does not comply with R.C. 4906.10(A)(6).

**3. The Project's Construction And Operation Would Reduce The Quality Of Life For The Ebenhacks And Other Wayne Township Residents.**

Ebenhack Farm is the center of life for Wesley and Suzannah Ebenhack. The farm is the site of their house, their events barn, the fields in which they grow crops, a residential cabin used by family relatives and guests, and a recreational pond. W. Ebenhack Testimony, p. 2, lines 2-6, 12-13. Ebenhack Farm is also important to Thomas E. Ebenhack, Scarlett Ebenhack, and Thomas J. Ebenhack, who share in the farm's ownership and use. For example, Scarlett and Thomas E. Ebenhack routinely help at Farmstead Market. W. Ebenhack, Tr. III 574:4-6. The family engages in recreational activities there. W. Ebenhack Testimony, p. 2, lines 10-13.

The Project would be devastating for the Ebenhacks' enjoyment of Ebenhack Farm. The panel fields in the Project Area also would be visible from inside and outside of Wesley and Suzannah's house at Ebenhack Farm, including its two porches. S. Ebenhack Testimony, p. 7, lines 5-6; W. Ebenhack Testimony, p. 7, lines 14-16. The Ebenhacks would be forced to drive on roads damaged, destroyed, dirtied, and muddied during Project construction, and would have to endure the unsightly views of solar panels from the public roads during Project construction and operation. Loud construction noise would make life miserable for them. The Project would spoil the enjoyment of the recreational activities that they and their guests would enjoy there, such as the use of the farm's recreational pond and residential cabin. Consequently, the Project

would impair not only the occupational livelihood of Wesley and Suzannah Ebenhack, but also the Ebenhacks' enjoyment in living and socializing there.

The Ebenhacks' plight is severe and unavoidable if the Project is approved. However, they are not the only residents of Wayne Township who the Project will victimize. Other township citizens and visitors also be harmed by the visual blight of fields full of industrial solar panels as they travel the township's roads or try to enjoy life at home on land adjacent to the Project Area. They too will suffer from construction noise, damaged roads, dust, dirt, and dust on the roads, glare, dust blowing from the Project Area onto public roads and onto their homes and yards, and traffic associated with Project construction. Consequently, this Project is not in the public interest, convenience, or necessity and should be disapproved under R.C.

4906.10(A)(6).

**D. Lessons Learned From The Construction Of Yellowbud Solar Farm Reveal The Damage That SFS' Project Would Cause.**<sup>5</sup>

The construction of the Yellowbud Solar project ("Yellowbud") has been a wakeup call for the citizens of Wayne Township. Yellowbud's construction created loud noises from heavy machinery and pile driving, has damaged roads, has caused glare on the public roads, has caused traffic congestion, has placed mud, dirt, and dust on public roads, has created dust clouds from earthmoving activities in the solar panel fields across public roads and into Farmstead Market's strawberry and garlic fields, and has resulted in views of the ugly facility from public roads. S. Ebenhack Testimony, p. 8, lines 10-15. SFS has provided no evidence to disprove the Intervenors' testimony about the damage that Yellowbud has caused. In fact, SFS' project manager acknowledged the public's "great deal of concern – most of the concerns were -- raised

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<sup>5</sup> Intervenors Scarlett Ebenhack and Thomas E. Ebenhack do not join this Section III. D, because Yellowbud Solar has threatened to sue them if they make statements about the Yellowbud Solar project. T.E. Ebenhack Testimony, p. 4, lines 2-4; T.E. Ebenhack, Tr. III 510:14-23.

were associated with the Yellowbud project and the conditions that were received there.”

Woodruff, Tr. II 258:14-21.

SFS tries, vainly, to demonstrate that its Project will somehow be less harmful due to supposedly stricter controls in the certificate conditions proposed for the Project. SFS provided a comparison of the proposed conditions in this case with the conditions imposed on Yellowbud in an effort to distinguish the two projects. Applicant’s Exh. 10, Errata to Jim Woodruff’s Testimony (“Errata to Woodruff Testimony”), Exh. A. However, while many SFS conditions were not included in Yellowbud’s certificate, the conditions pertaining to the main problems experienced by the Ebenhacks and Wayne Township are substantively the same.<sup>6</sup>

The Board should learn from the bad Yellowbud experience and, because the SFS Project would cause even worse damage, deny the SFS certificate.

### **1. Visual Impacts**

Suzannah Ebenhack testified that, at the time Yellowbud was in the planning stages, she had no experience with what the solar panels would look like upon construction. S. Ebenhack, Tr. III 555:22 - 556:5. The appearance of Yellowbud’s solar facility reveals that SFS’s solar facility will be a visual blight in the community.

Nevertheless, unlike the SFS Project Area, Yellowbud is barely visible from Farmstead Market in winter once the trees lose their leaves, and at other times is not visible from the market at all. S. Ebenhack, Tr. III 565:25 – 566:15. Yellowbud is not visible from the events barn or Dungan Road during crop growing season. *Id.*, 566:4-15. In addition, a map of the Yellowbud project area shows that Yellowbud abuts State Route 104 for only a short distance. Applicant’s

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<sup>6</sup> This brief cites the language of the conditions as set forth in Yellowbud’s Joint Stipulation instead of citing the summary of conditions in Yellowbud’s certificate, because the certificate provides that the conditions’ language in the stipulation is controlling. W. Ebenhack Testimony, Yellowbud Opinion, Exh. K, p. 21, ¶ 66; Woodruff, Tr. I 150:6 – 152:3.

Exhibit 37. In contrast, SFS' Project would despoil a long stretch of State Route 104, which is a major thoroughfare in this area.<sup>7</sup> See Application Exh. V, Attachment A, Visual Impact Mitigation and Lighting Plan, pdf p. 6. Moreover, Yellowbud is south of Ebenhack Farm, and most of Farmstead Market's produce customers travel there from the north. W. Ebenhack Testimony, p.4, lines 7-8; S. Ebenhack Testimony, p. 5, lines 10-11. Consequently, relatively few of Farmstead Market's customers drive past Yellowbud's facility, and then they see it only briefly. In contrast, Farmstead Market's customers arriving from the north would need to travel on State Route 104 and Dungan Road, both of which would be in close proximity to long stretches of SFS facilities located close to those roads. See the Project Site Layout Map in Figure 3-2 of the Application. On State Route 104 close to Dungan Road, visitors would have to run a gauntlet between solar panels on both sides of the road. *Id.* Consequently, SFS will cause substantially more visual damage to the Ebenhacks and Wayne Township than Yellowbud does.

