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 Of a Solar-Powered Electric Generation Station in Wayne Township, Pickaway County, Ohio	)))))	Case No. 21-868-EL-BGN

POST-HEARING REPLY 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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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 post-hearing reply 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").[1]

I. Standards for Certification Of Major Utility Facilities

The other parties' initial post-hearing briefs have no content contrary to Intervenors' arguments in this section.

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

[1] 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.

The other parties' initial briefs do not address the concerns described in this section of the Intervenors' initial brief. Intervenors refer the Board to their initial brief for an explanation of this argument.

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).

SFS' opening brief betrays its realization that the public overwhelmingly hates its Project. Seeking to divert attention from the Project's poor design and terrible siting, SFS opens its brief with name-calling in an attempt to belittle its detractors. SFS invokes the worn-out cliché utilized by developers everywhere who want to draw attention away from their developments' flaws – the "not in my backyard" (NIMBY) argument that its Project is opposed only because the neighbors do not want to live next to it. However, there is nothing wrong with protecting one's home and community from a harmful project.

Ohio has provided its citizens with the right to protect themselves by insisting that utility developers satisfy the criteria of R.C. 4906.10(A). One of those criteria requires a utility developer to demonstrate that its project serves the public interest, convenience, and necessity. Although SFS may prefer that citizens not be provided with these rights, the Board has a duty to respect these rights. The Intervenors request that the Board fulfill that duty here and disapprove this Project as recommended by the Staff.

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

1. The Government Officials and Citizens Of Pickaway County, Especially Those In Wayne Township, Have Determined That The Project Will Harm Them Rather Than Benefit Them.

SFS falsely claims (at 2-3)[2] that the Township has based its opposition to the Project on the statements of "only six residents" "at a single meeting" and that only "a few residents" oppose the Project. As explained in Intervenors' initial brief, the local citizen opposition to this Project was expressed in numerous and constant phone calls, letters, and meetings with the township trustees, almost 200 signatures on petitions against the Project, the Staff's observations of public opposition at local public information meetings, the Staff's observations of opposition in public comments on the docket, opposition by 21 of the 24 speakers at the public hearing,[3] and opposition by 33 of the 35 attendees who signed sheets at the public hearing. See Section III.A of Intervenors' initial brief.[4] These facts are in stark contrast to the unions' inaccurate statement (at 11) that fewer than 30 people have expressed opposition to the Project. The unions' brief states that not all of the opposing speakers at the local public hearing live or work in the community, but, in fact, only one of them lives outside of Pickaway County and even he intends to live in the community in the future. In comparison to the community's widespread opposition, local support for this Project is almost non-existent despite the efforts of SFS' public relations contractor Swing State Strategies and the unions to sway public opinion and SFS' mostly unaccepted offers to pay people for their support under good neighbor agreements.[5]

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[2] Throughout this brief, Intervenors identify in parentheses the page numbers in the other parties' initial briefs containing the arguments to which Intervenors are responding.

[3] Intervenors' initial brief stated that 19 of the 22 speakers oppose the Project (excluding T.J. Ebenhack), but a recount shows that 21 of 24 are opposed.

[4] In *Kingwood Solar*, the Board recognized that, although public comments filed in the docket "fall short of being admitted evidence in the case, we nonetheless affirm that they add value to the Board's consideration of the local perception of the Project." *In re Kingwood Solar*, Case No. 21-117-EL-BGN, Opinion, Order, and Certificate (Dec. 15, 2022), p. 65, ¶ 151.

[5] SFS and IBEW deceptively attempted to persuade the Board in their testimony that the Project's opponents have intimidated people from expressing support for the Project. IBEW's Daniel Shirey admitted that he meant only that one union member had a verbal argument with a Project opponent and that the community was expressing its opposition through such means as signs. Shirey, Tr. III 481:4 – 483:20. SFS employee Jim Woodruff alleged that he had heard that a neighbor had called OPSB and asked that his public comment supporting the Project be kept confidential due to intimidation from Project opponents. Woodruff, Tr. I 144:21 – 145:21. However, the Staff member who would have received any such communication, Matt Butler, recalled no such incident and recalled no

SFS also attempts, unsuccessfully, to disguise the significance of local government opposition to the Project. SFS states that the Wayne Township Trustees voted to oppose the Project even though, according to SFS, few township residents opposed the Project. This pretense defies common sense, since local officials do not risk their jobs by opposing a project that their constituents support. Consistent with that principle, Trustee Gibson testified that the trustees oppose the Project due to the widespread constituent opposition expressed in phone calls, letters, and meetings. Wayne Twp. Exh. 1, p. 1, lines 1-3. 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*. Local government officials such as township trustees and county commissioners are most knowledgeable about the views of their constituents.

With regard to the county's opposition to the Project, SFS attacks Commissioner Jay Wippel for voting for the county commissioners' resolution opposing the Project while he was designated to serve as an *ad hoc* member of the Board to decide this case. However, Commissioner Wippel did nothing improper. R.C. 4906.023 bars *ad hoc* members from voting on county commissioners' resolutions to intervene into OPSB cases, but Mr. Wippel did not violate this prohibition because the commissioners passed no such resolution. If the legislature had intended to prohibit *ad hoc* members from voting on resolutions favoring or opposing projects, R.C. 4906.023 would have expressed such a prohibition.

Nor does an *ad hoc* representative have a duty to reserve judgment about a project's approvability prior to the evidentiary hearing. R.C. 4906.021(B) provides that *ad hoc* members must "represent the interests of the residents of the area in which the utility facility is to be

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such allegation of intimidation. Butler, Tr. III 627:15 – 628:2. This tactic by SFS and IBEW betrays their desperation to minimize what they realize to be overwhelming opposition to the Project.

located." In fact, SFS admits (at 18) that the *ad hoc* members serve the local interest, stating that "[t]he partial grandfathering provisions of SB 52 give local governments a vehicle for expressing opposition to a project in the form of the vote of the *ad hoc* member appointed to this Board." Commissioner Wippel's vote on the resolution to oppose the Project was entirely consistent with that local interest. Consequently, Commissioner Wippel did not act inconsistently with his appointment as an *ad hoc* member by expressing his and his constituents' views that the Project is inconsistent with the county's general health, safety, and welfare as stated in the resolution.

SFS' argument that Commissioner Wippel's vote to oppose the Project was improper also is backwards. Even if he had a duty of impartiality (which he does not), that duty would have applied to his vote on the Board, not his vote on the county commissioners' resolution opposing the Project. The commissioners fully avoided the appearance of any conflict of interest by replacing him as their *ad hoc* representative at the Board.

As an aside, SFS asserts (at 24, fn. 52) that replacing Mr. Wippel after the deadline in R.C. 4906.022(A) violates S.B. 52. However, while R.C. 4906.022 requires an *ad hoc* member to be designated within 30 days after notice of the application, it does not prohibit the replacement of the *ad hoc* member later. Otherwise, a county or township would not be able to make a replacement even in the event of death or disability.

