

**BEFORE
THE OHIO POWER SITING BOARD**

**In the Matter of the Application of Oak)
Run Solar Project, LLC for a Certificate)
of Environmental Compatibility and)
Public Need to Construct a Wind-Powered)
Electric Generation Facility)**

Case No. 22-549-EL-BGN

**In the Matter of the Application of Oak)
Run Solar Project, LLC for a Certificate)
of Environmental Compatibility and)
Public Need to Construct a Transmission)
Line)**

Case No. 22-550-EL-BTX

**INITIAL POST-HEARING BRIEF OF INTERVENORS BOARD OF TRUSTEES
OF DEERCREEK TOWNSHIP, BOARD OF TRUSTEES OF MONROE
TOWNSHIP, AND BOARD OF TRUSTEES OF SOMERFORD TOWNSHIP**

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I. Introduction

Concerns about lost farmland, aesthetic incongruity with rural landscapes, and environmental damage have resulted in growing opposition to solar farming (Groom, 2022).

Applicant’s Exh. 26A, Suppl. Direct Testimony of Sarah Moser (“Moser Suppl. Testimony”), Attachment SM-1, Agricultural Economic Impacts in Oak Run Project, p. 4. Although the author of this quote was making a statement about solar projects in general, this statement aptly describes the reasons for the public’s opposition to the Oak Run Solar Project. For these reasons, and as further explained below, the Boards of Trustees for Deercreek, Monroe, and Somerford Townships (the Townships) request that the Ohio Power Siting Board (“OPSB” or “Board”) deny the certificate requested by Oak Run Solar Project, LLC (“Oak Run Solar”) for its solar-powered electric generation station (the “Project”).¹

¹ This brief uses the following abbreviations for citations: (1) “Application” refers to Applicant’s Exhibit 1, the Application submitted by Oak Run Solar on September 2, 2022, including its exhibits; (2) “Application Narrative”

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

- (a) “The nature of the probable environmental impact.” R.C. 4906.10(A)(2).
- (b) “That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations.” R.C. 4906.10(A)(3).
- (c) “That the facility will comply with Chapters 3704., 3734., and 6111. of the Revised Code and all rules and standards adopted under those chapters....” R.C. 4906.10(A)(5).
- (d) “That the facility will serve the public interest, convenience, and necessity.” R.C. 4906.10(A)(6).

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

refers to the narrative portion of the Application; (3) “Application Exh.” refers to the exhibits attached to the Application Narrative; (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 (e.g., “Turvy, Tr. III 364:3-13” refers to Robert Turvy’s testimony at lines 3 to 13 on page 364 of transcript volume III); (7) “OAC” refers to the Ohio Administrative Code; (8) “Conditions” refer to the proposed conditions in the Staff Report identified as Staff Exh. 1; (9) “Stipulation” refers to the Joint Stipulation and Recommendation of Oak Run Solar and some of the intervenors identified as Jt. Exh. 1. References to “Oak Run Solar” also include its parent company, Savion, LLC.

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 July 10, 2023). 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. R.C. 4906.10(A)(3) prohibits OPSB from issuing a certificate unless the facility achieves this standard. As explained below, Oak Run Solar 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.

Oak Run Solar also has not provided much of 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, Oak Run Solar 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). Finally, Oak Run Solar has not demonstrated that the Project will serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6).

III. 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 chairperson 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. OAC 4906-4-01(B) allows an applicant to apply for waivers of rule requirements that are unnecessary to protect the public from a specific project. Oak Run Solar has not obtained any waivers of the rule requirements at issue in this brief. OPSB cannot allow an applicant to ignore a rule requirement unless the Board follows the procedure in its waiver rule.

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. Intervenors have 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 Townships 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 intervenors such as the Townships.

Many of Oak Run Solar's rule violations stem from its failure to provide definitive designs and mitigation plans for the various types of damage its Project can cause. Oak Run Solar'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, Oak Run Solar's disregard for the Board's rule requirements has produced a Project design that is not approvable.

IV. 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 Oak Run Solar's Project for the failure to comply with R.C. 4906.10(A)(6).

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 Oak Run Solar’s Project has been especially prominent and one-sided. The Madison County Commissioners, the Board of Trustees of Deercreek Township, the Board of Trustees of Monroe Township, and the Board of Trustees of Somerford Township have passed resolutions opposing the Project. Townships’ Exh. 1, Direct Testimony of Robert Turvy (“Turvy Testimony”), p. 3, lines 1-8 & Attachments A² and B; Townships’ Exh. 2, Direct Testimony of Ernest Sparks (“Sparks Testimony”), p. 2, lines 13-16 & Attachment A³; Townships’ Exh. 3, Direct Testimony of Lloyd Frey (“Frey Testimony”), p. 2, lines 11-14 and Attachment A.⁴ The three Townships have intervened in the case and participated in the evidentiary hearing to further emphasize their opposition.

A representative of the Madison County Board of Commissioners testified against the Project at the local public hearing, indicating that the “commissioners will fight this project tooth and nail, and if this project is approved it will be in the face of a strong local government

² IBEW’s counsel asked Deercreek Township Trustee Turvy questions establishing that Deercreek Township passed its resolution of July 5, 2022 opposing the Project prior to the September 22, 2022 filing date for Oak Run Solar’s Application, implying that the township was uninformed about the Project at the time of the resolution. Turvy, Tr. III 347:20 – 348:5. However, Oak Run Solar previously had hosted its first public information meeting on June 22, 2023, so the nature of the Project was well known prior to Deercreek Township’s resolution. Application Exh. G, Public Information Meetings, 2nd page of the pdf. The Chairman of the Deercreek Township Board of Trustees, Levin Hutson, attended that public information meeting. See Mr. Hutson’s signature on the resolution at Attachment A of the Turvy Testimony and his attendance card at the 17th pdf page of Application Exh. G. Mr. Turvy also attended that public information meeting. Turvy, Tr. III 363:16 – 364:2. Prior to the resolution, the township trustees also had attended a meeting on October 18, 2021 about the Project with Oak Run Solar representative Sarah Moser. Turvy, Tr. III 362:23 – 363:10; Moser, Tr. II 219:1-3. The county engineer also had met with the trustees prior to the resolution, informing them about problems with other solar facilities being constructed in the county. Turvy, Tr. III 364:3-13.

³ IBEW’s counsel asked Somerford Township Trustee Ernest Sparks questions establishing that Somerford Township passed its resolution of June 8, 2022 opposing the Project prior to the September 22, 2022 filing date for Oak Run Solar’s Application, implying that the township was uninformed about the Project at the time of the resolution. Sparks, Tr. III 370:12 – 371:7. However, Sarah Moser, on behalf of Oak Run Solar, had met with the Somerford Township trustees on October 13, 2021 to describe the Project. Moser, Tr. II 218:5-10. Consequently, the Somerford Township trustees had ample opportunities to learn about the Project prior to passing their resolution on June 8, 2022.