The conditions for Yellowbud and SFS are substantially the same for addressing the two projects' visual impacts. Yellowbud Condition 13 and SFS Condition 21 provide almost identical requirements for a landscape and lighting plan to address visual impacts. W. Ebenhack Testimony, Exh. L, p. 7; Jt. Exh. 1, Joint Stipulation, pp. 6-7. SFS Condition 21 has additional language requiring the landscape plan to "also address potential aesthetic impacts to nearby communities, the travelling public, and recreationalists by incorporating appropriate landscaping measures such as shrub plantings or enhanced pollinator plantings." Errata to Woodruff Testimony, Exh. A, p. 7. However, planting an unknown number of bushes and perennials along

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<sup>7</sup> SFS has represented that it would not build the solar arrays on the east side of State Route 104, but SFS has not made any binding commitment in the Application or Joint Stipulation to remove these areas from the Project. Even if solar modules are not built east of the road, this would still not address the eyesore from the much more extensive solar panels areas on the west side of State Route 104.

public roads will do nothing to block or improve the public's views of this industrial facility with solar modules up to 20 feet in height.

## **2. Construction Dust**

Suzannah Ebenhack saw clouds of dust coming from Yellowbud's earthmoving in its solar panel areas during about three or four days per week for about a month during construction. S. Ebenhack Testimony, p. 9, lines 16-17. She made these observations while she was working in vegetable and strawberry fields and as she was driving on Ebenhack Road. *Id.*, lines 17-19.

Wesley Ebenhack saw dust clouds from Yellowbud's earthmoving activities in one of its solar panel fields traveling at least one quarter of a mile to the strawberry and garlic fields that Farmstead Market grows in fields south of the Ebenhack Farm. W. Ebenhack Testimony, p. 9, lines 2-5. The strawberry plants and a greenhouse in that area were coated with dust. *Id.*, lines 5-6. Fortunately, those strawberries had been harvested before the dust coated them. *Id.*, lines 6-7. Otherwise, these dustings would have been disastrous for Farmstead Market, as they would have ruined the strawberries that are a large and important component of its fruit business.

While Yellowbud's dust clouds traveled a quarter mile to the strawberry and garlic fields and greenhouse, other Farmstead Market fruit and vegetable fields are located only 600 feet and 700 feet from SFS' proposed solar panel areas to the north and east, respectively. W. Ebenhack Testimony, p. 9, lines 15-17. Dust from SFS' earthmoving activities could easily reach Farmstead Market's fields, ruining produce and making it miserable for employees and U-Pick customers in the fields. Farmstead Market's events barn is located only 650 feet and 1400 feet from Scioto Farms' closest proposed solar panel areas to the north and east, respectively. *Id.*, lines 13-15. Dust would soil the events barn and grounds, ruining social events and making selling and purchasing products a miserable experience.

Construction dust also would harm other Wayne Township residents. There are 17 houses, including one house under construction, on land adjacent to the Project Area. W. Ebenhack Testimony, p. 5, lines 7-8. There are two additional parcels of land adjacent to the Project Area on which no houses are located, which are owned by persons other than those living in these 17 houses. *Id.*, lines 8-10. The Project structures, such as solar panels, are projected to be located within 700 feet of nine nonparticipating residences. Application Narrative, p. 72, Table 8-7. Moreover, the setback between the Project and nonparticipating residences is only 300 feet. Applicant's Exh. 11, Modification of Application, pdf p. 4. Since Yellowbud's dust clouds traveled a quarter mile to Farmstead Market's strawberry and garlic fields and greenhouse, there is reason to believe that SFS' dust will smother the adjacent homes and roads at these much shorter distances.

Neither the SFS conditions nor the Yellowbud conditions address dust problems from facility construction. Yellowbud's application required best management practices to control dust. W. Ebenhack Testimony, Exh. L, p. 17, ¶ 50. Yet Yellowbud sent clouds of dust for long distances to aggravate and harm its neighbors. SFS likely will cause the same problem.

### **3. Construction Noise**

Wesley Testimony testified that he heard pile driving noise from Yellowbud's construction as far away as two miles. W. Ebenhack Testimony, p. 11, lines 14-15. SFS' pile driving will be much closer to Ebenhack Farm. Farmstead Market's fruit and vegetable fields are located only 600 feet and 700 feet from SFS' proposed solar panel areas to the north and east, respectively. W. Ebenhack Testimony, p. 9, lines 15-17. Farmstead Market's events barn is located only 650 feet and 1400 feet from SFS' closest proposed solar panel areas to the north and east, respectively. *Id.*, lines 13-15. SFS' construction noise in these solar panel areas would shut

down Farmstead Market's fruit and vegetable marketing and social activities at Ebenhack Farm. Since pile driving noise travels two miles, people at Ebenhack Farm would hear pile driving in the Project Area far beyond the two solar panel fields immediately adjacent to Ebenhack Farm. Farmstead Market's employees would have to endure the noise or, more likely, quit their jobs. The Ebenhacks would not be able to avoid the noise at Ebenhack Farm.

Construction noise would also harm other Wayne Township residents. The Project structures, such as solar panels, are projected to be located within 700 feet of nine nonparticipating residences. Application Narrative, p. 72, Table 8-7. Moreover, the setback between the Project and nonparticipating residences is only 300 feet. Applicant's Exh. 11, Modification of Application, pdf p. 4. This means that SFS' noisy construction activities will be occurring close to adjacent residents as well as other township residents living up to two miles away.

The SFS and Yellowbud conditions have the same lenient time restrictions for construction activities, except that Condition 14 of Yellowbud's certificate allows pile driving until the later of 7 p.m. or dusk, and SFS proposed Condition 23 allows pile driving until the later of 6 p.m. or dusk. Errata to Woodruff Testimony, Exh. A, p. 7; W. Ebenhack Testimony, Exh. L, p. 7; Jt. Exh. 1, Joint Stipulation, p. 7. Neither the SFS conditions nor the Yellowbud conditions limit the volume of construction noise from pile driving, heavy earthmoving machinery, or other noise sources. Neither project's conditions would prevent pile driving noises from traveling two miles to Ebenhack Farm and the homes of other Wayne Township residents.

SFS represents that its construction noise will be temporary and intermittent, would occur away from most residential structures, and would be limited to daytime working hours.



Yellowbud's representations were identical. W. Ebenhack Testimony, Exh. L, Yellowbud Opinion, p. 13, ¶ 40. Yet Yellowbud's construction noise has been intrusive and damaging. SFS' construction activities will be closer and thus even more harmful.