SFS' brief reveals the actual reason it is upset at Commissioner Wippel's vote on the resolution opposing the Project, stating that he cited his status as an *ad hoc* member as grounds for not entertaining SFS' attempts to persuade him to support the Project. Undoubtedly, SFS would have liked to unleash its employees and its public relations consultant Swing State Strategies on Mr. Wippel to change his view on the Project. After all, one of Swing State Strategies' roles is to lobby government officials on behalf of paying clients. Actually,

Commissioner Wippel was being overly cautious in avoiding *ex parte* contacts, since R.C. 4906.024(A) specifies that an *ad hoc* member is allowed to have *ex parte* communications with the public and the parties to the case. Nevertheless, SFS was deprived of no rights by its inability to pressure Commissioner Wippel to vote against his constituents' best interests. Although SFS argues (at 19) that SFS was "denied the statutory protections intended to ensure that non-grandfathered projects are accorded due process and an opportunity to be heard before local governments," SFS identifies no such statutory or constitutional right pertinent to this case. Even if it had a right to promote its Project to Commissioner Wippel, that right was satisfied by SFS' Application and SFS' public information meeting. This public information meeting of September 14, 2021 was held prior to Commissioner Wippel's appointment as an *ad hoc* member on March 8, 2021, so he had no self-perceived conflict of interest at that time. Notice of Resolution No. PC-030822-24, filed in the docket on March 10, 2021; Applicant's Exh. 2, Application Exh. E, Public Information Meeting Summary, p. 1.

SFS also claims that Wayne Township's resolution against the Project is suspect, arguing that it was passed before the Staff finished its Staff Report investigation and that the township trustees did little to investigate the Project beforehand. However, the Township had a responsibility to take a position on the Project prior to the Staff Report so the Staff could consider that position in the Staff Report's evaluation of public interest, convenience, and necessity. Prior that time, it was SFS' duty to educate the public, including the Township, about the Project in the public information meeting. SFS was also given the opportunity to speak at the township trustees' meeting at which the resolution was adopted, since the floor was open for public comments during that meeting. Gibson Testimony, Exh. B (reciting in the resolution that the trustees had held public meetings at which it had "heard from a large group of residents").

Thus, the Township had sufficient input about the Project from SFS itself prior to voting against the Project on March 9, 2022, including SFS' Application and SFS' public information meeting occurring on September 14, 2021. Applicant's Exh. 2, Application Exh. E, Public Information Meeting Summary, p. 1; Wayne Twp. Exh. 1, Direct Testimony of Brenna Gibson ("Gibson Testimony"), Exh. B. After the Township's resolution on March 9, 2022, SFS also had ample opportunity to persuade the township trustees to support the Project, since the trustees met with SFS on August 1, 2022 and September 2, 2022 and since SFS sent seven letters to them by email. Applicant's Exh. 8, Direct Testimony of Jim Woodruff ("Woodruff Testimony"), p. 9, line 15 to p. 10, line 7. By this point, SFS had presented its arguments to the trustees and the trustees were unpersuaded by them, so there was no purpose for more communication.

SFS notes that both the county and the township have opposed each project that was disapproved under R.C. 4906.10(A)6) in other cases and asserts that denial is not appropriate unless both the county and the township oppose the project. But, while both a county and a township may have opposed each of the previously disapproved projects, the previous Board decisions do not state that both a county and a township must oppose a project in order to demonstrate widespread local opposition. Moreover, in this case, both the county and the township do oppose SFS' Project.

SFS claims (at 41, fn. 100) that "many" members of Local Union 432 Laborers have filed public comments supporting the Project, referring to short form letters filed as public comments by a mere 18 people, only five of which live in Wayne Township. Tellingly, all of them support the Project to get money. None of them indicate that they live near the Project Area, so they can freely support the Project to get money without bearing the brunt of the Project's crushing environmental impact. SFS quotes (at 41) from the public comments of a few of these people

touting the Project's economic benefits. However, the residents that actually would be affected by the Project's presence are typified by the testimony of neighbor Connie Kiser at the public hearing:

> My husband and I spent several years planning and saving to build our forever home in Wayne Township. He grew up there. We're half a mile from the proposed site, you know. It's a big, dark cloud over our happy move. We have been looking forward to this for some time, and, you know, to find out that there is a huge solar field proposed, you know, right down the road is very concerning.

Public Hearing Transcript, p. 38, line 19 to p. 39, line 1. Like the Ebenhacks, the Kisers have fallen prey to SFS' subterfuge in concealing its plans from the general public for years even while the community expends resources to enjoy a lifestyle that the Project will destroy. Paula Metzger, whose family owns land adjacent to the Project and three homes in the immediate vicinity, testified about the community's actual opinion about the Project:

> The many signatures on our Township Petition of Opposition, the many letters of Wayne Township residents opposing this project, and the No Solar on Farmland signs planted on those properties in the area are evidence to the preferences of this community. I think it's important for you to know the local community because your decision will impact their lives forever.

Id., p. 54, line 17 to p. 55, line 18.

The residents who the Project will harm are not fooled by SFS' and the unions' claims of riches about the jobs extravaganza they misleadingly portray. For instance, Kim Davey testified at the public hearing that the Project will produce "only a few" long term jobs and "I'm sure that there are more people that are going to lose money from the jobs they currently have in agriculture because of these projects." Public Hearing Transcript, p. 42, line 17 to p. 43, line 2.

The impacted public has figured out that construction jobs last for 12 to 18 months, but the damage to the community from Project construction and operation will last for 40 years, or longer if SFS' risky experiment with precious farmland irreversibly damages the soil. The

public has also discovered that SFS is concealing the Project's adverse economic impacts by examining only the Project's positive economic impacts. The union workers do not oppose the Project, because they can simply leave the damage behind after 12 to 18 months and return to homes that are not impacted by a looming solar facility.

For the same reason, the Board should discount the support for the Project by the few participating landowners who would benefit financially from the Project at the expense of the community. SFS refers (at 46) to the opportunity for participating landowners to profit from the solar development of their land as "land ownership rights," but SFS does not mention the land ownership rights of nearby landowners. This inconsistency of position is especially ironic in this case, in which every participating landowner is an absentee landowner. Ebenhacks' Exhibit 4, SFS Interrogatory Answers, p. 13, Responses to Interrogatories 28-30. None of the participating landowners live in or adjacent to the Project Area. *Id*. That means that none of them would personally endure the hardships that this Project would impose on the surrounding community. Consequently, their views on what is good for the community are meaningless.

The Board has recognized that broad community opposition to a project is more reflective of the public interest than union member support for a project providing them with fleeting construction jobs:

> We do not discount the importance of the IBEW comments. But as they are generally single-issue focused and supportive of the temporal job creation from the Project, we see benefit to considering the ratio of support/opposition comments absent the IBEW block for purposes of gauging the local perception of the Project.