⁴ IBEW’s counsel tried the same approach in questioning Monroe Township Trustee Frey about Monroe Township’s passage of its resolution opposing the Project on June 16, 2022. Frey, Tr. III 385:10 – 387:11. However, Sarah Moser had presented information about the Project to the trustees on July 22, 2021 and October 21, 2021. Frey, Tr. III 385:14-23; Applicant’s Exh. 26, Direct Testimony of Sarah Moser, p. 9, lines 1-2, 17.

opposition.” Testimony of Rob Slane, Transcript of the Public Hearing of Apr. 11, 2023, pp. 194-197. He noted that Madison County already has four approved solar projects – more than any other Ohio county – and “we have reached a point of saturation.” *Id.*, p. 195. He concluded by saying that “Madison County is strongly opposed” to the Project. *Id.*, p. 196.

The Madison County Township Association, an association of all townships in the county, voted during a meeting on September 12, 2022 to oppose all current and future solar projects in Madison County. Sparks Testimony, p. 2, lines 17-21 & Attachment B. All of Madison County’s 14 townships voted to approve the resolution, except for two townships that had no trustees present at the meeting. *Id.*, lines 20-21.

A citizen living across the road from the Project Area, Kathy Little, testified that she sees numerous signs all over the community expressing opposition to the Project. Townships’ Exh. 5, Direct Testimony of Kathy Little (“Little Testimony”), p. 2, lines 6-7 & p. 4, line 5. She attended two public information meetings held by Oak Run Solar, where most of the questions and comments from the crowds at both meetings expressed opposition to the Project. *Id.*, p 4, lines 5-8.

Another citizen living across the road from the Project Area, Errol Gattis, testified that he sees signs all over the community opposing the Project. Townships’ Exh. 4, Direct Testimony of Errol Gattis (“Gattis Testimony”), p. 4, line 1. Mr. Gattis also attended a public meeting about the Project at the Madison County Farm Bureau office, where 30 to 40 people spoke against the Project and only one person spoke positively about the Project. *Id.*, lines 1-4.

The local public hearing held on April 11, 2023 confirmed that local public opposition to this Project is overwhelming. The Madison County residents testifying against the Project outnumbered the Madison County residents testifying in support of the Project by 24 to 5.

Transcript of the Public Hearing of Apr. 11, 2023.⁵ Madison County residents attending the local public hearing who signed sheets indicating opposition to the Project outnumbered Madison County residents signing sheets in support of the Project by a count of 98 to 3.⁶ See the signature sheets filed on the docket as public comments on May 4, 2023 (which also were marked as Townships' Exhs. 8-9). The Board has noted that testimony at the local public hearing is a credible indicator of the public views on a project, because it is "sworn testimony subject to cross examination." *In re Birch Solar 1, LLC*, OPSB Case No. 20-1605-EL-BGN, Order on Rehearing, 2023 WL 4105392, at *6, ¶ 22 (June 15, 2023). The attendance and testimony of local citizens opposing the Project, in contrast to the handful of county residents showing up to support it, demonstrates the pervasiveness of the local opposition to this Project in Madison County. The government officials in Madison County have taken note of this opposition and have duly registered their opposition as well.

The Townships have many concerns about the Project's potential negative impacts on the township and its residents. Frey Testimony, p. 2, lines 16-17; Sparks Testimony, p. 3, lines 1-2; Turvy Testimony, p. 2, lines 16-17. Monroe Township's residents and Deercreek Township's residents oppose this Project, as Monroe Township Trustee Lloyd Frey and Deercreek Township Trustee Robert Turvy, Jr. learned in conversations with many of them. Frey Testimony, p. 2, lines 17-18; Turvy Testimony, p. 3, lines 5-6. Somerford Township Trustee Sparks, a

⁵ Fourteen other people spoke in favor of the Project. They were not residents of Madison County, but were mostly union members hoping to work on Project construction, hopeful vendors for the Project, and trade groups beholden to solar company donations. One of the Project's local supporters is hoping to get a deal with Savion paying him for participating in a future expansion of the solar farm. Tr. of Public Hearing, pp. 67-69. Another supporter is a representative of a nonprofit group purporting to advocate for solar energy, landowners' rights, national security, and defense, who did not disclose that Savion is a donor to the organization until forced to reveal that fact under cross-examination. *Id.*, pp. 107-109.

⁶ The unions supporting Oak Run Solar sent their members from outside of Madison County to the hearing in an attempt to demonstrate support for the Project. However, even counting the out-of-county signatures, the Project's opponents outnumbered supporters by 116 to 60. *Id.*

pharmacist, heard many customers at the pharmacy express their opposition to the Project.

Sparks Testimony, p. 3, lines 2-3. Monroe Township Trustee Frey attended a public meeting on February 16, 2023 at Beck's Hybrids in London, Ohio, which was open to all residents in all Madison County townships and anyone else who wished to attend. Frey Testimony, p. 2, lines 18-20. Approximately 200 people attended that meeting. *Id.*, lines 20-21. About 90% of the approximately 30 people speaking during the first hour of that meeting stated their opposition to the Project.⁷ *Id.*, lines 21-22; Frey, Tr. III 383:3 – 384:18.

The Townships' primary concerns about the Project stem from its potential damage to drainage, roads, views, soil erosion, water quality, groundwater levels, fire protection, wildlife, land use, agricultural land, and the area's businesses. Sparks Testimony, p. 3, lines 5-7; Frey Testimony, p. 3, lines 1-3. The trustees have good reason to expect substantial damage from this Project, because they have already witnessed the construction activities in the Madison Fields Solar Farm, Big Plain Solar Farm, and Fox Squirrel Solar Farm. Frey Testimony, p. 2, lines 7-10; Sparks Testimony, p. 2, lines 7-10; Turvy Testimony, p. 2, lines 16-21. The Trustees summarized some of these issues in their resolutions opposing the Project. Frey Testimony, p. 3, lines 3-5; Sparks Testimony, p. 3, lines 7-9; Turvy Testimony, p. 3, lines 1-2.

The trustees are concerned that Project may flood nearby roads and land by damaging drainage tiles and surface waterways, damage the public roads near the Project Area, and cause soil erosion during Project construction that runs off into and pollutes the area's streams. Sparks Testimony, p. 3, lines 10-17, & p. 4, lines 36; Frey Testimony, p. 4, lines 8-9, 12-13, 22-23; Turvy Testimony, p. 3, lines 15-22, & p. 4, lines 1-4. Mr. Gattis noted that Dun Ditch received drainage from the Project Area prior to flowing past his house. Gattis Testimony, p. 3, lines 15-

⁷ Mr. Frey could attend only the first hour of that meeting due to a township trustees' meeting on the same night, so he heard only the first 30 or so speakers. Frey, Tr. III 384:11-18.

16. Ms. Little testified that she is concerned about drainage from the Project Area, because water from the Project Area drains into a tile flowing into the roadside ditch on her yard that already floods some of her yard and some of Juanita Smith's nearby yard during heavy rainfall. Little Testimony, p. 3, lines 13-16. In particular, the drainage of water in Deercreek Township is already a challenge, because the area once was swampland and needs effective tile systems and surface waterways to avoid flooding. Turvy Testimony, p. 3, lines 17-19.

