BEFORE
THE OHIO POWER SITING BOARD

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

YELLOW WOOD SOLAR ENERGY, LLC'S MEMORANDUM CONTRA APPLICATIONS FOR REHEARING OF INTERVENORS BRAD COCHRAN, BRAD COCHRAN FARMS LLC, JWP FAMILY FARMS LLC, DIANE RHONEMUS, AND CHARLES THOMPSON, AND THE CLINTON COUNTY BOARD OF COMMISSIONERS

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I. INTRODUCTION

Pursuant to Ohio Administrative Code ("O.A.C.") 4906-2-32, Yellow Wood Solar Energy LLC ("Yellow Wood" or "Applicant") submits this memorandum contra to the July 17, 2023 Applications for Rehearing filed by intervenors Brad Cochran/Brad Cochran Farms LLC; JWP Family Farms LLC; Diane Rhonemus; and Charles W. Thompson (jointly referred to herein as ("Residents") and the Board of Commissioners of Clinton County ("Clinton County").

On June 15, 2023, the Ohio Power Siting Board ("Board") issued its Opinion, Order, and Certificate ("Order") in the above-captioned matter adopting the Joint Stipulation and Recommendation ("Stipulation") filed by Yellow Wood, the Board's Staff ("Staff"), and the Ohio Farm Bureau Federation ("OFBF") (jointly referred to herein as "Stipulating Parties"). The Order authorizes Yellow Wood to construct a solar-powered electric generation facility on leased land in Clark and Jefferson Townships, Clinton County, Ohio ("Project") with a generating capacity of up to 300 megawatts ("MW") alternative current consistent with the Stipulation and the Order ("Certificate"). On July 17, 2023, the Residents and Clinton County filed Applications for Rehearing contending that the Board acted unreasonably and unlawfully by failing to address a litany of issues in determining that the Applicant's construction, operation, and decommissioning of the proposed generation Project would meet the requisite statutory criteria under Ohio Revised Code ("R.C.") 4906.10.

The Residents claim the Board committed 12 separate errors of fact and law in reaching its decision to issue a certificate for construction of the Project. Each of these issues has something in common: it was thoroughly and appropriately addressed in the Board's Order, based on a detailed evidentiary record. In fact, the Residents' arguments on rehearing are merely a reiteration of the same arguments they made in their initial brief filed on November 18, 2022. The Residents simply seek to rehash their failed arguments on each of these fronts on rehearing. Clinton County similarly re-purposes its two failed arguments regarding public interest to argue that the Board committed 3 separate errors of fact or law in reaching its decision to issue a Certificate for construction of the Project.[1]

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[1] One of Clinton County's arguments is new and was not presented in their initial brief: its second assignment of error regarding the Applicant's commitments regarding drain tile remediation.

A review of the Applications for Rehearing filed by the Residents and Clinton County reveals that the Residents and Clinton County ignored the Applicant's factual responses set forth in Yellow Wood's reply brief filed on December 9, 2022. The Residents' reasoning is flawed, refuses to take into consideration Board precedent and ignores the facts of the case. Had the Residents and Clinton County properly reviewed the actual facts of the case, Yellow Wood's reply brief, or, for that matter, even the Board's Order, they would have known that the assertions set forth in their Applications for Rehearing are unfounded and have been addressed. In fact, the Residents repeat the arguments in their initial brief and do not meaningfully attempt in their Application for Rehearing to rebut the facts in Yellow Wood's reply brief, likely because there is no record evidence to support the Residents' claims. Clinton County disputes that the Order and record in this case satisfy the criterion in R.C. 4906.10(A)(6) regarding the public interest and also wrongly takes issue with the Board's description of the Applicant's commitments regarding drain tiles. As fully documented in the record, and summarized at length in Yellow Wood's initial brief and below, all of the concerns expressed by Clinton County have been fully addressed and resolved. Thus, to the extent the Applicant's responses below sound familiar, that is because it has no choice but to restate the facts in Yellow Wood's reply brief in the hopes that the Residents and Clinton County will take note of the true facts of the case and the Board's ultimate findings and conclusions. Therefore, Yellow Wood respectfully requests that the Board deny the Applications for Rehearing filed by the Residents and Clinton County on the same robust grounds that justified granting a Certificate for the Project in the first place.

II. ARGUMENTS

A. The Order provides sufficient measures in compliance with the standards for certification under R.C. 4906.10(A)(2), (3), (5), and (6), including determining the probable environmental impact of the facility, ensuring minimum adverse environmental impact considering the state of available technology and the nature and economics of various alternative, and that the facility serves the public interest.