In re Kingwood Solar, Case No. 21-117-EL-BGN, Opinion, Order, and Certificate (Dec. 15, 2022), ¶ 148, fn. 8. In SFS' case, the public opposition to the Project far exceeds public support, even if union comments on form letters are included in the comparison.

Obviously, the surrounding community has more public interest in the outcome of the Board's certification decision than workers who make some money for 12 to 18 months by constructing solar facilities that will damage the homes of other people and then are able to escape the impacts of their work by going back to their own, unimpacted homes. In considering the "public interest, convenience and necessity" under R.C. 4906.10(A)(6), the Board should ascribe the greatest weight to the views of the members of the public who are most impacted by a project, as it did in *Kingwood Solar*. Those members of the public are the residents of the surrounding community, not construction workers with brief stints as employees.

2. <u>The Reasons For The Project's Lack Of Popularity Support A Finding That The Project's Is Inconsistent With R.C. 4906.10(A)(6)</u>.

SFS' argument that the Staff's recommendation and the public's desire to deny the Certificate are based solely on the Project's unpopularity is simplistic and inaccurate. Public opposition does not occur without a reason, and the Project's unpopularity is not based simply on the fact that the Project would be located in community back yards. The Project is opposed because it will seriously harm the community's back yards, and everything else in the surrounding community. The Staff Report identifies the public's "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 cited concerns about public health, safety, and the environment expressed by the Wayne Township trustees, the county commissioners, and other local officials. *Id.*, pp. 44-45.

While the county commissioners and the township trustees recognized their constituents' widespread opposition to the Project, these officials also based their positions on the reasons for their citizens' opposition. SFS complains that the resolutions of opposition passed by the county commissioners and township trustees contained little detail on their reasons for opposing the Project, but the record identifies many of these reasons. The Staff Report discusses letters from two county agencies -- the Pickaway County Emergency Management Agency and the Pickaway County Park District -- that identified numerous concerns about the Project. Staff Exh. 1, Staff Report, pp. 44-45; Ebenhacks' Exh. 6, Letter to OPSB from Tom Davis, Director of the Pickaway County Park District, dated Oct. 13, 2021; Ebenhacks' Exh. 7, Letter to County Commissioners from Gary Cameron, Pickaway County EMA Director, dated Apr. 5, 2022. Township trustee Brenna Gibson described some of Wayne Township's reasons for opposing the Project in detail in her hearing testimony, including the loss of farmland, threats of fires, flooding, groundwater contamination, wildlife disruption, topsoil impairment, vegetation loss, road damage, deterioration of water quality, and property value reductions. Gibson Testimony, pp. 1-2.

SFS implicitly recognizes the extensiveness of Wayne Township's expressed concerns by spending two pages of its brief (at 26-27) trying to dispute the accuracy of those concerns. At the hearing, SFS' counsel asked Ms. Gibson a long series of questions attempting to show that Ms. Gibson had not independently and extensively investigated the technical bases of these concerns. Gibson, Tr. I 28:4 – 42:10.[6] However, Ms. Gibson was not presented as an expert on

[6] SFS has cited some requests for admissions that it filed on the docket after the hearing concluded, under the guise of a document entitled "Notice of Facts Deemed Admitted by Intervenor the Board of Trustees of Wayne Township. See SFS' footnotes 69 and 70. These requests for admissions were not introduced into evidence and are not included in the record. SFS' failure to introduce them into evidence at the hearing prejudiced the Township, which otherwise would have had the opportunity at the hearing to add more context to explain the subjects matter of the

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.

OPSB precedent has recognized the concerns enunciated by local officials as a factor in determining that a project is contrary to the public interest, convenience, and necessity. See *Kingwood Solar*, ¶¶ 146, 147 (citing county and township concerns about the expected adverse impacts from a solar project on scenic views, recreational preserves, historic sites, tourism, agriculture, property values, and other resources). The Board must take into account the judgment of local officials and residents about these impacts, since they are the most familiar with the area. The Staff Report recognizes this component of public interest, stating that its recommendation of disapproval under R.C. 4906.10(A)(6) is supported by the facts 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.

SFS contends that the Staff's recommendation of denial is based on public opinion, and nothing else, based on the following testimony by Staff Project Lead Thomas Crawford at the hearing:

> Q: Okay. Mr. Crawford, is it correct that local opposition is the only reason Staff identifies for recommending denial of the project?
>
> A: That seems to be the principal opposition, yes, ma'am.
>
> Q: Is there another – is there another reason?
>
> A: No. It's just a number of Township, County, individuals. That's it.

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requests for admissions. In addition, the Ebenhacks are prejudiced if the Board considers them, because they were deprived of their right to introduce evidence to rebut any the admissions introduced into evidence. See OAC 4906-2-20(D) (providing that "such admission may be rebutted by evidence offered by any other party."). Because the requests for admissions were not admitted into evidence, the Board may not rely on them.

Crawford, Tr. IV:702:12-20. Based on this testimony, SFS argues (at 15) that the Staff "relied wholly on local opposition in recommending denial." Actually, SFS is misinterpreting Mr. Crawford's testimony. His answers show that he understood the question from SFS' counsel to be asking whether the only opposition to the Project was local, and he answered that local opposition "seems to be the principal opposition." He clarified that he considered opposition in the township and county to be "local." Mr. Crawford's testimony should not be construed as stating that the Staff did not consider the reasons provided by the local officials for their opposition; the Staff Report specifically states otherwise as explained above. Staff Exh. 1, Staff Report, pp. 44-45. The Board should make this principle clear in its decision.

SFS contends (at 19-21) that the Board should consider the Project's impacts on the public as a whole rather than looking solely at its impacts on the local community. Intervenors agree with that principle, but it does not justify the issuance of a certificate in this case. The Staff Report does state that Staff "believes that any benefits <u>to the local community</u> are outweighed by this public opposition and, therefore, the project would not serve the public interest, convenience, and necessity." Staff Exh. 1, Staff Report, p. 45 (emphasis added). Nevertheless, the Staff Report, examined as a whole, did evaluate the Project's supposed benefits to the public as a whole, not just to the local community. *E.g.*, see the report's recitation of SFS' list of purported economic benefits on Pages 14-16. The Board should do the same in this case, as it has in prior cases. In *Kingwood Solar*, the Board balanced the local public interest against the Project's purported overall benefits to the general public and found that the balance favored denial of the certificate. *Kingwood Solar*, ¶¶ 144, 149. The Board has described this balancing test as follows:

> In reaching this decision, we recognize that the need to determine whether the Facility will serve the public interest, convenience, and necessity should be examined broadly. For example, this factor should consider the public's interest in a power siting project that ensures continued utility services and the prosperity of the state of Ohio. At the same time, this statutory criterion regarding public interest, convenience, and necessity, must also encompass the local public interest, ensuring a process that allows for local citizen input and consideration of local government opinions that reflect the citizenry that is impacted by the Project. As part of the Board's responsibility under R.C. 4906.10(A)(6) to determine that all approved projects will serve the public interest, convenience, and necessity, we must balance projected benefits against the magnitude of potential negative impacts on the local community.