#### **4. Drainage**

Wesley Ebenhack testified that he observed an increase in ponding of water at Yellowbud after construction started in its solar panel fields. W. Ebenhack Testimony, p. 12, lines 5-6. Water now stands in areas where he had never seen it ponded before. *Id.*, line 7.

SFS may contend that its acquisition of a stormwater construction permit from Ohio EPA would reduce runoff from the Project Area. It also may argue that its proposed Conditions 12 and 30 require SFS to obtain a stormwater permit from Ohio EPA. However, Yellowbud Condition 20 also required Yellowbud to acquire a stormwater permit. W. Ebenhack Testimony, Exh. L, Yellowbud Opinion, p. 8; W. Ebenhack Testimony, Exh. K, p. 17, ¶ 51. SFS also may argue that its proposed Condition 10 limits grading to 15% of the Project Area, but as Section VII below explains, this limitation is no improvement over other solar projects approved by the Board. Conditions for both SFS and Yellowbud require the applicant to protect the field tiles to preserve good drainage. W. Ebenhack Testimony, Exh. L, pp. 7-8, Condition 15; Jt. Exh. 1, Joint Stipulation, p. 8, Condition 25. This condition did not prevent drainage problems at Yellowbud, and there is no reason to believe SFS' Project will be any different.

#### **5. Glare**

Wesley Ebenhack frequently drives past the solar panels installed at Yellowbud. W. Ebenhack Testimony, p. 12, line 9. On many sunny days, glare from these panels shines into his face as he drives by. *Id.*, lines 9-10. Notably, Yellowbud's glare analysis predicted that no glare

would occur, just like SFS' analysis does. W. Ebenhack Testimony, Exh. K, Yellowbud Opinion, p. 8, ¶ 28. Yellowbud promised to use anti-reflective coating on its solar panels. *Id.*

Neither the SFS conditions nor the Yellowbud conditions address glare. SFS told its consultant that the solar panels would be covered with an anti-reflective coating. Brunty, Tr. II 389:2-5; Application Exh. M, p. 3.11, Table 3. However, the Application contains no commitment to use anti-reflective coating. And SFS did not even evaluate the potential for solar panel glare on Farmstead Market. Brunty, Tr. II 388:4-9. Just as Yellowbud's solar panels shine glare into the eyes of passing motorists, SFS' solar panels likely will do the same, as well as casting glare on Ebenhack Farm.

#### **6. Mud And Dust On The Roads**

Suzannah Ebenhack frequently drove her car on public roads that have been covered with mud or dust from the construction of Yellowbud and that have been damaged or destroyed by trucks delivering equipment and materials to that project. S. Ebenhack Testimony, p. 9, line 22 to p. 10, line 1. For example, she gave one of her employees a ride home from Farmstead Market via Ebenhack Road and Lutz Road on many days in May, June, and July of 2022. *Id.*, p. 10, lines 1-3. Often, her entire car became caked with mud splashed on it from Ebenhack Road and Lutz Road. *Id.*, lines 5-6. Wesley Ebenhack testified that Yellowbud used a road sweeper in attempts to clean the public roads, but this sweeping was ineffective, as the roads remained soiled with mud, dirt, and dust. W. Ebenhack Testimony, p. 9, line 22 to p. 10, line 2.

SFS Condition 16 requires track-out construction entrances and routine road cleaning. Jt. Exh. 1, Joint Stipulation, p. 6. However, the experience with Yellowbud shows that road sweeping is ineffective. W. Ebenhack Testimony, p. 9, line 22 to p. 10, line 2. And nothing in

the record establishes that track-out entrances will take care of the problem. There is no reason to predict that SFS will take better care of the roads than Yellowbud did.

**7. Roads Congested With Construction Traffic**

Wesley Ebenhack's experiences with the construction of the Yellowbud project to the south of Ebenhack Farm showed that, during solar project construction, numerous vehicles were driven by solar construction employees who arrive at and depart from the construction areas at the same time, resulting in congested traffic on the roads. W. Ebenhack Testimony, p. 6, lines 11-15. For example, construction employees departing the Yellowbud construction area formed a long line of vehicles on Swaney Road waiting their turn to get onto State Route 104. *Id.*, lines 15-17. During Yellowbud construction, delivery trucks sometimes formed a line of trucks stopped on State Route 104 while waiting to get into the laydown area to deliver their loads. *Id.*, lines 17-19. Wesley Ebenhack has seen numerous trucks full of gravel headed to the Yellowbud project area on the local public roads, and he has been forced to drive his vehicle off the road into the roadside ditch on three occasions by these trucks because they were occupying both sides of the road while coming towards him. *Id.*, lines 19-23. During Suzannah Ebenhack's trips to give an employee a ride home from Farmstead Market via Ebenhack Road and Lutz Road on many days in May, June, and July of 2022, she frequently encountered solar construction equipment that completely or partially blocked the road. S. Ebenhack Testimony, p. 9, line 22 to p. 10, lines 1-5. SFS' promise not to use Dungan Road for construction deliveries is of little assurance given that Yellowbud Solar promised that its company trucks and employees would not use Ebenhack Road during construction and then its trucks, and employees used that road anyway during construction. W. Ebenhack, Tr. III 15 – 605:1-12.

As explained above, many of Farmstead Market's customers obtain access to Ebenhack Farm via State Route 104 and Dungan Road. Passenger vehicles and farm machinery frequent Dungan Road, including machinery used for planting, harvesting, spraying, and mowing. W. Ebenhack Testimony, p. 4, lines 11-14. Although SFS promises not to let construction delivery vehicles use Dungan Road, this does not prevent its employees from monopolizing traffic on that road during their arrivals and departures. S Ebenhack, Tr. III 550:10-14; W. Ebenhack, Tr. III 602:22 – 603:7. Nor does it provide any relief from construction deliveries or employee traffic on State Route 104, which is the most important avenue for Farmstead Market customers arriving from the north. This would cause a huge problem for Farmstead Market, because most of its customers at Farmstead Market come from the north.

SFS Condition 16 and Yellowbud Condition 22 both require the applicant to obtain the required transportation permits and to coordinate with the appropriate governmental officials regarding traffic control measures during construction. Both of those conditions require the applicants to prepare a transportation management plan to figure out how to coordinate construction traffic with community traffic. Although SFS Condition 16 provides more detail on what needs to be included in the transportation management plan, there is no reason to believe that Yellowbud's plan was any less detailed. Yellowbud's application promised that only "minimal increases" in traffic would occur during construction (W. Ebenhack Testimony, Exh. K, Yellowbud Opinion, p. 13, ¶ 39, but that was a false prediction. Both Yellowbud and SFS would be subject to the same conditions that failed so miserably at Yellowbud.