As in the Residents' initial brief, the Residents focus their allegations in their Application for Rehearing on the criteria set forth in R.C. 4906.10(A)(2), (3), (5) and (6). A review of the 100-plus page Order reflects that the Board thoroughly reviewed the record evidence, the Stipulation, as well as the assertions by the Residents in their initial brief when the Board concluded, that:

1. The probable impacts, including the community and ecological impacts, have been properly evaluated and determined in accordance with R.C. 4906.10(A)(2);[2]

2. The facility will represent the minimum adverse environmental impact, considering the state of available technology and the nature and economics of various alternatives, and other pertinent considerations in accordance with R.C. 4906.10(A)(3);[3]

3. The facility will comply with the regulations for pollution control, solid and hazardous wastes, and air navigation in accordance with R.C. 4906.10(A)(5);[4] and

4. The facility will serve the public interest, convenience, and necessity in accordance with R.C. 4906.10(A)(6).[5]

Throughout its Application for Rehearing, the Residents allege Yellow Wood did not provide sufficient information required by the Board's rules to enable the Board to determine the probable environmental impact of the facility. As discussed in detail in Yellow Wood's reply brief, and further set forth below, this allegation has no factual basis or support in the record.

Despite the Board's well-founded conclusions, the Residents continue to argue that "minimum adverse environmental impact" under R.C. 4906.10(A)(3) has not been met and the Board is prohibited from issuing a certificate unless it finds that the facility poses the least "quantity assignable, admissible, or possible" adverse environmental impact based on a dictionary definition of "minimum."[6] However, the Board correctly noted in its Order that "[t]aken to its extreme, the only Project that could satisfy the Residents' restrictive interpretation would be one that is not built, as the least quantity of adverse environmental impact possible would be zero."[7] Thus, the Board justly concluded that the Residents' interpretation of the language adopted by the Ohio General Assembly would be illogical.[8]

The Residents' dictionary definition of the statute has no support under case law or Board precedent. As the Applicant explained in response to the identical argument from the Residents

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2 Order at 49 ¶ 119, 60 ¶ 143, 72 ¶ 175
3 *Id.* at 70 ¶ 170.
4 *Id.* at 76 ¶ 191, 78 ¶ 197.
5 *Id.* at 90-91 ¶ 227.
6 Residents Rehearing App. at 5, 25.
7 Order at 70 ¶ 70.
8 *Id.*

in their initial brief, the Ohio General Assembly does not define the term "minimum" or "minimum adverse environmental impact" in the context of R.C. 4906.10(A)(3). Contrary to the Residents' extreme and flawed theory, Ohio courts have made it abundantly clear that minimum is not synonymous with no impact – and minimum does not require that projects result in zero impact as the Residents suggests. Cases addressing the jurisdiction and authority of the Board further demonstrate that R.C. 4906.10(A)(3) authorizes the Board to grant certification as long as a project does not have greater than a minimum adverse environmental impact, not that applicants must demonstrate no impact.[9]

The Ohio General Assembly enacted R.C. 4906.10 decades ago, during a time when coal was the primary source of energy for electric generation; however, it recognized that new and innovative technology would be forthcoming and reflected that foresight in the statute by directing the Board to consider the "state of available technology and the nature and economics of various alternative, and other pertinent considerations" when considering what constitutes minimum adverse environmental impacts from a facility. Although the Residents assert in their Application for Rehearing that the Residents took the Ohio General Assembly's language regarding the future of generation facilities into consideration in expounding its theory, the plain reading of the Residents' arguments reveal that they did not.

As acknowledged by the Board in its Order, the record demonstrates that Yellow Wood has made a number of commitments that will minimize the adverse environmental impact of the facility, including:

> For instance, Applicant has coordinated with OHPO [the Ohio Historic Preservation Office] and plans to file an MOU [Memorandum of Understanding] to avoid certain sites and impacts to any state or federal threatened or endangered species will be avoided by following seasonal restrictions for construction in certain habitat types (Staff Ex. 1 at 29). Applicant will prepare a landscape and lighting plan to address potential aesthetic impacts to nearby communities, the travelling public, and recreationalists by incorporating appropriate landscaping measures such as shrub plantings or enhanced pollinator plantings (App. Ex. 5). Yellow Wood has also committed to limit noise to certain levels and limit construction to daytime hours and will finalize a transportation management plan and RUMA [road use and maintenance agreement] to account for construction traffic (App. Ex. 1 at 32, 53-54; Staff Ex. 1 at 29; Jt. Ex. 1 at 8-10). Applicant has committed to 300 feet