Id., at ¶ 149 (emphasis added). The Board used the same balancing test in *In re Birch Solar 1, LLC*, OPSB Case No. 20-1605-EL-BGN, pp. 18-19, ¶ 68 (Oct. 20, 2022); *In re Cepheus Energy Project, LLC*, OPSB Case No. 21-293-EL-BGN, pp. 45-47, and 49, ¶¶ 121, 123, and 128 (Jan. 19, 2023); *In re Ross County Solar*, Case No. 20-1380-EL-BGN, Opinion, Order, and Certificate (Oct. 21, 2021) p. 36, ¶ 135. This balancing test is entirely appropriate under R.C. 4906.10(A)(6). Consistent with the precedent in *Kingwood Solar*, *Birch Solar*, and *Cepheus Energy*, the Board should find in SFS' case that the harm to the local community outweighs any benefits to the general public.

This balancing of public interests is consistent with the federal courts' interpretation of "public interest, convenience, and necessity" under the federal Communications Act, from which Ohio's standard may have been borrowed long ago. This act requires the Federal Communications Commission (FCC) to approve or disapprove licenses for communication companies in a manner that achieves this standard. *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 225, 63 S. Ct. 997, 1013, 87 L. Ed. 1344 (1943). This is an "expansive" standard, so that the FCC will have broad discretion to consider any factor relevant to attaining the goals and objectives of the act. *Id.*, 319 U.S. at 219, 63 S. Ct. at 1010. This standard also is flexible so that the FCC can adjust its practices "[i]f time and changing circumstances reveal that the 'public

interest' is not served." *Id.*, 319 U.S. at 225, 63 S. Ct. at 1013. R.C. 4906.10(A)(6) should be interpreted in the same way.

The FCC has interpreted public interest, convenience, and necessity in a manner that prohibits the licensing of stations that fail to protect local community interests, and the U.S. Supreme Court has upheld these requirements. *Id.*, 319 U.S. at 203, 63 S. Ct. at 1003–04 (requiring stations to broadcast local news, local events, local advertisements, and other programs of local consumer and social interest). Consistent with this principle, the FCC has carefully balanced local public interests against broader national and regional interests to achieve the public interest, convenience, and necessity. For example, see *Simmons v. F.C.C.,* 169 F.2d 670, 672 (D.C. Cir. 1948) (finding that the public interest, convenience, and necessity would be served by the FCC's order denying application to increase power and change frequency of radio station that would have enabled the station to plug into a network line and act as a mere relay of program material piped in from outside the community without regard for local community needs or desires for local news broadcasts and other programs of local interest); *Courier Post Pub. Co. v. F.C.C.*, 104 F.2d 213, 218 (D.C. Cir. 1939) (requiring the FCC to issue a permit for a local radio station to serve the local interests (e.g., local news) of a community that was being served only by regional stations, because the public interest component of public interest, convenience, and necessity required service of local interests, not just regional interests); *CBS Television Network Affiliates Ass'n v. F.C.C.,* 555 F.2d 985, 989–90 (D.C. Cir. 1977) (finding that the public interest component of public interest, convenience, and necessity could be implemented by prohibiting cable television companies with stronger signals from sending their signals into areas occupied by local cable television stations serving local interests whose

economic viability would be threatened by the competition). The same standard in R.C. 4906.10(A)(6) should be interpreted in the same way.

Certainly, while SFS urges OPSB to ignore the Project's adverse impacts on the local community, the Board cannot fully evaluate the public interest in a facility without considering its effects on the local public. R.C. 4906.10(A)(6) does not allow OPSB to ignore the interests of the segment of the public most impacted by a project. Local governments and citizens are the most knowledgeable about whether a project will harm their community, and OPSB is justified in considering their views. In considering the "public interest, convenience and necessity" under R.C. 4906.10(A)(6), the Board should ascribe the greatest weight to the views of the members of the public who are most impacted by a project. That is what the Board has done in other cases. In this case, the Project's harm to the local community greatly outweighs any benefits to the general public, and for that reason the Project should be disapproved.

SFS argues (at 1) that disapproving the Project under R.C. 4906.10(A)(6) due to local public opposition would ignore the Project's partially grandfathered status under Senate Bill 52 and rend the concept of public interest meaningless.[7] SFS portrays (at 18) the Staff's recommendation of disapproval as giving "veto power" over the Project to local governments. In other cases disapproving projects due to local opposition, OPSB did not allow local governments to veto this Project. Instead, it was OPSB, not the local governments, that weighed

[7] SFS contends (at 17, fn. 42) that this Project is in a class by itself as the only partially grandfathered project in which the Staff has recommended denial under R.C. 4906.10(A)(6) for not being in the public interest. This statement is inaccurate, as the Staff also cited that grounds in its recommended denial for the partially grandfathered project in *Circleville Solar* (Staff Report, p. 42-43). The Staff also recommended disapproval on the same grounds in the fully grandfathered projects in *Cepheus Energy* and *Kingwood Solar*. *Cepheus Energy*, p. 33, ¶ 107; *Kingwood Solar*, p. 59, ¶ 139. Moreover, the Board has denied certificates under R.C. 4906.10(A)(6) to a number of fully grandfathered projects, including Republic Wind, Birch Solar, Kingwood Solar, and Cepheus Energy. Finally, SFS' statement is irrelevant, since every project must comply with R.C. 4906.10(A)(6) whether or not grandfathered.

local opposition to the projects against the projects' perceived benefits to find out whether the projects were in the public interest as a whole. While Senate Bill 52 provides counties with outright authority to veto non-grandfathered solar projects, OPSB correctly interprets R.C. 4906.10(A)(6) to allow OPSB to consider local support or opposition as a factor in OPSB's balancing test for determining whether any project, whether grandfathered or not, complies with R.C. 4906.10(A)(6). The Board should do the same here and find that local interests threatened by the Project outweigh its supposed benefits.

3. Destroying The Agricultural Use Of 723 Acres Of Farmland For 40 Years Is Not Farmland Preservation And Does Not Serve The Public Interest.

SFS' premise that taking productive farmland out of food production for 40 years is good for agriculture is counterintuitive and false. Taking prime farmland out of production for four decades, with no binding promise to ever return the land to farming, does not serve agricultural objectives in a time where food shortages are becoming a reality. There is no guarantee that the descendants of the participating landowners will farm the land ever again once it has been industrialized for 40 years. They could just as easily renew its use for energy production or convert it into residential communities, especially here where SFS is purchasing some of the Project Area to gain complete control.