## **8. Road Destruction**

Suzannah Ebenhack testified that Ebenhack Road and Lutz Road along the Yellowbud project area were badly damaged or completely destroyed by construction traffic. S. Ebenhack Testimony, p. 10, lines 6-7.

Since Wesley Ebenhack makes deliveries for FedEx, he constantly experienced the road damage caused by Yellowbud construction. He saw the road damage caused by Yellowbud Solar's construction, especially on Lutz Road. W. Ebenhack Testimony, p. 7, lines 21-22. Prior to Yellowbud's construction, Lutz Road along the Yellowbud Solar project area had been entirely paved and undamaged. *Id.*, p. 7, line 23 to p. 8, line 1. The photographs in Exhibits C and D of his direct testimony taken on March 27, 2022 and March 15, 2022, respectively, show damage to Lutz Road along the Yellowbud project area during the early stages of Yellowbud's construction. *Id.*, p. 8, lines 1-4. The damage to Lutz Road from Yellowbud's construction activities increased as the project continued, as shown by his photographs of that road on February 12, 2023 marked as Exhibits E, F, G, and H to his direct testimony. *Id.*, lines 4-7. Much of the pavement on Lutz Road is entirely gone, as shown in Exhibits G and H of his direct testimony. *Id.*, lines 7-8. Exhibit H shows a section of Lutz Road where the existing pavement (which is cracked) transitions into a stretch in which the pavement has been completely destroyed. *Id.*, lines 8-10. On part of Lutz Road, Yellowbud used a roller to compact mud that its construction vehicles and equipment had tracked onto the road so that the road now has a mud surface instead of pavement. *Id.*, lines 10-12. This is illustrated in Exhibit I of his direct testimony, which is a photograph he took on February 2, 2023 showing some of Lutz Road along the Yellowbud project area that is now mud-covered instead of paved. *Id.*, lines 12-15. Yellowbud's construction activities also destroyed two sections of pavement on Swaney Road

that were each about 50 feet in length. *Id.*, lines 15-16. Yellowbud's construction activities have caused extensive cracking of other public roads along the Yellowbud project area. *Id.*, lines 16-18.

Neither the SFS conditions nor the Yellowbud conditions prevent road damage. The conditions for both projects merely require the applicants to enter into road use agreements with local authorities to repair roads after they are damaged. W. Ebenhack Testimony, Exh. L, p. 9, Condition 22; Jt. Exh. 1, Joint Stipulation, pp. 5-6, Condition 16. If the Project is approved, it would cause road damage that would hamstring Farmstead Market's operations. The road damage also would harm every other Township resident and visitor who uses those roads.

## **9. Conclusion**

Yellowbud's construction activities reduced the number of customers visiting Ebenhack Farm during 2022. S. Ebenhack, Tr. III 556:14-25. The SFS Project would be substantially more damaging to Farmstead Market during both construction and operation, because SFS' solar panel areas would be much closer and visible. Other Township residents and visitors also would be forced to endure these oppressive views.

Yellowbud has demonstrated that solar facility construction spoils the public's scenic views, stirs up dust clouds, annoys neighbors with loud noises, creates glare, causes flooding, spreads mud, dirt, and dust on public roads, slows the flow of traffic, and destroys public roads. The conditions for SFS and Yellowbud contain no significant differences in the measures designed to prevent these problems. For these and other reasons, the Project does not comply with R.C. 4906.10(A) and should be disapproved.

**E. The Ohio Power Siting Board Cannot Issue A Certificate To SFS, Because SFS Has Not Evaluated 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) 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). In this case, SFS has focused solely on what it regards as the Project’s positive economic results.

SFS’ economic impact study in the Application is a “rose-colored glasses” exercise that considers the Project’s economic benefits, but not its adverse economic impacts. Application Narrative, pp. 24-28; Applicant’s Exh. 3, Response to 12<sup>th</sup> Data Request, Attachment D. SFS’ Application did not evaluate the economic losses to local businesses and individuals that will result from its Project, including the loss of income to tenant farmers that currently farm land in the Project Area, their employees, and their vendors for seed, herbicides, and fertilizer. *Id.*; Dohoney, Tr. II 296:6-12. SFS did not bother to find out what agricultural service companies serve land in the Project Area by applying fertilizer, pesticides, or herbicides, by planting cultivating, or harvesting crops, or by providing any other type of service. Ebenhacks’ Exh. 4, SFS Interrogatory Answers, p. 7, Response to Interrogatory 8. SFS’ sponsoring witness for the economic study did not even know how many farmers and their employees will be displaced by solar panels. Dohoney, Tr. II 295:1-25. SFS knows that at least three farmers leased at least 1971 acres in the Project Area in 2022, but it does not even know how many employees conducted farming operations in the Project Area in 2022. Ebenhacks’ Exh. 4, SFS Interrogatory Answers, pp. 8, 9, Responses to Interrogatories 10. 11. SFS has not even revealed whether the Project will result in a net gain or a net loss of jobs. Dohoney, Tr. II 296:1-5; Applicant’s Exh.

12, Response to 12<sup>th</sup> Data Request, Attachment D. Nor did SFS' economic study evaluate the losses in income to businesses that otherwise would purchase and beneficially use the crops grown in the Project Area to produce their own products. *Id.*; Dohoney, Tr. II 296:6-12.

A partial, 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 issue the certificate due to SFS' failure to conduct a complete economic analysis as required by R.C. 4906.10(A)(6) and OAC 4906-4-06(E)(4).

**F. Conclusion**

While the Intervenors recognize the widespread unpopularity of the Project in their community, they also have identified many substantive reasons for the community's opposition as expressed above. The Project will cause substantial damage to the public, including the Ebenhacks, other Wayne Township residents, and the Township's visitors. The ensuing Sections IV through IX of this brief describe many of the ways in which this poorly conceived Project will harm the public interest. For that purpose, Intervenors hereby fully incorporate by reference Sections IV through IX below. The Board should consider all of these threats in determining that the Project does not satisfy R.C. 4906.10(A)(6).



**IV. The Ohio Power Siting Board Cannot Issue A Certificate To SFS Without Receiving The Information Required By OAC 4906-4-08(D)(4)(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 Ebenhacks and other township residents from the solar arrays and substation. SFS has made an utmost effort to conceal the actual appearance of the Project from the Board and the public.

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 to determine whether the Project satisfies the R.C. 4906.10(A) criteria and should be approved. If the Board does approve the Project, then the required visual images are necessary to formulative measures for the certificate to mitigate the Project's visual impacts.