The township's residents rely on their wells to provide them with water. Frey Testimony, p. 4, line 3; Sparks Testimony, p. 4, line 9; Turvy Testimony, p. 4, line 21. The Trustees are concerned that, if the Project uses groundwater to clean its solar panels, this usage may lower the levels of the groundwater used in the wells of neighboring residents. Sparks Testimony, p. 4, lines 7-11; Turvy Testimony, p. 4, lines 21-23; Frey Testimony, p. 4, lines 3-5.

The Townships' witnesses testified that the Townships' residents value the area's scenic beauty and rural setting, which are important aspects of the residents' quality of life. Frey Testimony, p. 3, lines 16-17; Sparks Testimony, p. 3, lines 20-21; Turvy Testimony, p. 4, lines 7-9. An important benefit to rural life in Madison County is the peacefulness and beauty of the countryside. *Id.*, lines 9-10. The trustees are concerned that the sight of solar panels, substations, and other solar facilities will detract from their citizens' enjoyment of the views from their homes, their yards, and the public roads. Frey, p. 3, lines 17-19; Sparks Testimony, p. 3, line 21 to p. 4, line 2; Turvy Testimony, p. 4, lines 10-12. Many Deercreek Township residents drive State Road 38 to work at the Honda plant, and they will see the Project located along a long stretch of that road every day they go to work. Turvy, p. 4, lines 12-14.

The Townships are concerned about the possibility of fires, and the difficulty in extinguishing them, in the solar panel arrays and the battery energy storage system. Turvy

Testimony, p. 4, lines 3-4; Sparks Testimony, p. 4, lines 14-17; Frey Testimony, p. 4, lines 8-11. The trustees, including longtime firefighter Robert Turvy, Jr., understand that there is no effective way to extinguish these fires, and that a fire department's only option is to stop the fires from spreading to other areas. Frey Testimony, p. 4, lines 9-11; Turvy Testimony, p. 2, lines 1-9 (testifying about his 33 years of firefighting experience) & p. 4, lines 4-6; Sparks Testimony, p. 4, lines 15-17. Mr. Gattis observed that a battery energy storage facility would be located across the road from his house and expressed concern about how smoke from the fires may affect his family's health. Gattis Testimony, p. 3, lines 16-18.

The trustees are concerned that the Project's fences will keep deer out of this large Project Area and increase the number of deer eating in the neighbors' crops, gardens, and yards. Turvy Testimony, p. 5, lines 7-11; Sparks Testimony, p. 4, lines 20-22; Frey Testimony, p. 4, lines 14-16. This is a realistic scenario. The substations and BESSs will be surrounded by 18,000 feet of chain link fence, while the rest of the Project will be encircled by about 130,300 liner feet of fence. Application Narrative, p. 15. This means that the Project will erect 28 miles of seven-foot fencing that will exclude deer from 4,400 acres of land and concentrate these herds on the neighbors' land. Although Oak Run Solar states that, "[w]here possible," it will incorporate some wildlife travel corridors (Application Narrative, p. 112), the fact remains that it would still reduce the deer's range by 4,400 acres of land.

The Townships oppose the Project's plan to convert farmland into an industrial solar facility for decades. Sparks Testimony, p. 5, lines 3-4; Frey Testimony, p. 4, lines 19-20; Turvy Testimony, p. 5, lines 14-15. The Project Area is 6,050 acres. Application Narrative, p. 5. The Project would construct solar equipment on about 4,400 acres of land, including at least 4,316 acres of cropland. Application Narrative, pp. 1, 131. The Project's lifespan is expected to be 30

to 35 years. Applicant's Exh. 9, Response to Sixth Data Request, p. 2. Farmland is needed for food production. Frey Testimony, p. 4, line 20. Some of the best, most fertile farmland in Madison County would be lost to this Project. Frey Testimony, Monroe Township Resolution, Attachment A; Sparks Testimony, Somerford Township Resolution, Attachment A; Turvy Testimony, Deercreek Township Resolution, Attachment A. Oak Run Solar will purchase the land in the Project Area, and the company is making no commitment to return the land to farming after the Project closes down. Application Exh. I, Economic Impact and Land Use Analysis, p. 15; Narrative, pp. 5, 14; Flannery, Tr. I 49:7-16. Consequently, there is no guarantee that the land will return to farming even after 35 years.

Oak Run Solar might contend that the employment of agrivoltaic practices among the solar panels would allow continued agriculture in the Project Area. The term sheet offered by Oak Run Solar to Ohio State University is a tentative offer to farm between the solar panel rows, but only on 2,000 acres. Applicant's Exh. 14, Suppl. Response to Second Data Request, Attachment 2, p. 2. At least 4,316 acres will be developed into solar equipment. Application Narrative, p. 131. Crops will be planted only "between rows of solar panels." Applicant's Exh. 14, Suppl. Response to Second Data Request, Attachment 2, p. 2, ¶ 5.b. Even if agrivoltaic practices are employed, the farm crops will occupy only 50%, at most, of the land used for agrivoltaics. Reutter, Tr. III 309:4-17. This means that only 1,000 acres will continue to grow food, for a net loss of 3,316 acres of the 4,316 acres of fertile farmland converted to solar equipment. With that result, this mammoth Project would devour more valuable farmland than any other solar project considered by the Board.

Even more concerning is the fact that Oak Run Solar's application and the proposed certificate conditions contain no enforceable commitment to devote any acres to agrivoltaics.

The Application provides Oak Run Solar with the flexibility to either employ agrivoltaics in the Project or not to incorporate agrivoltaics as it chooses. Page 108 of the Application Narrative states that “agrivoltaics are also under consideration at the site as discussed further in Section 8(C)(4)(b).” Emphasis added. Page 116 of the Application Narrative cautions that “it is possible that based on agrivoltaic programs to be potentially implemented at the site, a portion of this row-crop agriculture could continue onsite during Project operations.” Emphasis added. Section 8(C)(4)(b) on Page 119 of the Application Narrative states that “[t]he Applicant is evaluating the potential to use the Project Area for agrivoltaics.” Emphasis added. Page 131 of the Application Narrative advises that, “as described in Section 8(C)(4)(b), the Applicant is evaluating the potential to implement agrivoltaics within the Project Area.” Emphasis added. Page 132 of the Application Narrative states that Oak Run Solar “is currently conducting research and development with The Ohio State University to investigate the possibility of including portions of the Project Area into agricultural operations.” Emphasis added. The Staff Report also recognizes the tentative nature of the agrivoltaics proposal, stating that Oak Run Solar “is investigating the possibility of implementing an agrivoltaic program.” Staff Exh. 1, Staff Report, p. 14. Emphasis added.