While SFS asserts that this land's soil will again be productive after the Project is decommissioned, SFS provides no case studies in which decommissioned solar facility land has been demonstrated to be productive or even returned to agriculture. SFS cites Karl Gebhardt's direct testimony for the proposition that the Project will increase the soil's productivity in the far future, but his cross-examination exposed a lack of foundation for that opinion. Mr. Gebhardt is not a farmer, soil scientist, or agronomist. Gebhardt, Tr. II 308:22 – 309:12. Thus, he has

absolutely no expertise to opine about soil productivity for farming. He has never visited the Project Area to examine the soil there. Gebhardt, Tr. II 312:14-20. He stated that leaving vegetation on the soil during solar use can improve the soil's productivity, but he admitted that no-till or minimum till farming practices serve the same purpose. Gebhardt, Tr. II 313:1 – 314:23. He could provide no assurance that the Project Area would be returned to farming after Project decommissioning. Gebhardt, Tr. II 318:22 – 319:4. Most importantly, he has never evaluated the soil productivity on land formerly occupied by solar facilities to find out whether the resumption of farming is possible. Gebhardt, Tr. II 317:13-22. He is not aware of any solar land that has been returned to agriculture. Gebhardt, Tr. II 317:23 – 318:2. In short, this Project is a risky experiment on precious farmland.

SFS contends that the Project will remove only 0.2% of Pickaway County's total farm farmland from agriculture. But that statistic is misleading. Every solar project removes just a small percentage of the total acreage from farming, but the cumulative effect of a multitude of projects is substantial. The same argument can be made about every non-solar development project, which in isolation may be small but which in the aggregate has added up to huge losses of farmland. The cumulative effects of solar project development, combined with other types of developments, have a devastating effect on farmland inventories. SFS does not seek to protect farmland; it is just joining the stampede of developers looking to exploit agricultural land.

Moreover, even if displacing farmland for four decades somehow preserves farmland, the local governments do not need any assistance from SFS for that purpose. That objective has already been achieved by the farmland preservation measures in Pickaway County's comprehensive land use plan, which has zoned the Project Area for agriculture. There are many reasons to disapprove this Project, and the preservation of farmland is an important one.

4. **A Statement By A Single Legislator Outside Of And Long After Conclusion Of The Legislative Process Is Not Probative Of A Statute's Meaning.**

SFS and the unions cite a statement in a public comment letter filed on the docket in the *Circleville Solar* case by State Representative William Seitz as evidence that the Ohio General Assembly did not intend R.C. 4906.10(A)(6) to give local governments the right to veto projects, unlike Senate Bill 52. Mr. Seitz's letter opines that "localized opposition to a grandfathered project may be of some relevance" under R.C. 4906.10(A)(6), but is not "determinative" as it is under Senate Bill 52.

Although Mr. Seitz portrays his knowledge about this topic to be the result of his co-sponsorship of Senate Bill 52, his statement does not interpret Senate Bill 52 but instead opines about the meaning of the age-old requirement for "public interest" in R.C. 4906.10(A)(6). He makes no claim to know the minds of the legislators who enacted the public interest criterion in R.C. 4906.10(A)(6) many decades ago. Consequently, he has no firsthand knowledge about what the legislators intended when they established that criterion.

The "views of individual legislators do not determine what a provision means." *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022-Ohio-65, 167 Ohio St.3d 255, 279, 192 N.E.3d 379, 402–03, ¶ 90, citing *State v. Toney*, 81 Ohio St. 130, 140, 90 N.E. 142 (1909). The view of a single legislator expressed in a letter after passage of a statute is not probative of the legislation's intent, even if expressed by a legislator substantially involved in its formation. *Ohio Sch. for Blind & Deaf Educ. Ass'n v. State Bd. of Educ.*, No. 86AP-669, 1987 WL 28453, at *4 (10th Dist., Dec. 15, 1987) (rejecting the notion that a letter from the chairman of the subcommittee initiating the legislation could be used to interpret the legislation's meaning). Accordingly, Mr. Seitz's letter is not probative of the intent of R.C. 4906.10(A)(6).

SFS' request that the Board take administrative notice (which is equivalent to judicial notice by a court) of Mr. Seitz's letter is also inappropriate. SFS did not offer this letter for introduction into evidence at the hearing. Although a request for judicial notice may be appropriate at any stage of the proceedings, "judicial notice does not furnish litigants an exception to the rule that evidence must be timely offered in a judicial proceeding." *State ex rel. Richard v. Chambers-Smith,* 157 Ohio St.3d 16, 19, 2019-Ohio-1962, ¶12 (citing *AP Hotels of Illinois, Inc. v. Franklin Cty. Bd. of Revision*, 118 Ohio St.3d 343, 2008-Ohio-2565, ¶8, fn.1). In other words, judicial notice is a means to authenticate evidence; it does not relieve a party's obligation to introduce the evidence at trial. In fact, the Ohio Supreme Court's ruling on a decision of the Ohio Board of Tax Appeals ("BTA") in *AP Hotels* rebuffed BTA for doing exactly what SFS is asking OPSB to do here – take judicial notice of a document not introduced into evidence at trial – and ordered BTA to strike the document from the record. *Id*. Even in the decision cited by SFS as the primary authority for its request for administrative notice, the Ohio Supreme Court cautioned that administrative notice is not allowed unless "the complaining party had prior knowledge of, and had an adequate opportunity to explain and rebut, the facts administratively noticed." *Allen v. Pub. Utilities Comm'n of Ohio,* 40 Ohio St.3d 184, 186, 532 N.E.2d 1307, 1310 (1988). Here, SFS is blindsiding the Intervenors with a public comment in another case.

SFS' request for judicial notice is an attempt to circumvent procedural and evidentiary rules and principles, and amounts to an untimely introduction of evidence after the hearing. The inherent problems and fundamental unfairness with SFS' tactic are glaring – if evidence is not introduced at trial, the opposing party does not have an opportunity to object or to offer evidence to rebut that evidence. Here, SFS did not seek to admit the letter at the hearing, nor were the

Intervenors provided with fair warning and an opportunity to rebut the letter with their own evidence at the hearing.

Even if the Seitz letter had been timely and properly introduced at the hearing, judicial notice under Rule of Evidence 201 requires that the proposed fact must not be "subject to reasonable dispute," in that it is either generally known within the jurisdiction, or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Ohio R. Evid. 201(B). Here, those requirements are not met. SFS is relying on a statement in Mr. Seitz's letter that is subject to reasonable dispute.

In addition, Mr. Seitz's statement simply does not support SFS' argument that local governments have no power to veto a project, because no one else argues that local governments can veto projects. Certainly, OPSB's past decisions denying approvals to projects in response to local opposition do not make any such argument. As explained above, OPSB's decisions have weighed local opposition against project benefits, and in some cases have found that local interests outweigh project benefits. That approach is consistent with Mr. Seitz's view that "localized opposition to a grandfathered project may be of some relevance" under R.C. 4906.10(A)(6) even though it is not "determinative."