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

> from nonparticipating residences, 150 feet from nonparticipating parcel boundaries, and 150 feet from roadsides (App. Ex. 12; App. Ex. 18 at 6). Furthermore, Applicant will avoid or repair drain tiles, and has prepared a decommissioning plan to restore the land back to agricultural use at the end of the Facility life (Jt. Ex. 1 at 10-12; Staff Ex. 1 at 30). The Applicant has also committed to use panels that meet the U.S. EPA [United States Environmental Protection Agency] definition of non-hazardous waste (App. Ex. 1 at 55; Staff Ex. 1 at 30; Jt. Ex. 1 at 12).[10]

The Residents' rehashed arguments throughout their Application for Rehearing about the meaning of R.C. 4906.10(A)(3) and the term "minimum" are clearly erroneous and self-promoting. The Residents' argument that minimum means zero or no impact is neither reasonable nor legally sustainable in light of the full context of R.C. 4906.10(A)(3) and all of the information the statute requires the Board to consider in reaching its decision. What is evident in the record of this case is that the manifest weight of the evidence supports the Board's Order, which approved the Stipulation, and issued the Certificate to Yellow Wood.

The Applicant submits the arguments set forth in Section II.A. herein, and applies them equally to the arguments espoused below in Section II.C in response to the Residents' erroneous assignments of error 1 through 12 and espoused below in Section II.D Clinton County's erroneous assignments of error 1 through 3.

B. The Board correctly determined that Yellow Wood complied with all requirements in the Board's O.A.C. rules.

The Residents make a number of claims throughout their Application for Rehearing that Yellow Wood has not complied with various O.A.C. rules developed by the Board.[11] These allegations are without merit. The Residents ignore the thousands of pages of documentation responding to each and every subject posed by the Board's rules and Staff's data requests.[12] The Residents also disregard the Staff's expertise and its thorough and exhaustive investigation of all of the information provided in the Staff Report of Investigation ("Staff Report").[13] The requirements contested by the Residents are set forth in O.A.C. and not the statute. The rules illuminate the information the Board seeks to make its determinations under R.C. 4906.10(A), but the specific rules the Residents allege were not satisfied are not as proscriptive as the Residents

[10] Order at 70-71 ¶ 171
[11] Residents Rehearing App. at 6-11.
[12] App. Exs. 1-12.
[13] Staff Ex. 1, Staff Report (Oct. 4 2021).

claim and cannot be viewed out of context of the entire rule and its purpose for the Board. The Board in making its decision in this case applied the proper meaning to the rules to ensure that Yellow Wood provided all of the information necessary for the Board to make its decision and issue the Certificate. There is no doubt that, as a package, the Application, responses to data requests, and the expert witness testimony provide all of the requisite information supporting the Board's Order.

Ignoring arguments to the contrary in Yellow Wood's reply brief, the Residents insist on continuing to assert that case law supports its claim that the Board has not followed its own rules and, thus, should not have issued a Certificate to Yellow Wood; however, as thoroughly explained in Yellow Wood's reply brief, the case law cited by the Residents is inapplicable here.[14] The cases cited by the Residents address rights of employees or regulated entities that sought enforcement actions against administrative agencies for alleged violations of administrative agency rules and due process. These cases simply are not relevant to an administrative agency's determination of whether to grant a certificate to an applicant.[15]

The provisions in O.A.C. 4906-4 ensure that the Board and its Staff have the information needed to evaluate and determine whether a certificate should be issued to an applicant requesting to construct and operate a generation facility in Ohio. The Residents' myopic interpretation of the purpose of the Board's rules ignores that the Board promulgated the rules to fulfill its duty to evaluate an application for a certificate and determine whether the record, as a package, satisfies all requirements in R.C. 4906.10(A). As acknowledged by the Board in its Order, the information

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[14] Residents Rehearing App. at 5.

[15] *Parfitt v. Columbus Correctional Facility*, 62 Ohio St.2d 434, 406 N.E.2d 528 (1980) (Where the Supreme Court of Ohio ("Supreme Court") reversed a Franklin County Court of Appeals decision, holding that the termination of corrections officers would not be invalidated due to failure of an agency to follow its own administrative rules. The Supreme Court explained that "in the absence of prejudice, a public employee in challenging his removal from employment may not assert the employer-agency's procedural rules, unless that employee is a member of the class which the rule was intended to benefit."); *State ex rel. Cuyahoga Cty. Hosp. v. Ohio Bureau of Workers' Comp.*, 27 Ohio St.3d 25, 500 N.E.2d 1370 (1986) (Where the Supreme Court denied a writ of mandamus and motion for summary judgment, holding that a county hospital, which had treated an injured employee in a nonemergency situation, but which failed to show good cause for not obtaining prior approval for payment of bills from the Bureau of Workers' Compensation ("BWC"), was not entitled to payment of bills from BWC under the BWC's administrative rules.); *Clark v. Ohio Dep't of Mental Retardation and Developmental Disabilities*, 55 Ohio App.3d 40 (6th Dist. 1988) (Where the Sixth District Court of Appeals affirmed the trial court's holding that a state department's revocation of a license to operate a residential care facility was proper due to mismanagement as established by continuous failure of an operator to meet minimal standards set by the department's rules and where correction of the situation was not possible; thus, no warning letter was required to be sent prior to revocation of the license.). None of the three cases cited by the Residents are relevant for purposes of the Board's review of this matter.