Oak Run Solar employee Sean Flannery testified that he believed the company has made a binding commitment to use agrivoltaics in the Project, citing the term sheets provided to Ohio State University and the county commissioners. Flannery, Tr. I 50:3 – 52:10. To the contrary, the term sheets are worded to avoid any enforceable commitments to use agrivoltaics. The term sheets caution that they are not binding agreements and, in fact, they have not been finalized or signed. Applicant’s Exh. 14, Suppl. Response to Second Data Request, p. 2; *id.*, Attachment 2, p. 4, ¶ D & p. 5; Applicant’s Exh. 26, Direct Testimony of Sarah Moser (“Moser Testimony”),

Attachment SM-3, p. 4, ¶ D & p. 5. Even at the evidentiary hearing, Oak Run Solar’s testimony reflected that “there is the potential for portions of the Project Area to be used for agricultural operations as part of Savion’s agrivoltaics research program with The Ohio State University.” Applicant’s Exh. 24, Direct Testimony of Courtney Dohoney (Dohoney Testimony), p. 4, lines 27-29 (emphasis added).

This uncertainty continues in the proposals for conditions to be included in the certificate. Proposed Condition 31 of the Staff Report requires Oak Run Solar to submit a sheep grazing plan, but it does not specify the acreage that must be grazed or the number of sheep that must be grown. Staff Exh. 1, Staff Report, p. 59. Oak Run Solar’s “enhanced” language for Condition 31 agrees to submit an agrivoltaics plan such as a “grazing and/or cropping plan,” but this language does not identify the number of acres that will host agrivoltaics. Moser Testimony, p. 15, lines 17-18. Oak Run Solar could decide to plant just one acre in agrivoltaics and still comply with this flaccid condition. With respect to sheep grazing, Oak Run Solar’s “enhanced” language for Condition 31 proposes to provide the livestock stocking rate, manure management practices, and mortality management practices only “if applicable.” Moser Testimony, p. 15, lines 17-18. This language allows Oak Run Solar to abandon its tentative idea about growing sheep without consequences. Since Oak Run Solar has made only noncommittal statements that it might employ agrivoltaics, the Board should not regard agrivoltaics as a factor in deciding whether the Project is in the public interest.

Notably, agrivoltaics is an experimental use for solar facility land. The largest agrivoltaic operation in the world is the Madison Fields Solar Farm in Madison County, which started operation only this year by planting a mere 30 acres of soybeans among the solar panels. Moser, Tr. II 205:18 – 206:18. Oak Run Solar agrivoltaics employee Sarah Moser guessed that Jack’s

Solar Garden in Colorado, with four acres of agrivoltaics, might be the second largest agrivoltaics operation in the world for agricultural activities other than sheep grazing. Moser, Tr. II 206:19 – 209:7. Ms. Moser was aware of agrivoltaic operations in other countries, but could not say how large they are. *Id.* Nor could she identify the size of the Fraunhofer ISE agrivoltaic operation touted in her written direct testimony, which has operated since only 2016. Moser, Tr. II 208:17-24; Moser Testimony, p. 4, lines 16-17. Ms. Moser’s testimony acknowledges that “[a]s early as 1981, the concept of combining agricultural and energy production has been proposed; however, to date, especially in the United States, no utility-scale solar energy (‘USSE’) developer has dedicated time or resources to fully investigate the challenges and possibilities of real execution.” *Id.*, lines 9-12. Consequently, even if Oak Run Solar tries agrivoltaics, the effective use of agrivoltaics is just an experimental goal.

The trustees believe that solar facilities should not be placed on productive farmland. Sparks Testimony, p. 5, lines 3-4; Frey Testimony, p. 4, lines 20-1. This land may not be suitable for growing crops after the Project is decommissioned, especially given the nature of the earthmoving activities witnessed at Big Plain Solar in Madison County that are grading, stripping topsoil, and flattening the ground. Turvy Testimony, p. 5, lines 15-19; Sparks Testimony, p. 5, lines 4-6. The Deercreek Township Board of Trustees is concerned that the Project may damage the fields’ soil permanently through compaction, flatten the fields’ raised areas, change drainage patterns, and mix topsoil with subsoil through grading and other earthmoving. Turvy Testimony, p. 5, lines 15-18; Turvy Testimony, Deercreek Township Resolution, Attachment A. The Staff notes that “topsoil once disturbed and/or removed is unlikely to retain its productivity.” Staff Exh. 1, Staff Report, p. 48. Oak Run Solar admits that grading damages the soil’s capability for growing crops and other vegetation by removing nutrients and compacting the soil. Ivy, Tr. I

95:3-17. Farmland used for solar energy production will never again be as productive as it is now. Turvy Testimony, Deercreek Township Resolution, Attachment A.

The Townships are concerned that the Project's displacement of farmland will reduce the income of local fuel companies, seed companies, fertilizer suppliers, farm implement dealers, and other businesses that sell their goods and services to farmers who otherwise would be farming land in the Project Area. Frey Testimony, p. 5, lines 1-4; Turvy Testimony, p. 5, line 22 to p. 6, line 3; Sparks Testimony, p. 5, lines 9-12. Two examples of these local businesses are a nearby John Deere dealer and the Beck's Hybrids store at which the meeting referenced above was held. Sparks Testimony, p. 5, lines 9-12; Frey Testimony, p. 5, lines 4-6; Turvy Testimony, p. 6, lines 3-4.

Oak Run Solar boasts that the jobs and economic benefit from the Project's construction activities will be substantial, but these jobs and income are temporary. During operation, the Project's benefits to Madison County and the State of Ohio would hardly be the bonanza that Oak Run Solar portrays them to be. The company's economic analysis represents that the Project would result in the direct and indirect employment of 63 people in Ohio, including 35 in Madison County. Application Exh. I, Economic Impact and Land Use Analysis, p. 25, Table 5. The Project's total annual output is expected to be \$8,367,839 for operation and maintenance, including \$3,073,093 in Madison County. *Id.*, p. 28; Application Narrative, p. 54. In comparison, grain production in the Project Area would result in the direct and indirect employment of 50 people in Ohio, including 30 in Madison County, and would have a total annual output of \$8,942,684 in Ohio, including \$6,275,030 in Madison County. Moser Suppl. Testimony, Attachment SM-1, Agricultural Economic Impacts in Oak Run Project, p. 20. That is, the Project would produce only slightly more operational jobs than the current agricultural

activities, and would produce less financial output for both the state and the county. The Project would result in a loss of more than \$3,000,000 per year in economic output for Madison County. Adding agrivoltaics would increase the Project's jobs and income, but the use of agrivoltaics is speculative given its experimental nature and Oak Run Solar's failure to make an enforceable commitment to employ agrivoltaics.

Errol Gattis and Kathy Little, the two witnesses residing adjacent to the Project Area, echoed the concerns of the township trustees who testified. Ms. Little testified that she opposes to the Project due to her concerns about the Project's potential impairment of property values, road damage from construction vehicles, traffic congestion during construction, drainage impacts, the disruption of electrical service to her home during construction while she works at home, and the solar equipment's unsightliness as seen from her house, her yard, and the public roads. Little Testimony, p. 3, line 9 to p. 4, line 2. Mr. Gattis testified that he opposes the Project due to his concerns about the replacement of good farmland with solar panels and other solar equipment, the misery his family will endure from construction noise, road damage, dust and littering during construction, the impairment of community property values, crowding of deer by solar fences, traffic congestion from construction workers and delivery vehicles during construction, drainage impacts, smoke from fires at the battery energy storage facility near his house, the inconsistency of the industrial solar facility with the rural character of the area, and the solar equipment's ruination of the scenic views from his house, his yard, and the public roads. Gattis Testimony, p. 3, lines 5-21. In short, Oak Run Solar plans to make money by sacrificing the pleasant character of the community.