Although R.C. 4906.13(B) preempts local governments from requiring separate local approvals for energy projects under OPSB's jurisdiction, R.C. 4906.10(A)(6) softens the draconian impact of that preemption by making sure that OPSB considers local community interests rather than trampling roughshod over local interests. This restraint assigns to OPSB the responsibility to make sure that any energy project "serve[s] the public interest, convenience, and necessity."

Thus, OPSB precedent establishes that local opposition is an important factor in determining whether a project is approved under R.C. 4906.10(A)(6):

> The Board again acknowledges that this case is not impacted by SB 52, which subjects solar projects that are filed after October 11, 2021 to increased county-level and township-level review and participation in the Board's certification process. Still, as in Birch Solar, the Board stresses its continuing obligation to determine a project's compliance with the public interest, convenience, and necessity. R.C. 4906.10(A)(6). Accordingly, the Board must consider, independent of SB 52, the manner and degree of opposition of the local governments impacted by the Project as it relates to whether the Project is in the public interest, convenience, and necessity.

Kingwood Solar, at p. 61, ¶ 143, fn. 6. Accord, *Birch Solar*, p. 19, ¶ 69, fn. 9; *Cepheus Energy*, pp. 46-47, ¶ 123, fn. 4. The Board should disapprove SFS' Project for the same reason.

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.

The other parties' initial briefs do not address the concerns described in this section of the Intervenors' initial brief. Intervenors refer the Board to their initial brief for an explanation of this argument.

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.

The other parties' initial briefs do not address the concerns described in this section of the Intervenors' initial brief. Intervenors refer the Board to their initial brief for an explanation of this argument.

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

The other parties' initial briefs do not address the concerns described in this section of the Intervenors' initial brief. Intervenors refer the Board to their initial brief for an explanation of this argument.

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

The other parties' initial briefs do not address the concerns described in this section of the Intervenors' initial brief. Intervenors refer the Board to their initial brief for an explanation of this argument.

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

The other parties' initial briefs do not address the concerns described in this section of the Intervenors' initial brief. Intervenors refer the Board to their initial brief for an explanation of this argument.

D. Lessons Learned From The Construction Of Yellowbud Solar Farm Reveal The Damage That SFS' Project Would Cause.[8]

SFS takes a cheap shot at the Ebenhacks, stating that all Ebenhack intervenors "are actively leasing other land they own to a different solar project." SFS is fully aware that this statement is false, since the testimony establishes that Wesley Ebenhack, Thomas J. Ebenhack, and Suzannah Ebenhack are not leasing land to Yellowbud. Ebenhacks' Exh. 1, Direct Testimony of Thomas E. Ebenhack ("T.E. Ebenhack Testimony), p. 4, lines 1-2; T.E. Ebenhack, Tr. III 1-5. Moreover, Suzannah Ebenhack and Wesley Ebenhack testified about the destruction that Yellowbud has caused in the community, as discussed in the Intervenors' initial brief.

[8] 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.

Because solar developers do not disclose the damage their projects will cause, the Ebenhacks had no idea that Yellowbud would cause the destruction it has perpetrated on the community.

SFS mentions (at 34) that the Project will use best management practices to control dust from construction. Yellowbud was subject to the same requirement, so that is of no assurance to the Ebenhacks and other township citizens. Yellowbud's application required best management practices to control dust. Ebenhacks' Exh. 3, Direct Testimony of Wesley Ebenhack ("W. Ebenhack Testimony"), Exh. L, p. 17, ¶ 50. Yet Yellowbud's construction activities sent clouds of dust for long distances to aggravate and harm its neighbors. There is no reason to believe that SFS would not cause the same problem, at great cost to Farmstead Market and with great discomfort to citizens who pick farm produce there, live nearby, and travel the nearby roads.

Otherwise, SFS' initial brief, remarkably, fails to discuss the concerns described in this section of the Intervenors' initial brief. Intervenors refer the Board to their initial brief for an explanation of these concerns.

E. <u>The Sky Will Not Fall On Renewable Energy If The Board Disapproves This Project</u>.

SFS, taking its cue from Chicken Little, makes (at 19-20) a "sky is falling" argument that respecting community wishes as the Staff seeks to do in this case "could, and likely would, derail every large-scale generation project under consideration by the Board." This is untrue. A utility developer can enjoy the certainty of knowing its project will be approved if it sites and designs the project in a responsible way that does not trample the community – which are principles of good citizenship that SFS unwisely chose to ignore. Moreover, OPSB has continued to approve solar projects unabated even while it has disapproved some of them for failure to demonstrate compliance with R.C. 4906.10(A)(6).

The best way for the Board to promote renewable energy facilities is to make sure the facilities do not harm the communities in which they reside. One of the first actions taken by citizens learning about a developer's plans for a new solar facility near them is to visit solar facilities under construction or in operation in Ohio to see for themselves whether the projects are harming the surrounding communities. At poorly sited and badly operated solar projects, these citizens talk to the neighbors about their experiences with solar facility construction and operation and they see earthmoving machinery destroying the land, listen to the inverters' loud humming noise, look at the overgrown weeds, see flooded land, and observe the awful views from roads and yards, among other problems. These objective observations, along with testimonials of the projects' victims, fuel opposition to new facilities. If utility developers, and OPSB, wish to advance renewable energy, they need to incorporate protective setbacks and other reasonable practices into these projects. SFS has failed to do so.

SFS also contends (at 4, 38-39) that the Project will reduce air pollution. SFS has written a footnote (at 4, fn. 6), based solely on internet articles, alleging that Columbus has been ranked as the most polluted city in the United States due to lung-damaging particles in the air. SFS does not ask the Board to take administrative notice of these internet articles, nor would administrative notice be allowed under the principles explained in Section III.A.4 above. In particular, citing hearsay internet articles after the hearing provides Intervenors with no opportunity to introduce evidence rebutting them.

Actually, the website cited for SFS' statement advises that "Columbus air quality is generally clean." See https://www.iqair.com/usa/ohio/columbus. Counsel for the Ebenhacks was unable to find any reference on this website to Columbus having the worst air quality in the United States for any pollutant. Whether or not this website actually makes the alleged statement

about Columbus' air pollution, it is irrelevant to SFS' claim that the Project will help air quality because there is no evidence that any fossil fuel production of electricity actually occurs in Columbus. If Columbus' air is polluted, it more likely would be the result of vehicle operation rather than fossil fueled power plants displaced by the Project.

SFS also opines (at 38) that a reduction in air pollution would promote environmental justice. This argument is ironic, since a wealthy developer (SFS) forcing this damaging Project on a less well heeled rural community for immense profits is the antithesis of environmental justice. In addition, the processes of manufacturing solar equipment for a solar project can produce greenhouse gas emissions, as does mining for the metal components of solar equipment. Poll, Tr. III 417:10-14, 420:3-13. Greenhouse gases produced in any part of the world would negatively impact air quality worldwide. Poll, Tr. III 414:2-18. Thus, the emissions from producing the Project's solar equipment will harm air quality at the location of production and all around the world. This is not environmental justice. Yet SFS has provided only a one-sided analysis of the Project's impacts on air quality by calculating air emission reductions without calculating its air emission contributions.