provided in the record is not interpreted by the Board in a vacuum as to one feature.[16] Rather, the Board evaluated all of the information and commitments in the record when issuing its Order approving the Stipulation.

Understanding that the Board has the responsibility under R.C. 4906.10(A) to make determinations, including the probable environmental impacts and that the facility will represent the minimum environmental impact considering the state of available technology, the nature and economics of various alternatives, and other pertinent considerations, Yellow Wood is obligated to comply with all of the commitments in the Application as enhanced by the Stipulation. Yellow Wood provided and filed in the record in this case all of the information that is required under both the statute and the rules, and the information is supported by extensive expert witness testimony. In reaching its decision, the Board fully considered all of this information.

The Residents do not like the results of the studies and surveys authenticated in the record or the fact that knowledgeable parties entered into a Stipulation supporting the Project, but that opinion does not constitute evidence in the record. Consistent with the requirements in R.C. 4906.10(A), the manifest weight of the evidence, as detailed in the Yellow Wood's initial brief filed on November 18, 2022, and supported in Yellow Wood's reply brief, as well as the brief filed by the Staff, supports the Board's approval of the Stipulation and issuance of the Certificate.

The Residents are correct in so far as the Board was required to issue its decision in this case based on the evidence of record.[17] However, the Residents refuse to recognize that the record thoroughly supports a determination by the Board that all of the criterion in R.C. 4906.10(A) have been met and that the Board properly issued Yellow Wood a Certificate.

The Residents erroneously argue that Yellow Wood's alleged deficiencies stem from its failure to include final design plans in the Application for the public to review and for the Board to act on.[18] The Order requires the Applicant to update and finalize all of these plans prior to construction. While the Residents repeatedly revisit the importance for the Board to follow its own rules, nowhere—neither in the statute nor the rules—is there a requirement that final plans be submitted prior to the issuance of the Certificate. Recognizing that completion of the final design and plans for a project occur closer to construction, for decades the Board has reviewed and considered preliminary drawings and plans and issued certificates to major utilities under the

[16] Order at 71 ¶ 172.
[17] Residents Rehearing App. at 9.
[18] *Id*. at 10-11.

condition that the final engineering design and plans be provided prior to construction.[19] Applicants in all cases before the Board, such as Yellow Wood here, understand that they must provide the information, including design and plans, required for their project to the Board for review and approval – if this information is sufficient for the Board to make its determination as to the criterion set forth in R.C. 4906.10(A), the Board grants the applicant a certificate – following the issuance of a certificate, projects then file final designs and plans that can be more but not less than what the Board reviewed and approved in the certificates.

As the Board acknowledges, the Stipulating Parties presented a strong and all-inclusive Stipulation that is supported by the record in this proceeding. Of particular importance is Condition 1 in the Stipulation, which requires that the Applicant:

> … install the facility, utilize equipment and construction practices, and implement mitigation measures as described in the application and as modified and/or clarified in supplemental filings, replies to data requests, and recommendations in the *Staff Report of Investigation*.[20]

This condition in the Stipulation includes extensive and significant commitments and conditions by which Yellow Wood must construct, operate, and decommission the facility. Throughout the Application, the Applicant makes substantial commitments regarding all facets of the facility. These commitments are set in stone and cannot be decreased or reduced. Any mitigation measures in the final plans can be more, but they cannot be less, than those presented in the preliminary plans. When issuing the Certificate to Yellow Wood, the Board acknowledged that "the Stipulation obligates Applicant to construct the Facility 'as described in the application' and failing to honor commitments or studies included with the application will be a violation of the terms of