SFS has provided a barebones depiction of the Project's features to disguise its actual appearance. All but one of the simulations in Application Exhibit U portray solar panels from extremely long distances, rather than showing them at the much shorter distances from residences and public roads allowed by the 150 foot- and 300-foot setbacks that will have the most damaging impact on the community. Application Exh. U, Visual Resources Technical

Report, pdf pp. 19-23. The one exception, View 5b), deceptively fills just half of the frame with solar panels as seen from a public road instead of the more impactful views that the public and Farmstead Market's customers would endure while driving along long stretches of solar panels on State Route 104. *Id.*, pdf p. 20. OPSB should not issue a certificate without realistic and accurate simulations of these views in compliance with the rule.

In addition, the evidentiary record in this case contains no photographic simulation or pictorial sketch of the substation. One component of this substation, the substation transformer, could be as tall as 100 feet. Applicant's Exh. 3, Response to 3<sup>rd</sup> Data Request, p. 4, Request No. 15. Application Exhibit U does not show how these tall structures will look to people who drive by them or are unfortunate enough to live near them. The Staff even made a direct request that SFS provide information about the substation's support structures and poles, and SFS flatly refused to do so prior to certification. Applicant's Exh. 3, Response to 3<sup>rd</sup> Data Request, pp. 3-4, Request No. 12.

OAC 4906-4-08(D)(4)(e) requires an applicant to "[p]rovide photographic simulations or artist's pictorial sketches of the proposed facility." 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 SFS to simulate or sketch each component of 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. Surely SFS has the resources to create a simple simulation or draw a sketch to depict the substation.

These deceptions violate OAC 4906-4-08(D)(4)(e), which requires simulations “from public vantage points that cover the range of landscapes, viewer groups, and types of scenic resources found within the study area.” (Emphasis added.) The term “range” means “the amount, number, or type of something between an upper and a lower limit.” The Cambridge Dictionary, “Range,” <https://dictionary.cambridge.org/us/dictionary/english/range> (last accessed on April 19, 2023). Thus, SFS must cover the entire range of landscapes, viewer groups, and scenic resources. At the very least, SFS must simulate the worst-case views in that range --and those were the views that SFS omitted from the Application and the record. The rule does not allow SFS to skip the landscapes, viewer groups, and scenic resources that will suffer the greatest visual impacts from the Project.

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) and R.C. 4906.10(A)(2), (3), and (6) and should deny the certificate.

**V. The Ohio Power Siting Board Cannot Issue A Certificate To SFS 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).**

Without effective mitigation, the Ebenhacks, other township residents, and visitors to the Township will be exposed to objectionable views of the solar panels and substation for 40 years. 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).

The vegetative screening commitments in the Application are pathetic. Application Exhibit V provides for just four extremely short lines of trees to be planted along the long stretches of State Route 104 and Dungan Road. Application Exh. V, Visual Impact Mitigation and Lighting Plan, Attachment A, pdf p. 6. No screening is provided for Westfall Road where the substation and switchyard will be located. *Id.* The Application does not identify the locations of lighting planned for the Project, but only promises to point its lights downward. *Id.*, p. 3.

Proposed Condition 21 seeks to address this shortfall by requiring additional measures to be designed after certification to protect the neighbors' and the public's views. However, 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 allowed by Condition 23, does not satisfy this mandate. Of

particular concern is the wording of Condition 23, which provides no assurance that SFS' landscape and lighting plan will satisfactorily mitigate the community's views of the Project. Condition 21 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 nearby communities, the traveling public, and recreationalists." This language provides no objective standards for SFS to achieve. This language would let SFS 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.

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. SFS promises to work with adjoining landowners to finalize details on the locations, tree heights, and spacing after certification (Application Exh. V, Visual Impact Mitigation and Lighting Plan, p. 2), but there is no reason why SFS could not have done that necessary work prior to filing its Application. Instead of complying with this rule, SFS seeks to describe these measures only in a final, post-certificate plan. SFS has provided no good reason for not producing a final plan in the Application for public scrutiny and input.

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). For that reason, the certificate should be denied.

**VI. The Ohio Power Siting Board Cannot Issue A Certificate To SFS Without Identifying Mitigation Measures For Construction Noise Required By OAC 4906-4-08(A)(3)(d) And 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 such heavy equipment as pile drivers, dump trucks, bulldozers, and backhoes. Application Exh. O, Sound Report, p. 12, Table 5.1. These machines will impose an excruciating level of noise on the community of 79 to 90 A-weighted decibels ("dBA") at a distance of 50 feet away. *Id.* This noise level is far louder than the average ambient sound level of 44 dBA Leq to 52 dBA Leq normally experienced in the community during the daytime. *Id.*, pdf p. 11, Table 4.1. Even at a distance of 300 feet, the construction equipment would impose noise at levels of 65 dBA to 74 dBA. *Id.*, pdf p. 12. SFS' noise consultant roughly estimated that pile driving, which consists of a metal object pounding another metal object, would produce noise of about 67 dBA at a distance of 700 feet. Blank, Tr. II 377:10-16, 376:5-11. SFS estimates that it will pound in approximately 48,000 posts. Application Narrative, p. 11. As discussed above, Ebenhack Farm is only 600 feet from one solar panel area and only 700 feet from another one. The Project structures, such as solar panels, are projected to be located within 700 feet of nine nonparticipating residences. Application Narrative, p. 72, Table 8-7. Moreover, the setback between the Project and nonparticipating residences is only 300 feet. Applicant's Exh. 11, Modification of Application, pdf p. 4. Thus, SFS' assurance that the adverse impacts to the community are not expected to be significant is patently false.

Construction will last 12 to 18 months. Application Exh. O, pdf p. 12. SFS' consultant contended that loud construction noises will be temporary at each location, but she did not know how long this period would be. Blank, Tr. II 371:18 -372:21, 373:21 – 374:11.

SFS' consultant also opined that solar construction noise sounds like farm equipment, but she admitted that no existing community sounds are similar to the pounding noise of an impact pile driver. Blank, Tr. II 375:25 – 376:4.

OAC 4906-4-08(A)(3)(d) requires SFS 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.” SFS’ noise “mitigation” measures are illusory, consisting of no more than having undamaged mufflers, complying with federal limits on truck and equipment noise, and driving delivery vehicles “responsibly.” Application Exh. O, pdf pp. 13-14, § 5.6. In fact, the Application Narrative frankly admits that “no sound mitigation is planned for the Project” during construction. Application Narrative, p. 49.