SFS also argues (at 36-38) that the Project will improve electric grid reliability to reduce the potential for power blackouts in the local power grid, citing Tao Yang's testimony. However, he testified that "any nearby generation from the 345 kV system injection would be able to supply the power within the local power grid," even if the energy source is located outside of the local power grid. Yang, Tr. III 448:17 - 449:14. In fact, the newly opened Yellowbud facility is inside the local power grid, and it contributes electricity to the local power grid. Yang, Tr. III 456:19 – 457:9, 458:15-16. Dr. Yang did no evaluation to find out whether Yellowbud can by itself completely prevent blackouts in the local power grid. Yang, Tr. III

464:7-11. Either way, improvement of grid reliability does not excuse the approval of a bad project.

Notwithstanding the flaws in SFS' analyses of Project benefits, no one will miss SFS' Project if it is disapproved. The Board is inundated with applications for new solar facilities. PJM is backlogged and overwhelmed with a "huge number" of new solar facility applications, so much so that some projects will be delayed for years. Cook, Tr. I 84:7 – 85:6. OPSB need not allow utilities to trample on the state's citizens with poorly sited and badly designed projects in a mad rush to build these facilities. Approving a bad project like SFS' will just inflame opposition to solar projects and set back the growth of solar energy in Ohio. Approving a flawed Project that will severely damage a community is not the right way to promote green energy when a better designed project can be planned and constructed in a more appropriate location.

F. 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).

With regard to the Project's economic impacts, SFS' initial brief suffers from the same deficiency as its Application: it lacks a complete discussion of the Project's negative economic impacts. SFS asserts (at 42) that the "calculus is simple," but it is simple only because SFS did not calculate or compare the negative side of the equation. OPSB cannot accurately conduct a balancing test to identify the public interest under R.C. 4906.10(A)(6) without taking a hard look at the Project's detrimental economic impacts.

The unions note (at 8) that solar construction jobs "are excellent opportunities for new workers to enter the electrical industry and start lifelong careers." It is hardly reassuring to learn that one of the Project's perceived benefits is its use as a training ground for inexperienced employees to figure out how to work with electricity near peoples' residences. At any rate, the

economic benefits from these jobs are fleeting, while the economic damage would be long lasting or permanent.

SFS contends that it will give money to the community through donations and taxes, but paying off potential opponents to overlook the Project's harms and let it operate is not the same as serving the public interest. The local governments and most of the community's citizens have recognized this fact, as displayed by their opposition to the Project. They have made clear that the damages they expect to be caused by the Project to their properties and/or the community at large cannot be fully compensated by the amount of money SFS has offered.

The Board cannot 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).

G. Conclusion

As stated in Intervenors' initial brief, Sections IV through IX below are additional reasons why the Project does not satisfy the public interest, convenience, and necessity under R.C. 4906.10(A)(6). SFS points out (at 6) that Intervenors offered no expert testimony on these issues. However, SFS' experts provided ample admissions and other expert testimony in support of Intervenors' positions on the issues discussed below.

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.

The other parties' initial briefs do not address the concerns described in this section of the Intervenors' initial brief. Intervenors refer the Board to their initial brief for an explanation of this argument.

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).

The other parties' initial briefs do not address the concerns described in this section of the Intervenors' initial brief. Intervenors refer the Board to their initial brief for an explanation of this argument.

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 other parties' initial briefs do not address the concerns described in this section of the Intervenors' initial brief. Intervenors refer the Board to their initial brief for an explanation of this argument.

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.

SFS states (at 33) that the Project will incorporate design features aimed at mitigating potential flooding and stormwater runoff, citing Matthew Hildreth's direct testimony. Applicant's Exh. 23, Direct Testimony of Matthew Hildreth ("Hildreth Testimony"), pp. 3-4, answer 14. Mr. Hildreth's testimony on that topic merely states that SFS will grow plants after construction that supposedly will slow stormwater runoff. SFS produced none of the water quantity data required by OAC 4906-4-07(C) to prove its barebones assertion that plants actually will reduce stormwater runoff after construction. In addition, and just as importantly, growing plants after construction does nothing to control flooding from stormwater runoff during construction during the time the fields are stripped of vegetation.

Nevertheless, SFS' expert witness admitted that SFS has not submitted the water quantity information required by OAC 4906-4-07(C)(2)(b) to "[p]rovide an estimate of the quality and

quantity of aquatic discharges from the site clearing and construction operations." Hildreth, Tr. II 336:9-19. Mr. Hildreth admitted in the following testimony that the required data has not been provided:

> Q. Does anything in the application provide an estimate of the quantity of stormwater discharges from site clearing and construction operations?
>
> A. During construction?
>
> Q. Yes.
>
> A. No, we have not looked at any runoff volumes during construction.

Hildreth, Tr. II 336:9-12.

OPSB promulgated OAC 4906-4-07(C) to require the applicant to submit water quantity data to remove the guesswork from determining whether a project will cause flooding. The Board should not allow SFS to ignore these 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 Intervenors 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.

SFS asserts (at 52) that the Project will improve erosion and runoff conditions, but it provides no actual water quality to prove this statement. Instead, it offers statements from expert witnesses that are not backed up by data.

For instance, SFS states its best management practices ("BMPs") will control stormwater runoff, citing Matthew Hildreth's testimony and his Preliminary Stormwater Management Report. But these BMPs consist of no more than just planting some plants in the Project Area and limiting grading. Hildreth Testimony, p. 4, lines 2-12 & Attachment B, pp. 7-8. Yet SFS

commits (at 31) to growing plants on about only 70% of the Project Area to stabilize the ground and reduce soil erosion. That is, almost a third of the Project Area will lack vegetation to control runoff and erosion. And SFS' promise to limit grading is entirely illusory, as explained in Section VII of Intervenor's initial brief. Mr. Hildreth also stated that temporary sediment basins might be used, but his own report contradicts that testimony. Hildreth Testimony, p. 4, lines 10-12 & Attachment B, p. 9.

Moreover, unless BMPs in an earthmoving project trap 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 eroded 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.

Again without supporting water quality data, SFS cites (at 45-46) Karl Gebhardt's direct testimony as the basis of its assertion that the Project's vegetation will be denser than agricultural crops and thus will reduce the runoff of nutrients and other pollutants into the area's streams. This position also is undercut by SFS' promise (at 31) to grow plants on about only 70% of the Project Area to stabilize the ground and reduce soil erosion, leaving almost a third of the Project Area without vegetation to control runoff and erosion. That fact alone should set off an alarm about the Project's potential adverse impacts on water quality. SFS produced none of the water quality data required by OAC 4906-4-07(C) to prove that vegetation planted after construction actually will reduce soil erosion. In addition, and just as importantly, growing plants after construction does nothing to control soil erosion from stormwater runoff during construction when the fields are devoid of vegetation.