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[19] *See e.g., In re Application of Nat'l Power Coop., Inc.*, Case No 00-243-EL-BGN, Opinion, Order, and Certificate(Sept. 5, 2000); *In re Application of Columbus Southern Power, Co*, Case No. 02-2153-EL-BTX, Opinion, Order, and Certificate (Apr. 27, 2004); *In re Application of Sun Coke Co., Case No.* 04-1254-EL-BGN, Opinion, Order, and Certificate (June 13, 2005); *In re Application of Calpine Corp., Case No.* 01-369-EL-BGN, Opinion, Order, and Certificate (Jan. 28, 2002); *In re Application of Paulding Wind Farm, LLC*, Case No. 09-980-EL-BGN,Opinion, Order, and Certificate (Aug. 23, 2010); *In re Application of South Field Energy LLC*, Case No. 15-1717-EL-BTX, Opinion, Order, and Certificate (Sept. 22, 2016); *In re Application of Paulding Wind Farm IV, LLC*, Case No. 18-1293-EL-BTX, Opinion, Order, and Certificate (Apr. 4, 2019); *In re Application of Madison Fields Solar Project, LLC*, Case No. 19-1881-EL-BGN, Opinion, Order, and Certificate (Jan. 21, 2021); *In re Application of Clearview Solar I, LLC*, Case No. 20-1362-EL-BGN, Opinion, Order, and Certificate (Oct. 21, 2021).

[20] Jt. Ex. 1 at 3.

the Stipulation."[21] Again, Residents seems not to have read the Order prior to submitting their Application for Rehearing.

The Board's decision in this case and issuance of the Certificate was soundly based on the facts on the record. The Board provides its determinations and conclusions based on the facts on the record in an objective and straightforward manner. There is no doubt upon reading the 100-plus page Order, that the Board took great pains to meticulously recount the facts in the record and consider all arguments made by the parties on brief. The Residents' arguments and accusations to the contrary are unfounded and baseless.

The Applicant submits the arguments set forth in Section II.B. herein, and applies them equally to the arguments espoused below in Section II.C in response to Residents' assignments of error 1 through 12 in Sect II. D in response to Clinton County's assignments of error 1 through 3.

C. The assignments of error alleged by the Residents reiterate the arguments set forth in the Residents' initial brief, have been thoroughly considered by the Board in its Order, and are without merit.

1. The Board properly determined that the Project has support and is in the public interest under R.C. 4906.10(A)(6).

The Residents reference past Board decisions to argue that the Project is not in the public interest.[22] These arguments were thoroughly considered by the Board in its Order, are groundless, and should be rejected.

Restating its same arguments from their initial brief, the Residents cite *Republic*, claiming that "the 'especially prominent and one-sided' local opposition to the disapproved wind project was an important factor in [the Board's] determination that the Republic Wind project did not serve the public interest, convenience, and necessity."[23] Further, contrary to the Residents' arguments, unlike in *Republic*, *Kingwood*, and *Cepheus* the record in this case does not reflect "prominent" or "one-sided" opposition.[24]

In fact, the record evidence shows that, at the local hearing in this case held on October 20, 2021, two-thirds of the witnesses (25 of 36 witnesses) testified in support of the Project.[25]

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21 Order at 96 ¶ 245.

22 Residents Rehearing App. 11-13

23 Residents Br. at 6, *citing In re Application of Republic Wind, LLC*, Case No. 17-2295-EL-BGN, Opinion and Order (June 24, 2021) at 28 ¶ 91.

24 *In Application re Kingwood Solar I LLC*, Case No. 21-117-EL-BGN Opinion and Order; *In Application re Cepheus Energy Project, LLC*, 21-293-EL-BGN, Opinion and Order (Jan. 19, 2023).

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

Thus, the facts at the local public hearing weigh in favor of the Project by the vast majority of those who testified.

Further, the attempt by the Residents to analogize a wind case that was before the Board with the Yellow Wood solar case is inappropriate and misleading. The *Republic* case is distinguishable from Yellow Wood in many respects, not the least of which is that the type of equipment utilized for a wind and solar facility are vastly different and such distinction is clear from the comments and opposition posed in *Republic*. However, perhaps the most notable distinction is the fact that there was not a Stipulation between any of the parties in *Republic*; unlike this case where Yellow Wood, Staff, and OFBF all recommend the Board adopt the Stipulation and issue a Certificate to Yellow Wood subject to the 34 Conditions set forth in the Stipulation.[26]

Citing the *Kingwood* and *Cepheus* decisions[27] in their Application for Rehearing, the Residents request the Board review the Order in this case in light of these two decisions which they argue are factually similar to Yellow Wood. However, *Kingwood* and *Cepheus* are distinguishable from Yellow Wood. In both *Kingwood* and *Cepheus*, the Board's Staff recommended denial of the Certificate and did not sign a stipulation. The opposition in those two cases is incomparable to this case where the Board concluded that there was local support for this Project on the record:

> County commissioner views on a project should be considered, but we do not agree that those views should be determinative of the Board's ultimate decision. Although Clinton County opposes the Facility, as well as Residents and other local individuals, 26 of the 36 total witnesses at the local public hearing testified in support of the Facility (Pub. Tr.). Additionally, the public comments were fairly evenly split between those in support of the Facility and those in opposition to the Facility when eliminating duplicative comments and comments from the same household. We also note that although Clinton County opposes the Facility, Clinton County Trails Coalition and Wilmington-Clinton Chamber of Commerce have offered comments in support of the Facility.[28]

The Board's order makes it clear that "Although the Board recognizes that there is some local opposition to the Facility, the Board does not find that opposition to be overwhelming, and various individuals and entities have noted support and opposition to the Facility."[29]

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

[27] *In Application re Kingwood Solar I LLC*, Case No. 21-117-EL-BGN Opinion and Order; *In Application re Cepheus Energy Project, LLC*, 21-293-EL-BGN, Opinion and Order (Jan. 19, 2023).

[28] Order at 89-90 ¶ 226

[29] *Id*.

Contrary to the views of Clinton County and the Residents, the Board must factually look at the entire Application package, including: the impact of the facility on the environment and agricultural land; whether the facility will result in the minimum adverse environmental impacts; whether the facility is consistent with the regional plans for the electric grid; and whether it incorporates water conservation and complies with certain state regulations on pollution, waste, and air navigation. In addition, the Applicant notes that the Court has upheld determinations by the Board that a project satisfies the public interest requirements under R.C. 4906.10(A)(6) by fulfilling the renewable energy mandate and serving electric utility needs, maintaining a competitive marketplace, as well as promoting employment benefits.[30]

The vast majority of witnesses testifying at the local public hearing were in favor of the Project (25 of 36 witnesses), thus, disproving the theory espoused by Clinton County and the Residents that opposition to the Project is widespread or unanimous in the area.

Throughout the Application for Rehearing, the Residents merely reiterate the arguments from their initial brief and ignore the totality of the commitments agreed to by the Stipulating Parties and, instead, attempt to isolate specific topics for complaint.

Hence, the Residents' position on rehearing regarding local support for the Project and public interest criteria is without merit and should be denied. The record reflects that the Board lawfully and reasonably approved the Stipulation issuing the Certificate to Yellow Wood in compliance with R.C. 4906.10(A)(6).

2. The Board lawfully and reasonably determined Yellow Wood provided the information required by R.C. 4906.10(A)(6) and O.A.C. 4906-4-06(E)(4) regarding the Project's economic impact.

The Residents reiterate their argument that the Board cannot make a determination of the public interest of the facility because Yellow Wood did not conduct a negative economic impact study.[31] The Residents' argument is without merit because there is no requirement either in the statute or the rules that an applicant specifically investigate every possible facet of economic impact, only that the impacts be studied and reported. O.A.C. 4906-4-06(E)(4) requires applicants to "provide an estimate of the economic impact of the proposed facility on local

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

[31] Residents Rehearing App. at 14-19.

commercial and industrial activities." In fact, the Ohio Supreme agrees that this administrative code provision does not require applicants to provide a negative economic impact study and explains that the rule does not require applicants to "specifically quantify potential losses to tourism, farmers, or other energy providers." [32]

The Economic Impact and Land use Analysis Socioeconomic Report submitted with the Application reflects the facts as they were discovered by the expert in an objective and nonbiased manner showing the socioeconomic impacts associated with the Project. The report thoroughly addresses local impacts of the Project, both from construction and operation.

The study employed the widely-accepted National Renewable energy Laboratory's Jobs and Economic Development Impact ("JEDI") model and the IMPLAN regional economic modeling systems, as well as data from the Ohio Department of Taxation, which the Staff Report explicitly verified "were appropriate for [the socioeconomic] study and that the estimated impacts reported by the Applicant are reasonable."[33] These models and methodologies have been used by Applicants and accepted by the Board in rendering its decisions to issue certificates to solar developers in previous cases.[34]

The Residents, being opposed to the Project, obviously view the economics of the Project in a negative light. However, negative perspectives by opponents does not equate to true measurable facts. For example, the Residents complain about the possibility of lost value of the agricultural products that will not be produced if the Project proceeds.[35] But this value would accrue to the landowners who want to participate in the Project, and the socioeconomic study need not address what is in the best economic interest of those landowners, which they obviously are in the best position to judge. Moreover, the Board has determined that unsubstantiated worries expressed by individuals in the local community are not sufficient to determine that a Project is against the public interest.[36] Thus, while the complaints of the Residents in their initial brief reflect

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[32] *In re Application of Firelands Wind, L.L.C.*, Slip Opinion No. 2023-Ohio-2555 at 18 ¶ 58.