Proposed Condition 23 would allow “[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. OPSB can take judicial notice of the fact that dusk in central Ohio occurs as late as 9:35 p.m. during the summer. See <https://www.gaisma.com/en/location/columbus-ohio.html>. The “[g]eneral construction activities” allowed by the certificate during those long hours include the operation of such heavy equipment as dump trucks, bulldozers and backhoes. Application Exh. O, Sound Report, p. 12, Table 5.1. This machinery will produce noise levels of up to 90 dBA at a distance of 50 feet away. *Id.* Even at a distance of 300 feet, the construction equipment would cause noise at levels of 65 dBA to 74 dBA. *Id.* Thus, a certificate containing proposed Condition 23 would allow Project construction to destroy the Residents’ quality of life for 12 to 14.5 hours per day. Impact pile driving would be allowed between 9 a.m. and 6 p.m., or longer. Condition 23 would even allow SFS to conduct all of these intrusive construction activities during weekends and holidays.

Enabling loud noise lasting up to 12 to 14.5 hours for seven days per week during 12 to 18 months is not a noise mitigation measure. In reality, Condition 23 would give nearby residents little relief from this noise.

OPSB should not approve the Project under R.C. 4906.10(A)(2), (3), and (6) without requiring meaningful mitigation to address these construction noise impacts as required by OAC 4906-4-08(A)(3)(d).

**VII. The Ohio Power Siting Board Cannot Issue A Certificate To SFS Without Obtaining 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.**

The Project Area's soils already are characterized by moderate or high stormwater runoff and low infiltration rates. Applicant's Exh. 23, Direct Testimony of Matthew Hildreth ("Hildreth Testimony"), Attachment B, Preliminary Stormwater Management Report, p. 5. Soils with low infiltration rates produce more stormwater runoff. Hildreth, Tr. II 333:9-13. The impervious surfaces created for the Project, consisting of 27 acres of new roads, inverter pads, substation, switchyard, and the O&M facility, will add almost an inch of stormwater to what is already flowing off the site during Project operation. Hildreth Testimony, Attachment B, Preliminary Stormwater Management Report, pp. 6, 7.

Stormwater runoff during construction has been a problem at other solar facility projects. The Staff has discovered drainage problems at other solar farms during construction, including Big Plain Solar and Fox Squirrel Solar. Conway Testimony, p. 6, lines 25-27; Conway, Tr. IV 664:2-10, 664:20 – 665:5. In this case, SFS' drainage consultant is not aware of SFS plans to keep any vegetation on the ground during construction that otherwise might slow the rate of stormwater runoff. Hildreth, Tr. II 335:3-9.



OPSB has learned from the Ohio Department of Agriculture that extensive grading and over-compaction with heavy equipment can diminish soil productivity and present an impediment to returning land to agricultural use. Staff Exh. 5, Direct Testimony of Andrew Conway (“Conway Testimony”), p. 5, answer 10, line 31 to p. 6, line 2; Conway, Tr. IV 669:20 – 670:12. However, grading and compaction also increase stormwater runoff.

Proposed Condition 10 would provide SFS with an unenforceable goal to “minimize grading to the extent practicable and economically feasible” and an enforceable, but lenient, ceiling of 15% of the Project Area as a supposed solution for the soil compaction problem. Conway Testimony, answer 9, pp. 4-5. But this is no better than the status quo. As Staff member Andrew Conway testified, solar facility applications already typically commit to minimal grading. Conway, Tr. IV 666:5-17. Moreover, the proposed 15% limit applies to the entire Project Area of 1070 acres, not just the developed area. Cook, Tr. I 109:19 – 110:1; Hildreth, Tr. II 345:5-12. SFS plans to develop 750 acres of the Project Area. Application Narrative, p. 2.<sup>8</sup> The 15% limit means that SFS could grade 160 of the 750 acres that it plans to develop, or 21% of the developed area. Even if SFS met the optional goal of five percent, it would be grading 53 acres. Condition 10 would not reduce the number of acres SFS has planned to develop all along. Hildreth, Tr. II 346:3-13. Thus, there is no reason to believe that the proposed language for Condition 10 will produce results different than the problems at other solar facilities.

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<sup>8</sup> SFS witness Jim Woodruff testified that promised enlarged setbacks would reduce the Project Area’s buildable space by 50 acres or approximately 10%. Woodruff Testimony, p. 11, lines 1-3. This would appear to imply that the buildable area is 500 acres, but that does not comport with the Application’s statement that SFS originally planned to develop 750 acres. Mr. Woodruff was unable to explain this apparent discrepancy. Woodruff, Tr. I 139:7 – 141:9.

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, so that potential drainage problems can be diagnosed prior to construction. Rather than making uninformed guesses about whether the 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.

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(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:

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

(Emphasis added.) The underlined language requires SFS 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. These water flow estimates are necessary to

determine whether site clearing will increase stormwater runoff that could flood downstream properties during construction. Nevertheless, SFS' expert witness admitted at hearing that SFS has not performed any calculations of the quantity of runoff during construction. Hildreth, Tr. II 336:9-19. Accordingly, SFS admits that it has not provided the data required by OAC 4906-4-07(C)(2)(b) to determine whether the quantity of runoff caused by Project construction will harm downstream landowners.

OPSB should find that SFS' failure to provide this data violates OAC 4906-4-07(C) and R.C. 4906.10(A)(2), (3), (5), and (6). The Intervenor request that OPSB cite this failure as an additional reason for denying the certificate.

**VIII. The Ohio Power Siting Board Cannot Issue A Certificate To SFS Without Obtaining The Information Required By OAC 4906-4-07(C) And R.C. 4906.10(A)(2), (3), (5), And (6) Concerning 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 prior to construction rather than finding out after water pollution damages the streams and the community.

As explained in Section VII, proposed Condition 10 would allow SFS to grade up to 160 acres of land. Even if SFS met the optional goal of five percent, it would be grading 53 acres. This earthmoving will expose the soil to precipitation and result in stormwater runoff.

OAC 4906-4-07(C)(1)(d) and OAC 4906-4-07(C)(2)(b), (c), and (e) require SFS to provide water quality data 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.

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(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.

Unless the best management practices (“BMPs”) in an earthmoving project traps 100% of all stormwater runoff onsite, precipitation will wash soil into the receiving streams. Hildreth, Tr. II 326:25 – 327:25. SFS’ Application does not provide for the BMPs that would control 100% of the stormwater runoff (*id.*, 328:13-18), so Project construction will result in soil discharging into the area streams. In fact, BMPs are typically designed only to control a two-year storm event, which is a mere 2.62 inches of precipitation over 24 hours. *Id.*, 338:4-8, 339:10-15. Soil in a

stream is a pollutant. *Id.*, 328:1-12. That is why proposed Condition 12 requires SFS to obtain a stormwater discharge permit from Ohio EPA.