Oak Run Solar did not inform the public about its plans to build the Project until the summer of 2021, after contracting for options to purchase the land for the Project in the fall of

2020. Moser, Tr. II 215:15 – 216:5. That is, Oak Run Solar’s strategy was to lock the sellers into binding contracts before the members of the public could find out about the Project and express their opposition. Oak Run Solar’s inconsiderate misconduct has increased the damage this Project would cause. In Errol Gattis’ case, he and his wife were unaware of Oak Run Solar’s plans to build the Project when they purchased and extensively renovated their house next to the Project Area during the time Oak Run Solar was secretly collecting land purchase options. Gattis Testimony, p. 2, lines 3-12. Oak Run Solar’s decision to conceal the Project from the general public until contractually locking in its land purchase options betrays the company’s early recognition that the Project would be unpopular in this community. The company’s secrecy prior to the summer of 2021 has inflamed the community’s resentment towards the Project.

While the Townships recognize the widespread unpopularity of the Project in their communities, they also have identified many substantive reasons for the communities’ opposition as expressed above. The Project will cause substantial damage to the public. The ensuing Sections V through XI of this brief describe many of the ways in which this poorly conceived Project will harm the public interest. For that purpose, the Townships hereby fully incorporate by reference Sections V through XI below. The Board should consider all of these threats in determining that the Project does not satisfy R.C. 4906.10(A)(6).

V. The Ohio Power Siting Board Cannot Issue A Certificate To Oak Run Solar 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.

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.

The Project would include two collector substations and one step-up substation.

Flannery, Tr. I 68:10-17. Each of these substations would have structures as high as 85 to 115 feet tall. Applicant's Exh. 9, Response to Sixth Data Request, p. 18. Each collector substation would occupy about 15 acres, and the step-up substation would consume about 17.6 acres.

Application Narrative, p. 25. Despite the size, height, and intrusiveness of these looming structures, Oak Run Solar has provided no simulations or artist's pictorial sketches for them.

Application Exh. X, Visual Resources Technical Report, Appx. A, Figures 5a-15b, pdf pp. 21-31; Dohoney, Tr. I 150:7-11.

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 Oak Run Solar to simulate or sketch each component of the entire facility, rather than 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 Oak Run Solar has the resources to create a simple simulation or draw a sketch to depict the substation.

Oak Run Solar's omission of an image for the substations violates OAC 4906-4-08(D)(4)(e), which requires simulations or sketches "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 July 10, 2023). Thus, Oak Run Solar must cover the entire range of landscapes, viewer groups, and scenic resources. At the very least, Oak Run Solar must simulate the worst-case views in that range -- and those were the views that the company omitted from the Application and the record. The

rule does not allow Oak Run Solar 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.

VI. The Ohio Power Siting Board Should Not Issue A Certificate To Oak Run Solar Due To The Project's Adverse Impacts On The Local Viewshed.

A. The Project's Enormous Blight On The Neighborhood Viewshed Precludes A Finding That The Project Complies With R.C. 4906.10(A)(3) and (6).

The Townships' witnesses testified that the Townships' residents value the area's scenic beauty and rural setting, which are important aspects of the residents' quality of life. Frey Testimony, p. 3, lines 14-17; Sparks Testimony, p. 3, lines 20-21; Turvy Testimony, p. 4, lines 7-9. An important benefit to rural life in Madison County is the peacefulness and beauty of the countryside. *Id.*, lines 9-10. The trustees are concerned that the sight of solar panels, substations, and other solar facilities will detract from their citizens' enjoyment of the views from their homes, their yards, and the public roads. Frey, p. 3, lines 17-19; Sparks Testimony, p. 3, line 21 to p. 4, line 2; Turvy Testimony, p. 4, lines 10-12. Many Deercreek Township residents drive State Road 38 to work at the nearby Honda plant, and they will see the Project located along a long stretch of that road every day they go to work. Turvy, p. 4, lines 12-14.

The size of this Project is monstrous. By occupying 4,400 acres of land, this Project will constantly and extensively expose the area's residents to its unpleasant appearance. The three substations will be as high as 85 to 115 feet. Applicant's Exh. 9, Response to Sixth Data Request, p. 18. Gen-tie towers will be as tall as 120 feet. Application Narrative, pp. 16-17. The solar panel arrays will range from nine feet to 12 feet in height. Application Narrative, p. 16.

There is no getting away from these awful views for the people unfortunate enough to be stuck near this facility. There are 75 structures, mostly residences, located adjacent to or in the immediate vicinity of the Project Area. Dohoney Testimony, p. 7, lines 12-13. There are 479 inhabited structures within a mile of the Project Area. Application Exh. R, Sound Level Assessment Report, p. 6-2. These people will all be harmed by the solar facility's views.

The short setbacks between solar facilities and neighboring areas guarantee that the views of solar equipment will be imposing to the public. The Project's equipment will be as close as 300 feet to nonparticipating residences, 150 feet to nonparticipating parcels, and 150 feet to public roads. Application Narrative, pp. 1, 39. In contrast, the Application admits that the solar equipment will be "visible in sustained views near residences" from 0.1 to 0.4 mile away. Application Narrative, p. 127. The Project will be fully visible from the Little Darby Creek and Spring Fork Scenic Rivers and partially visible from other recreational areas. Applicant's Exh. 5, Response to Second Data Request, p. 6, Table 8-12. Little Darby Creek is only a half mile from the Project Area, while Spring Fork flows through the Project Area. Application Narrative, p. 124.

Kathy Little is among the residents who will be harmed by the Project. Ordinarily, she and her family use their yard for family gatherings, cookouts, playing games, sitting on the porch, reading, listening to music, hosting bonfires, swimming in their aboveground pool, and watching birds such as the red-tailed hawks they often see across the road. Little Testimony, p. 2, lines 21-23. They even hosted the wedding of their oldest daughter in their yard last year. *Id.*, p. 2, line 23 to p. 3, line 1. They love to watch the farmers plant and harvest the crops across the road. *Id.*, p. 3, lines 1-2. Their yard is a great place to grow up and experience nature in a way that it is not disturbed. *Id.*, lines 2-3. They see deer, coyotes, hawks, skunks, raccoons, and

other animals. *Id.*, lines 3-4. Ms. Little also will be a grandmother in August; she would love for her grandchild to have the same experiences she had growing up, including the enjoyment of nature, the excitement of seeing deer come into the yard, and the ability to ride a bike or take a walk down the road without having to worry about being hit in busy traffic. *Id.*, lines 4-7.

Oak Run Solar's Project would change all of that. Kathy Little and her family can see the planned solar panel areas of the Project Area from their house and yard, because the Project Area is adjacent to and directly across the road from the front of their house. *Id.*, p. 2, lines 5-7. Their house is only about 250 feet from the road. *Id.*, line 7. They can see the Project Area while sitting on their front porch, which faces the Project Area. *Id.*, lines 7-8. That view is not blocked by trees between their house and the Project Area. *Id.*, lines 8-10. They have unobstructed views of the Project Area from both stories of the house, with 12 windows overlooking the Project Area. *Id.*, lines 10-12. If the Project is allowed to move forward, it will destroy the peacefulness and enjoyment that living in the country has to offer. *Id.*, p. 3, lines 20-22.