[33] App. Ex. 1, Ex. F; Staff Ex. 1 at 15.

[34] *In re Application of Hecate Energy Highland LLC*, Case No. 18-1334-EL-BGN, Order (May 16, 2019); *In re Application of Hecate Energy Highland 4, LLC*, Case No. 20-1288-EL-BGN -EL-BGN, Order (Mar. 18, 2021)

[35] Residents Rehearing App. at 16.

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

their negative attitudes regarding the Project, their perspectives do not negate the fact that the methodology used to determine the economic impact of the Project as required by the rule, concluded that the Project's net economic impact on the local community will be overwhelmingly positive.[37] Moreover, the Board has concluded that it "must rely squarely on the evidence presented in this case and not on speculation or [conjecture]."[38] The evidence presented in this record reflects that, when balancing the projected economic impacts of the Project, the impacts are positive. Thus, while the Residents hypothesizes that the Project may have some adverse economic impact due to the potential loss of agricultural activity, there is no evidence on the record supporting their theory.

The Board has determined that unsubstantiated worries expressed by individuals in the local community are not sufficient to determine that a Project is against the public interest.[39] Thus, while the concerns of the Residents reflect their negative attitudes regarding the Project, their perspectives do not negate the fact that the methodology used by the universities to determine the economic impact of the Project as required by the rule, concluded that the Project's net economic impact on the local community will be overwhelmingly positive.

In the Order, the Board lawfully and reasonably agreed noting that, while the Residents submit "the Facility may have some adverse economic impact due to the potential loss of some agricultural activity, no testimony was presented to quantify the alleged monetary loss."[40] As stated previously, the Board relies squarely on the evidence of record in a case and not on speculation."[41] The Board then proceeds to note record evidence supporting its determination on this issue, including the creation of construction and operational jobs and the associated earnings and local economic output.[42]

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37 App. Ex. 1, Ex. F.

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

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

40 Order at 88 ¶ 224.

41 *Id.* Quoting *In re Complaint of Buckeye Energy Brokers, Inc*., Case No. 10-693-GE-CSS, Entry on Rehearing (Feb. 23, 2012).

42 Order at 88 ¶ 224.

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

Accordingly, the Residents' position on rehearing regarding the economic impact of the Project is without merit and should be denied. The information on the record reflects that Yellow Wood provided the economic impact information required by O.A.C. 4906-4-06(E)(4) and the Board lawfully and reasonably approved the Stipulation issuing the Certificate to Yellow Wood in compliance with R.C. 4906.10(A)(6).

3. The Board lawfully and reasonably determined the Project will not impact food production and complies with R.C. 4906.10(A)(3) and (6).

The Residents' misperception that Yellow Wood significantly reduces productive farmland and contributes to substantial damage to the food supply is unfounded.[43] The Yellow Wood Project represents approximately 2,397 acres of land use compared to approximately 896,600,000 acres of total farm land in the State of Ohio, which is a .000267 percent use of the approximate total.[44] Additionally, as required by the April 2022 Comprehensive Plan issued by the Clinton County Planning Commission, the Project is not sited within an area that has been selected as Farmland of Statewide Importance as designated by the Natural Resources Conservation Service and the U.S. Department of Agriculture.[45] Moreover, it is noteworthy that 33% of Ohio's corn crop goes to the production of ethanol – not for the provision of food products.[46]

Further, without any record support, the Residents inaccurately claim that upon decommissioning the Project site may no longer be suitable for farming.[47] To arrive at this conclusion, the Residents take information from the Application and misconstrue their meaning, which results in a misleading narrative. In actuality, after multiple decades of hosting deep rooted,

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43 Residents Rehearing App. at 19- 22

44 App. Ex. 18 at 12; https://www.nass.usda.gov/Statistics_by_State/Ohio/Publications/Ag_Across_Ohio/2021/aao2103.pdf

45 App. Ex. 18 at 12.

46 https://ohiocornandwheat.org/corn-checkoff/ethanol/#:~:text=A%20thriving%20ethanol%20industry%20is,percent%20of%20Ohio's%20corn%20crop.

47 Residents Rehearing App. at 21.

diverse native plantings that do not get harvested every year, the nutrients and organic matter existing in the top soil at the end of the Project's life cycle, may be some of the best top soil at that time. Thus, the Residents' issue regarding farm land is without merit and the Board is able to determine the probable environmental impact and that the facility represents the minimum adverse environmental impact and is in the public interest in compliance with R.C. 4906.10(A)(3) and (6).