The Staff has already discovered erosion problems during the construction of other solar farms. Conway Testimony, p. 6, lines 25-27; Conway, Tr. IV 664:2-19. Similar water quality problems would occur at SFS Project unless OPSB enforces OAC 4906-4-07(C)(2)(b), (c), and (e).

The submittal of this rule-required data is highly important in this case. The streams in the Project Area flow into the nearby Scioto River or flow into Yellowbud Creek, which in turn flows into the river. Hildreth Testimony, Attachment B, Preliminary Stormwater Management Report, p. 5; Hildreth, Tr. II 330:14-15; W. Ebenhack Testimony, p. 1, line 24 to p. 2, line 2. This means that all of the runoff from the Project Area flows into the river. Hildreth, Tr. II 330:2-15.

The river near the Project Area currently is in full attainment of its designated warmwater habitat aquatic life use. Applicant's Exh. 26, Direct Testimony of Karl Gebhardt, p. 4, lines 4-6. Due to improvements in pollution control, including the farmers' actions to reduce the runoff of nutrients and eroded soil, this segment of the Scioto River is now so clean that Ohio EPA is considering an upgrade in its classification of this stretch of river to exceptional warmwater habitat. *Id.*, lines 4-13; Gebhardt, Tr. II 310:8-11. This is the highest classification for a surface water stream, meaning that the river supports a highly diverse and unique array of species including rare species. *Id.*, lines 12-25. Data on the water quality of the Project's stormwater discharges during construction and operation are essential to ensure that soil erosion from this Project would not impair the excellent water quality and diverse wildlife of the river and its tributaries flowing from the Project Area.

Nevertheless, SFS' expert witness admitted that SFS has not submitted any of the water quality information required by OAC 4906-4-07(C)(2)(b), (c), and (e). Hildreth, Tr. II 335:9 – 336:8. The Application contains no description of the existing water quality of the receiving streams for the Project Area, no estimates of the water quality of aquatic discharges from site clearing and construction activities, and no descriptions of equipment to be used to control stormwater effluent into the streams. *Id.*; Application Narrative, pp. 35-40. Instead, SFS states that it will provide this data later, when it obtains a stormwater discharge permit after certification. However, OPSB's rule requires these stormwater calculations before certification so that the Board can determine the Project's potential water quality impacts and the necessary mitigation measures.

This water quality data is even more essential due to the fact that the Scioto River in the area of the Project hosts endangered species of mussels. Dohoney, Tr. II 285:21 – 286:17; Dohoney Testimony, p. 8, lines 16-20. Silt from stormwater runoff can kill mussels or force them to abandon their habitat to look for more hospitable conditions. Dohoney, Tr. II 288:13 – 289:10. SFS' consultant contended that SFS' failure to evaluate the Project's effects on the mussels is justified, because SFS will obtain a stormwater construction permit to reduce the silt runoff that might flow into the mussel beds. Dohoney, Tr. II 289:11-19. However, she admitted that sediment runoff will still occur even if such a permit is implemented. Dohoney, Tr. II 289:20-25. SFS has not submitted the rule-required water quality data to prove the claim that soil-laden stormwater will not harm the river, the threatened and endangered mussels, and the threatened and endangered fish and other animals in the river.

Even if SFS claims that the Project will not harm water quality, the rule requires SFS 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. Merely telling the Board it does not need these calculations fails to satisfy these legal requirements.

OPSB should find that SFS' failure to provide this data violates OAC 4906-4-07(C) and R.C. 4906.10(A)(2), (3), (5), and (6). The Intervenor request that OPSB cite these failures as additional reasons for denying the certificate.

**IX. The Ohio Power Siting Board Cannot Issue A Certificate To SFS Without Receiving The Information Required By OAC 4906-4-08(B) And R.C. 4906.10(A)(2), (3) & (6) Concerning The Project's Potential Impacts On Wildlife And Plants.**

OAC 4906-4-08(B) requires an applicant to conduct 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 complies with R.C. 4906.10(A)(3) and (6).

In order to informedly identify and avoid Project harm to plants and wildlife, it is necessary to first find out what species of plants and wildlife exist in and near the Project Area. That is why OAC 4906-4-08(B)(1)(c) requires applicants to conduct literature searches to

identify the species that are potentially present, and perform field surveys to look for them. SFS did a woefully incomplete literature search and did no field surveys other than to look for bald eagles.

SFS performed a literature search only for threatened and endangered species of plants and animals. Dohoney, Tr. II 282:3 – 283:4; Application Narrative, p. 59. SFS did not search the literature for evidence that species of commercial or recreational value or any other plant or animal species that might inhabit the Project Area or the surrounding quarter mile as required by rule. For example, it did no literature search for waterfowl species in the area, even though even though thousands of waterfowl follow the nearby Scioto River during migration and may forage for food in the Project Area. Dohoney, Tr. II 284:15 – 285:20; Ebenhacks' Exh. 6, Letter from Tom Davis, Director of the Pickaway County Park District, to OPSB, dated Oct. 13, 2021. The Project Area is only several hundred feet from the Scioto River. Cook, Tr. I 91:5-8. Waterfowl are species of commercial and recreational value, and SFS should have searched for literature to find out which species are potentially present. OAC 4906-4-08(B)(1)(c) also requires SFS to conduct a literature search for all other plant and animal species, but SFS ignored that requirement.

OAC 4906-4-08(B)(1)(d) requires SFS to perform field surveys to find out which plant and animal species identified by the literature search as potentially present are actually present in the Project Area and within a quarter mile of its boundaries. SFS did not do a complete literature search nor did it search in the field for the species that its literature search should have identified. Indeed, it did not even conduct field surveys for the threatened and endangered species that its literature search identified from correspondence from the Division of Wildlife of the Ohio Department of Natural Resources ("ODNR") advising SFS that the Project is in the range for 40



species of threatened and endangered plants and animals. Application Exh. R, Letter from Mike Pettegrew of ODNR to Courtney Dohoney of Stantec Consulting Services, dated Sept. 1, 2021, pdf pp. 5, 7-9; Dohoney, Tr. II 283:5-20; Application Narrative, p. 66; Application Exh. Q, Ecological Resources Report, pp. 3, 27 (indicating that field surveys were conducted only for bald eagles and for habitat suitable for threatened and endangered species, not for the actual presence for those species). SFS ecology witness Dohoney admitted that the Project Area contains potentially suitable habitat for four endangered species of bats and the endangered lark sparrow. Applicant's Exh. 12, Direct Testimony of Courtney Dohoney ("Dohoney Testimony"), p. 7, lines 16-19. Nevertheless, SFS did not conduct a field survey to look for these species or any other species of plants or animals.