Ms. Little's mother, Juanita Smith, lives near Ms. Little across the road from the Project Area. *Id.*, p. 2, lines 14-17. The Project Area is located directly across the road from Ms. Smith's house and yard. *Id.*, line 17. Her house is only about 100 to 150 feet from the road. *Id.*, line 18. She too has unobstructed views of the Project Area. *Id.*, lines 18-19.

This enormous, sprawling Project will destroy the pleasant viewshed enjoyed by the residents of the Townships. Consequently, the Project does not represent the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations as required by R.C. 4906.10(A)(3). Nor will the facility serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6). Accordingly, the Board should disapprove this Project.

B. The Ohio Power Siting Board Cannot Issue A Certificate For The Project 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).

To evaluate a project's visual impacts, OAC 4906-4-08(D)(4) 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:

(f) 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. Oak Run Solar has not complied with the mandate in OAC 4906-4-08(D)(4)(f) to “minimize” the Project’s adverse visual impacts.

Oak Run Solar has not provided a vegetative screening plan for the Project, despite the Staff’s request for one. Applicant’s Exh. 5, Response to Second Data Request, pp. 6-7. The company has done no more than provide a one-sheet conceptual schematic of plantings which does not even show the locations where the vegetation would be planted. *Id.*, Attachment 2.

Oak Run Solar seeks to excuse this failure by representing that it is in the process of reaching out to adjacent, nonparticipating residents to find out their screening preferences. *Id.*, pp. 6-7. However, Oak Run Solar started its public outreach in July 2020. Application Narrative, pp. 53-54. There is no good reason why its communications with adjoining residents about visual mitigation should not be finished by now, three years later.

Oak Run Solar claimed on October 14, 2022 that it had contacted all nonparticipating residential landowners on the 59 parcels of land adjacent to the Project Area to discuss their preferences for vegetative screening. Applicant’s Exh. 5, Response to Second Data Request, pp.

6-7. This representation is false, as Kathy Little testified that the company never contacted her for that purpose. Little Testimony, p. 4, lines 9-14. On March 3, 2023, Oak Run Solar represented that it had not reached about 10 adjacent homeowners. Applicant's Exh. 12, Response to Eighth Data Request, pp. 8-9. At that time, Oak Run Solar stated that there are 48 adjacent homeowners (*id.*), whereas its Response to the Second Data Request had stated that there are 59. In response to another Staff request for a vegetative screening plan, the company again refused to provide a plan on the grounds that its discussions with adjacent homeowners had not been completed, and it again provided the same one-sheet conceptual schematic of plantings it had provided earlier. *Id.*, p. 9 & Attachment 1. Thus, up to the time of hearing, the company's efforts to prepare a vegetative screening plan and to find out the neighbors' screening preferences not only were still lacking, but the company even appeared to lack an accurate count of adjacent homeowners.

Because Oak Run Solar has not complied with the mandate in OAC 4906-4-08(D)(4)(f) to "minimize" the Project's adverse visual impacts, the Board should disapprove the Project. OPSB should not approve the Project under R.C. 4906.10(A)(2), (3), and (6) without requiring meaningful mitigation to address the Project's visual impacts.

VII. The Ohio Power Siting Board Cannot Issue A Certificate To Oak Run Solar 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 excavators, graders, dump trucks, flatbed trucks, cranes, and pile drivers. Application Narrative, pp. 81-82. Maximum noise levels from earthmoving and pile driving will be as loud as 71 A-weighted decibels (dBA) and 91 dBA, respectively, at a distance of 170 feet. Application Narrative, p. 82; Application Exh. R, Sound

Level Assessment Report, p. 8-2, Tables 8-1 and 8-2. These noise levels are far louder than the average ambient sound level of 41 dBA Leq to 50 dBA Leq normally experienced in the community during the daytime. *Id.*, p. 5-8, Table 5-2. In comparison to the 30 dBA to 41 dBA increase in noise level caused by solar construction machinery, an increase of 10 dB is perceived by the human ear as twice as loud. *Id.*, p. 3-1. Approximately 261,800 piles will be hammered 10 feet into the ground (Application Narrative, p. 21), so this noise will be pervasive and long-lasting. Construction of this enormous facility will last for four excruciating years. Application Narrative, p. 29.

OAC 4906-4-08(A)(3)(d) requires Oak Run Solar 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.” Oak Run Solar’s noise “mitigation” measures are illusory, consisting of no more than limiting “general construction activity” to 12 hours every day between 7 a.m. and 7 p.m. or until dusk when dusk occurs after 7 p.m. and giving the public a telephone number to make complaints. Application Narrative, p. 86. Staff Proposed Condition 40 contains the same pathetic limitations. Staff Exh. 1, p. 61. 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 proposed Condition 40 during those long hours include the operation of such heavy equipment as dump trucks, flatbed trucks, excavators, and graders. Application Exh. R, Sound Level Assessment Report, p. 8-1, § 8.1. Thus, a certificate containing proposed Condition 40 would allow Project construction to destroy the neighbors’ quality of life for up to 12 to 14.5 hours per day during summertime. Proposed Staff Condition 40 would allow impact

pile driving between 9 a.m. and 6 p.m. without noise level restrictions. Proposed Condition 40 would even allow Oak Run Solar 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 for four years is not a noise mitigation measure. In reality, the Application's promises and proposed Condition 40 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).

VIII. The Ohio Power Siting Board Cannot Issue A Certificate To Oak Run Solar 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.

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.

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

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

Emphasis added. The underlined language requires Oak Run Solar 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. OAC 4906-4-07(C)(3)(d) requires a quantitative flow diagram or description for water and water-borne wastes through the proposed facility. These water flow estimates are necessary to determine whether site clearing will increase stormwater runoff that could flood downstream properties during construction.

Most of the soil types in the Project Area are subject to flooding. Based on soil maps in the Application, 96% of the land in the Project Area contains Group C or Group D soils. Homan, Tr. I 134:19 – 136:7; Application Exh. O, p. 15, Table 4.1. Type D soils have a very low or very slow infiltration rate when thoroughly wet and are more prone to flooding than other soil types. Homan, Tr. I 135:19 – 136:1; Application Exh. O, Hydrology Report, p. 15. Type C soils are more prone to flooding than all other soil types other than Type D. Homan, Tr. I 135:11-14; Application Exh. O, Hydrology Report, p. 15. The Project Area contains streams that already flood their banks during 100-year storm events. Ivy, Tr. I 96:18-20. The Project’s

solar equipment would be built in areas experiencing up to two feet of flood water. Ivy, Tr. I 93:20-25.

Witnesses testifying for the Townships observed that drainage from the Project Area is already a problem. Kathy Little testified that water from the Project Area drains into a tile flowing into the roadside ditch on her yard and floods some of her yard, as well as some of Juanita Smith's yard, during heavy rainfall. Little Testimony, p. 3, lines 13-16. The testifying township trustees also described their concerns about drainage problems from the Project, as described in Section IV above.