SFS argues that plants in its solar arrays would control stormwater runoff and erosion. However, Mr. Gebhardt's cross-examination revealed that conscientious farming practices also can reduce soil erosion and the runoff of nutrients and other pollutants into the streams. A farmer can implement a nutrient management plan so that the crops will use all fertilizer applied to the fields rather than leaving excess fertilizer in the soil that could be washed into streams. Gebhardt, Tr. II 316:10 317:5. A farmer has very incentive to apply only so much fertilizer as will be used by the crops, because this reasonable practice saves money on fertilizer purchases. Gebhardt, Tr. II 316:25 – 317:5. Mr. Gebhardt confessed that he did not know whether the farmers who currently farm the Project Area already utilize nutrient management plans, soil erosion controls, or stormwater management practices. Gebhardt, Tr. II 315:2-5, 316:3-13. Nor did he know whether these farmers follow no-till or minimum till practices that increase the amount of vegetation left on the soil. Gebhardt, Tr. II 314:20 -315:1. Thus, SFS has not demonstrated that its vegetation management practices would be any more protective of water quality than reasonable farming practices in the Project Area.

OPSB promulgated OAC 4906-4-07(C) to require the applicant to submit water quality data to remove the guesswork from determining whether a project will impair water quality. Water quality data is especially important in this case, since the Project's runoff would flow into the high quality waters of the Scioto River where sensitive endangered species reside. The Board should not allow SFS to ignore these requirements.

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. Mr. Hildreth admitted in the following testimony that the required data has not been provided, in response to questions that use the rule's language to parrot those requirements:

> Q. Okay. Does the application for this project contain any descriptions of the existing water quality of the receiving streams for the project area?
>
> A. Not to my knowledge.
>
> Q. Does the application include any estimates of the water quality of the discharges during site clearing and construction operations?
>
> A. Not to my knowledge.
>
> ****
>
> Q. Does the application describe the equipment proposed for the control of stormwater discharged into bodies of water during construction?
>
> A. That would have to be covered under the construction stormwater -- general construction permit.
>
> Q. So that would be done after the project has been approved?
>
> A. I believe so, yes.

Hildreth, Tr. II 335:10 - 336:8. The Application also makes these admissions. Application Narrative, pp. 35-40. OPSB's rule requires these stormwater calculations <u>before</u> certification so that the Board can determine the Project's potential water quality impacts and the necessary mitigation measures.

Even though 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 Intervenors 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.

SFS' initial brief contains little information about plants and animals. That is not surprising, because its Application also contains such little information due to SFS' failure to perform the literatures searches and field surveys required by OAC 4906-4-08(B).

SFS' singling out the lark sparrow for special mention (at 32) in its brief betrays its realization that SFS' refusal to survey lark sparrow habitat suitable for this endangered bird's presence is an especially egregious failure to comply with OAC 4906-4-08(B). As discussed in Intervenors' initial brief, SFS also declined to search for mussels and other listed and non-listed species despite the rule's mandate to do so.

SFS promises (at 32) to take measures to avoid impacts to threatened and endangered species, but fails to identify what measures it will employ. That is the inevitable result of SFS' failures to find out what species are in the Project Area and where they live or feed. SFS' decisions not to survey the territory inside and within a quarter mile of the Project Area have left OPSB without the information necessary to determine what impact the Project would have on plant and animal life.

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. A Stipulation That Does Not Settle Anything Is Not Entitled To Deference.

SFS makes a big deal out of the fact that SFS, its union allies, and the Ohio Farm Bureau Federation ("OFBF") filed a Joint Stipulation and Recommendation as to Certificate Conditions. SFS' brief states that this stipulation will promote the public interest, convenience, and necessity.

However, neither the Staff nor Intervenors signed the stipulation. The Staff, for its part, asks (at 6) the Board to use the conditions set forth in the Staff Report with some modifications, rather than the conditions in the stipulation. And even the stipulation does not ask the Board to approve the Project. SFS' statement (at 6) that OFBF supports the Project is inaccurate, as OFBF has taken no position for or against the Project. That leaves only SFS and its union beneficiaries as Project supporters. In short, the stipulation is entitled to no weight. It is not a settlement of any magnitude.

The Board recognized this principle in *Kingwood Solar*, in which it found a stipulation signed by fewer than all parties did not make the settlement a product of serious bargaining among capable, knowledgeable parties:

> Initially, the Board concludes that the record evidence refutes a finding that the Stipulation meets the first part of the three-part test. While acknowledging Applicant's efforts at including the parties in settlement dialog as to seeking approval of the application and incorporating revisions to its conditions, the fact is that the Stipulation fails to describe agreement of any of the parties as to the core issue in this case - whether the Board should issue a certificate for the Project. Thus, while the Stipulation is technically a partial agreement of two parties in this case, we cannot conclude that it is the "product" of serious bargaining. As the Stipulation does not describe agreement of any parties as to the core issue in the case, we find that it is not the product of serious bargaining among capable, knowledgeable parties.

Kingwood Solar, p. 69, ¶ 168. SFS' stipulation is not approvable for the same reason.

SFS states (at 54) that it tried to engage the Intervenors in the negotiations over the stipulation, but "neither would participate further in any discussions." However, by that time, and after numerous communications with SFS, it had become evident to Intervenors that no amount of stipulations would prevent this Project from destroying the community. Moreover, both the Ebenhacks and the Township had had considerable discussions with SFS prior to the stipulation negotiations to learn how harmful this Project would be. In fact, SFS did not even

talk to the Ebenhacks until the Ebenhacks initiated discussions with SFS in August 2021. W. Ebenhack, Tr. III 579:17-25.

Prior to August 2021, SFS kept its plans for the Project hidden from the public even though SFS had started developing the Project in mid-2018. Application Narrative, p. 28; Ebenhacks' Exh. 4, SFS Interrogatory Answers, p. 8, Response to Interrogatory 13. If SFS had been interested in meaningful negotiations with the impacted community, SFS would have engaged the community at the same time it was courting participating landowners so that the community's views could be meaningfully incorporated into the Project's basic design and location, instead of trying to cram the Project down their throats four years later through a stipulation with meager adjustments that solve little.

Although SFS argues that the stipulation does not violate important regulatory principles, the stipulation's conditions will not enable the Project to satisfy the criteria in R.C. 4906.10(A). A stipulation for a project that does not achieve the criteria in R.C. 4906.10(A) also fails to satisfy the criteria for adopting a stipulation. *Kingwood Solar*, p. 69, ¶ 167. Accordingly, the stipulation has no bearing on whether the Board should approve the Project.

XI. <u>Conclusion</u>

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. Public opposition does not occur without a reason, and the Project's unpopularity is not based simply on the fact that the Project would be located in community back yards. The Project is opposed because it will seriously harm the community's back yards, and everything else in the surrounding community. 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,

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CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, I hereby certify that, on May 12, 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.

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