For example, ODNR noted that the Project is within the range of endangered lark sparrows, but SFS did not bother to look for them in the Project Area. Dohoney, Tr. II 283 – 284:11. Instead, even while admitting that the Project Area has suitable lark sparrow nesting habitat, SFS seeks to excuse its violation of the rule by stating construction would not impact these areas because they supposedly are small and fragmented. Dohoney Testimony, p. 7, lines 26-28. SFS itself revealed the falsity of this statement, admitting that lark sparrow nesting habitat exists on 32 acres of the Project Area and that 8.7 acres of this habitat will be destroyed. Applicant's Exh. 3, Response to 1<sup>st</sup> Data Request, pp. 5-6. SFS further betrayed its realization that its failure to survey for the lark sparrow was unacceptable, promising either to do a lark sparrow nest survey before construction or else to clear the 8.7 acres at times other than the sparrow's nesting season of May 1 to July 31. That is, SFS wants OPSB approval to destroy 8.7 acres of nesting habitat that might be used by an endangered species, further imperiling the species' survival. SFS was required by rule to look for lark sparrows in the Project Area to

determine with certainty whether the Project will harm this endangered species, and then, based on that informed data, OPSB must determine whether the Project would harm this endangered species or whether the Project must be modified to avoid that harm. Moreover, under no circumstances should the Board allow SFS to develop or impair any habitat used by the lark sparrow or any other threatened or endangered species.

SFS also failed to perform any field surveys for waterfowl, even though thousands of them follow the nearby Scioto River during migration and currently may forage for food in the Project Area. Dohoney, Tr. II 284:15 – 285:20; Ebenhacks’ Exh. 6, Letter from Tom Davis, Director of the Pickaway County Park District, to OPSB, dated Oct. 13, 2021.

In addition, SFS did nothing to look for mussels in the Scioto River downstream of its feeder streams in the Project Area, even though SFS knew that the river in that area hosts endangered species of mussels. Dohoney, Tr. II 285:21 – 286:17; Dohoney Testimony, p. 8, lines 19-20. The U.S. Fish and Wildlife Service (“U.S.FWS”) stressed the importance of conducting a field survey for the mussels:

The proposed project is in the range of several federally-listed freshwater mussels including clubshell (*Pleurobema clava*, endangered), northern riffleshell (*Epioblasma torulosa rangiana*, endangered), rayed bean (*Villosa fabalis*, endangered), and round hickory nut (*Obovaria subrotunda*, proposed threatened). These mussels are known from the Scioto River in Pickaway County, Ohio. Should the proposed project directly or indirectly impact the Ohio River or its naturally vegetated riparian zone, we recommend that a survey be conducted to determine the presence or probable absence of these mussels in the vicinity of the proposed site.

Application Exh. R, Letter from Patrice M. Ashfield of the U.S.FWS to Courtney Dohoney, Stantec, dated July 19, 2021, p. 2 (pdf p. 3) (emphasis added. SFS’ witness tried to excuse SFS’ negligence by asserting that SFS could not obtain access to the river or obtain the permits for conducting mussel surveys, but then admitted that neither assertion is true. Dohoney, Tr. II

286:11 – 288:2. When confronted with U.S.FWS’ recommendation to conduct a mussel survey, SFS’ witness sought to excuse SFS’ failure to do so by contending that “we didn’t feel” that the Project would directly impact mussels and “we do not believe” the Project’s indirect impacts were significant enough to warrant a survey. Dohoney, Tr. II 290:9 – 291:20 (emphasis added). So SFS chose not only to thumb its nose at U.S.FWS, but decided also to violate OPSB’s rule at the same time.

Without data on plants and animals in and around the Project Area, the Board’s issuance of a certificate to SFS would violate OPSB’s duties under OAC 4906-4-08(B)(1)(c) and (d), R.C. 4906.10(A)(2), (3), and (6). The Board should deny the certificate.

#### **X. Conclusion**

As explained above, there are a multitude of important reasons to deny the certificate sought by SFS. The Project is immensely unpopular with the local community and is opposed by local government officials. SFS has failed to provide the information on the Project’s adverse impacts and mitigation measurements necessary to minimize them that is required by the Board’s rules. The Board cannot violate its own rules by approving the Project without this information. Nor do the criteria in R.C. 4906.10(A)(2), (3), (5), and (6) authorize the issuance of this certificate. The Board should deny SFS’ Application.

Respectfully submitted,

/s/ Robert A. Chamberlain  
Robert A. Chamberlain (0091955)  
Assistant Prosecuting Attorney  
P.O. Box 910  
Circleville, OH 43113  
Tel: (740) 474-6066  
Fax: (740) 474-7475  
Email: [tchamberlain@pickawaycountyohio.gov](mailto:tchamberlain@pickawaycountyohio.gov)  
*Attorney for Intervenor Wayne  
Twp. Board of Trustees*

/s/ Jack A. Van Kley  
Jack A. Van Kley (0016961)  
Van Kley Law, LLC  
132 Northwoods Blvd., Suite C-1  
Columbus, OH 43235  
Tel: (614) 431-8900  
Fax: (614) 431-8905  
Email: [jvankley@vankley.law](mailto:jvankley@vankley.law)  
*Attorney for Ebenhack Intervenors*

### **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 April 20, 2023, a copy of the foregoing document also is being served by electronic mail on the following: Robert Chamberlain at tchamberlain@pickawaycountyohio.gov, Dylan Borchers at dborchers@bricker.com, Sommer Sheely at ssheely@bricker.com, Werner Margard at werner.margard@ohioAGO.gov, Shaun Lyons at shaun.lyons@OhioAGO.gov, Robert Eubanks at Robert.eubanks@ohioAGO.gov, Chad Endsley at cendsley@ofbf.org, Leah Curtis at lcurtis@ofbf.org, and Robert Dove at rdove@keglerbrown.com.

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

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Summary: Brief (Post-Hearing) electronically filed by Jack A Van Kley on behalf of Ebenhack, Scarlett and Ebenhack, Suzannah and Ebenhack, Thomas E. and Ebenhack, Thomas J. and Ebenhack, Wesley and Wayne Township Board of Trustees.