Nevertheless, Oak Run Solar's expert witness on drainage issues admitted at hearing that Oak Run Solar has not provided the estimated quantity of aquatic discharges from the site clearing and construction operations. Ivy, Tr. I 102:7-10. Accordingly, Oak Run Solar 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. The company's witness also admitted that Oak Run Solar has not provided a quantitative flow diagram or description for water and water-borne wastes through the proposed facility. Ivy, Tr. I 102:15-21. This failure violates OAC 4906-4-07(C)(3)(d). Oak Run Solar's expert acknowledged that the Stormwater Pollution Prevention Plan (SWPPP) that it plans to develop after certification would contain these water quantity calculations. Ivy, Tr. I 110:18-21. Thus, Oak Run Solar admits that these calculations are feasible and necessary. Nevertheless, the company has refused to provide these calculations prior to certification, thus depriving the public and the Board of the opportunity to vet those calculations and to determine what water pollution problems must be addressed.

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

IX. The Ohio Power Siting Board Cannot Issue A Certificate To Oak Run Solar 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.

OAC 4906-4-07(C)(1)(d) and OAC 4906-4-07(C)(2)(b), (c), and (e) require Oak Run Solar 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.

(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.

Stormwater from a construction site can carry eroded soil, *i.e.*, silt, as a pollutant into nearby streams. Ivy, Tr. I 92:1-11. Oak Run Solar's plans for extensive earthmoving will create substantial opportunities for soil-laden stormwater to flow into the area's streams. Oak Run Solar estimates that it will grade approximately 500 acres, which represents 8.2% of the total Project Area or 11.3% of the facility footprint. Applicant's Exh. 4, Response to First Data Request, Question and Answer 2. The Staff's proposed Condition 23 would do nothing to prevent this damage, since it would allow 20% of all agricultural land in the Project Area to be graded. Staff Exh. 1, Staff Report, p. 56; Conway, Tr. II 279:24 – 280:6. Since the Project Area contains 5,624 acres of agricultural land, proposed Condition 23 would allow Oak Run Solar to grade a total of 1,125 acres. Conway, Tr. II 280:15 – 281:5; Application Narrative, p. 131. There is no good reason to use such a lenient limit, since the applicant in the Scioto Farms Solar case agreed to a less lenient limit of 15%. Conway, Tr. II 282:6-9. Staff proposed Condition 23 states a "goal" of grading no more than five percent of the entire Project Area, but, being a mere "goal," that figure is unenforceable and meaningless. This earthmoving will expose the soil to erosion and result in stormwater runoff.

Oak Run Solar's expert witness on drainage issues admitted the company has not submitted one year of monitoring data for the existing water quality of the receiving streams.

Ivy, Tr. I 102:2-6. This failure violates OAC 4906-4-07(C)(1)(d). Seeking to justify its rule violation, Oak Run Solar contends that this data is required only for point sources of pollutants, not non-point sources. Ivy, Tr. I 108:23 – 109:6. To the contrary, nothing in the rule’s solicitation of “the existing water quality of the receiving stream based on at least one year of monitoring data” suggests that this data is limited to point sources. In fact, the preface to this requirement states that this data is “information regarding preconstruction water quality and permits.” OAC 4906-4-07(C)(1) (emphasis added). Oak Run Solar’s expert acknowledged that the Project needs a National Pollutant Discharge Elimination System (NPDES) permit, consisting primarily of a SWPPP, for the stormwater discharges resulting from grading and other construction activities. Ivy, Tr. I 108:3-22; *also see* Application Narrative, p. 65. He also admitted that the NPDES permit applies both to point sources and nonpoint sources of water pollutants. Ivy, Tr. I 109:15-18. Oak Run Solar’s expert further acknowledged that the SWPPP in the NPDES permit, which Oak Run Solar wants to develop only after certification, would contain these water quality calculations. Ivy, Tr. I 106:6-25 & 110:13-17. Accordingly, the water quality calculations necessary for the SWPPP and NPDES permit are “information regarding preconstruction water quality and permits” required by OAC 4906-4-07(C)(1) prior to certification. Emphasis added.

In addition, no estimate of the quality of aquatic discharges from site clearing and construction operations has been provided. Ivy, Tr. I 102:11-14. This failure violates OAC 4906-4-07(C)(2)(b).

Oak Run Solar’s expert acknowledged that the SWPPP developed after certification would contain these water quality calculations. Ivy, Tr. I 106:6-25 & 110:13-17. Thus, Oak Run Solar admits that these calculations are feasible and necessary. Nevertheless, the company has

refused to provide these calculations prior to certification, thus depriving the public and the Board of the opportunity to vet those calculations and to determine what water pollution problems must be addressed.

This water quality data is even more essential in light of the fact that the Project Area drains into a watershed with a significant number of endangered and threatened (aka “listed” species). An exhibit to the direct testimony of Oak Run Solar witness Sean Flannery notes that the Big Darby Creek watershed, in which the Project Area and Little Darby Creek are situated, is in danger of losing rare aquatic species, including federally listed species immediately downstream from the Project Area. Applicant’s Exh. 23, Direct Testimony of Sean Flannery (Flannery Testimony), Attachment SF-2, letter dated Apr. 11, 2023 from Anthony Sasson of the Darby Creek Association to Matt Butler, p. 2 (pdf p. 63). This letter further observes that Little Darby Creek and Big Darby Creek are at great risk of losing many of these species. *Id.* For example, Spring Fork in the Project Area hosts endangered species of mussels. Dohoney, Tr. I 144:17-21. Eroded soil from stormwater runoff can smother mussels with as little as less than one centimeter of sedimentation. Dohoney, Tr. I 145:4-19.

In addition, the Ohio Environmental Protection Agency has classified Spring Fork as Exceptional Warmwater Habitat, meaning that this stream possesses excellent water quality and high biological diversity. Flannery Testimony, Attachment SF-3, letter dated Oct. 28, 2022 from Robert Gable, Jr., Scenic Rivers Program Manager of the Ohio Department of Natural Resources, to Sean Flannery of Savion Energy, p. 1 (pdf p. 78). The ecological importance of the Big Darby Watershed has led to the investment of an estimated \$100 million in habitat protection by private and public stakeholders. *Id.*, p. 3 (pdf p. 80). The Board should not allow

Oak Run Solar to squander these ecological resources by taking shortcuts in water quality planning in violation of OAC 4906-4-07(C).

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

X. The Ohio Power Siting Board Should Not Issue A Certificate To Oak Run Solar, Because The Project's Risk Of Fires And Toxic Gas From The Battery Energy Storage Systems Precludes A Finding That The Project Complies With R.C. 4906.10(A)(3) and (6).

The Project will include two battery energy storage systems (BESSs) of 11 acres each. Applicant's Exh. 5. Response to Second Data Request, p. 8; Application Narrative, p. 22. The BESSs will hold approximately 328 battery containers and 92 transformers, with each container being about 28.9 feet by 5.4 feet and 9.2 feet tall. Application Narrative, p. 22. Oak Run Solar would use lithium ion batteries in these facilities. Flannery, Tr. I 61:3-8; Zavala-Iraheta, Tr. II 185:7-9. Lithium batteries can catch on fire, including situations in which the battery cells rapidly release heat in a process known as thermal runaway. *Id.*, 187:17 – 188:9.

The Ohio Department of Health has studied the risks from lithium batteries and has published a bulletin to advise the public on the risks of this technology, concluding:

Information to date does not indicate a public health burden from the use of lithium ion batteries operating under normal conditions. While more information is needed to understand the toxicity of lithium ion chemistries, there is not likely to be a completed exposure pathway to the general public if the battery systems are well maintained and monitored, and secured, such as by fencing around the installations. The greatest risk is if these systems catch fire releasing hydrogen fluoride gas which can combine with moisture to become hydrofluoric acid, a highly corrosive liquid and contact poison, and lithium metal. Release of these byproducts into the environment would be hazardous if exposure to skin were to occur and local and regional emergency response teams would need to be aware of the special precautions required for dealing with these types of fires.

Townships' Exh. 6, "Battery Energy Storage Summary and Assessments," p. 4 (emphasis added). Oak Run Solar's Application cites this bulletin. Application Narrative, pp. 78-79; Flannery, Tr. I 59:2 – 61:2. As stated in this bulletin, although the batteries are not likely to harm the public "under normal conditions," a battery fire is not a normal condition. Public exposure to lithium is unlikely, but only "if the battery systems are well maintained and monitored, and secured." Townships' Exh. 6, "Battery Energy Storage Summary and Assessments," p. 4. The batteries will release toxic gas if exposed to fire, mechanical shocks, decomposition, or added electric stress by misuse. *Id.*, p. 3. Although Oak Run Solar represents that the batteries are safe, even the most advanced technology poses risks from operator error. Even the Tesla promotional brochure introduced by Oak Run Solar admits that "the risk of fire for any energy infrastructure is never zero." Applicant's Exh. 38, p. 2. Tesla's advertisement claims that air emissions from a battery fire are expected to be negligible (*id.*), but ODH's bulletin treats hydrogen fluoride gas as "the greatest risk" from a battery fire (Townships' Exh. 6, p. 4). This is a valid concern to nearby residents such as Errol Gattis, who observed that a battery energy storage facility would be located across the road from his house. Gattis Testimony, p. 3, lines 16-18. Oak Run Solar tried to disguise this threat at the hearing by stating that the neighboring homes are at least 4,800 feet away from the BESSs (Flannery, Tr. I 78:7-19), but that would not prevent smoke from blowing onto neighboring public roads and properties.

Lithium can damage the kidneys, thyroid glands, parathyroid glands, heart, and digestive system. Townships' Exh. 6, "Battery Energy Storage Summary and Assessments," p. 4. Gastrointestinal side effects include nausea, vomiting, diarrhea and abdominal cramping. *Id.* The most frequent neurologic side effects are lethargy, fatigue, weakness, tremor and cognitive

impairment. *Id.* OPSB must consider the risks from a mammoth collection of lithium ion batteries when deciding whether to approve this Project.

Oak Run Solar has confirmed that there is no effective way to put out a fire in the battery energy storage areas, stating that a fire in a battery storage container cannot be extinguished and must burn itself out with a total loss of its contents. Applicant's Exh. 9, Response to Sixth Data Request, pp. 3-4. No fire suppression system is planned. *Id.*, p. 3. Once a fire starts, the only recourse is for the fire department to take a defensive position to prevent the fire from spreading to other battery containers and the surrounding community. *Id.*, pp. 3-4; Frey Testimony, p. 4, lines 9-11; Turvy Testimony, p. 4, lines 4-6; Sparks Testimony, p. 4, lines 15-17. But Oak Run Solar has not even done the elementary planning necessary to figure out whether the water necessary to prevent a fire's spread is available for the fire department use. Flannery, Tr. I 57:2 – 58:4. Instead, the company just states that it will work with the local fire department to look for sufficient water to serve that need. Applicant's Exh. 34, Direct Testimony of Marvin Zavala-Iraheta, p. 4, lines 17-19. The Board should not approve this Project without that important safety information.

OPSB should not approve a project at which a fire could pose such grave consequences for the public. Nor should the Board approve a project that has not produced evidence that it will be prepared to prevent the spread of such a fire from one battery container to other battery containers or to the neighborhood. Approving this Project under these circumstances would violate R.C. 4906.10(A)(3) and (6).

XI. The Ohio Power Siting Board Cannot Issue A Certificate To Oak Run Solar 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 Plants And Wildlife.

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 the Project's 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. Oak Run Solar did a woefully incomplete literature search and did no field surveys other than to look for bats.

Oak Run Solar performed a literature search only for threatened and endangered species of plants and animals. Dohoney, Tr. I 142:15 – 143:20; Application Narrative, p. 100. Thus, Oak Run Solar 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. No literature search for waterfowl was performed. Dohoney, Tr. I 146:8-15. OAC 4906-4-08(B)(1)(c) also requires Oak Run Solar to conduct a literature search for all listed and unlisted plant and animal species, but Oak Run Solar ignored that requirement.

OAC 4906-4-08(B)(1)(d) requires Oak Run Solar 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. Oak Run Solar did not search in the field for any species other than bats. Dohoney, Tr. I 144:3-13. No waterfowl surveys were conducted. Dohoney, Tr. I 146:3-15. Indeed, Oak Run Solar did not even conduct field surveys for threatened and endangered species other than bats, even though correspondence from the Division of Wildlife of the Ohio Department of Natural Resources (“ODNR”) advised that the Project is in the range of 25 species of threatened and endangered plants and animals. Dohoney, Tr. I 144:3-13; Application Narrative, pp. 101-103; Application Exh. U, letter dated Apr. 1, 2022 from Mike Pettigrew of the Ohio Department of Natural Resources to Courtney Dohoney of Stantec, pp. 1-4 (pdf pp. 3-6). The Application indicates that Oak Run Solar assessed habitat availability for listed species, but did not actually look for those species. Application Narrative, pp. 103-104. The company’s consultant found habitat in the Project Area suitable for a variety of listed birds, fish, and mussels. *Id.*, p. 104. Nevertheless, Oak Run Solar did not conduct a field survey to look for either listed or unlisted species of plants or animals, other than bats.

Without data on plants and animals in and around the Project Area, the Board's issuance of a certificate to Oak Run Solar 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.

XII. Conclusion

As explained above, there are a multitude of important reasons to deny the certificate sought by Oak Run Solar. The Project is immensely unpopular with the local community and is opposed by local government officials. Oak Run Solar 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 Oak Run Solar's Application.

Respectfully submitted,

/s/ Jack A. Van Kley

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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 July 10, 2023, a courtesy copy of the foregoing document also is being served by electronic mail on the following:

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Summary: Brief (Initial Post-Hearing Brief) electronically filed by Mr. Jack A. Van Kley on behalf of Deercreek, Monroe, and Somerford Boards of Township Trustees.