The information on the record reflects that Yellow Wood provided the economic impact information required by O.A.C. 4906-4-06(E)(4) and the Board lawfully and reasonably approved the Stipulation issuing the Certificate to Yellow Wood in compliance with R.C. 4906.10(A)(3) and (6).

4. The Board lawfully and reasonably concluded that the approved setbacks comply with R.C. 4906.10(A)(3) and provide the minimum adverse environmental impact, considering the state of available technology and the nature and economics of various alternatives.

The arguments the Residents make in their Application for Rehearing that the Board should not have accepted the setbacks proposed by Yellow Wood are the same arguments they made in their initial brief.[48] These arguments were thoroughly considered by the Board in its Order, are groundless, and should be rejected. Because the Residents do not believe the setbacks stipulated to in this case are sufficient, they argue the Board cannot determine that "the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations" (*emphasis added*), under R.C. 4906.10(A)(3). Apparently, the Residents believe that the minimum 150-foot setbacks to property lines[49] and roads, minimum 300-foot setbacks to residences, wildlife-friendly aesthetically suitable fencing, solar panels that will be no taller than 15 feet (which is a significantly conservative estimation of the panel height), and extensive landscape screening "will expose nearby residents and motorists to the unavoidable and unsightly views of the solar equipment and reduce their pleasure of living there."[50] Despite Residents' statement that they are not presuming minimum to be synonymous with zero impact, the Residents are still clinging to

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[48] *Id*. at 22-25

[49] Notably, Yellow Woods' setbacks are greater than the setbacks adopted by the Board in its recent rulemaking proceeding (*i.e.,* the Board adopted minimum setbacks from a project's solar modules of at least 50 feet from non-participating parcel boundaries). *See In re Ohio Power Siting Board Review of Ohio Adm.Code Chapters 4906-1, et al*., Case No.21-902-GE-BRO, Finding and Order (July 20, 2023).

[50] Residents Rehearing App. at 23.

their disproven theory that Yellow Wood needs to "prove that the project's impacts are 'the least quantity assignable, admissible, or possible' under the dictionary meaning of [minimum]."[51] As explained above, the Residents' assertion is nonsensical and would be impossible to quantify at anything less than zero or no impact whatsoever.

Initially, it is important to note that, contrary to the Residents' flawed reading of the regulations, there is no statute or rule that mandates a given setback or that final screening plans be provided prior to certification. Rather, the Board may determine appropriate setbacks for a given project based on the totality of the record and the commitments made by the applicant. As noted above, as with other final plans contemplated in the Stipulation approved by the Order, the Residents try to argue that Yellow Wood failed to provide final screening plans prior to certification. The Board, as noted above, reviews and considers preliminary drawings and plans and issued certificates to major utilities under the condition that the final plans be provided prior to construction. Thus, contrary to the Residents' assumption there legally can be no error regarding the Board's conclusions on this issue – because there are no actual requirements that final plans be produced prior to certification.

Importantly, the Residents neglect to mention that what they complain about are the Project's minimum setbacks, but in many locations along the perimeter of the Project the setbacks will be considerably larger. The Applicant will have vegetative screening modules installed at locations where there are sensitive receptor points (homes, etc.).[52] In accordance with Stipulation Condition 17, Yellow Wood has committed to prepare a landscape and lighting plan in consultation with a landscape architect licensed by the Ohio Landscape Architects Board that addresses the aesthetic and lighting impacts of the facility. The plan will: place an emphasis on any locations where an adjacent non-participating parcel contains a residence with a direct line of sight to the Project Area; address potential aesthetic impacts to nearby communities, the travelling public, and recreationalists by incorporating appropriate landscaping measures such as shrub plantings or enhanced pollinator plantings; and include measures such as fencing, vegetative screening, or good neighbor agreements. Further, Yellow Wood will: maintain vegetative screening for the life of the facility and replace any failed plantings so that, after five years, at least 90% of the vegetation has survived; maintain all fencing along the perimeter of the Project; ensure that lights in the array will

[51] *Id*. at 4, 24.
[52] App. Ex. 18 at 7.

narrowly focus light inward toward the solar equipment, be downlit and shielded, be motion-activated, and result in a maximum horizontal illuminance level of 1 foot-candle; ensure that substation lights will narrowly focus light inward toward the solar equipment, be downlit and fully shielded, be motion-activated, and result in a maximum horizontal illuminance level of 1 foot-candle, except at times of necessary or emergency.[53] The Project will also have a local and onsite staff to manage the facility, perform vegetative management and weed control duties, and ensure the facility is in good working order.[54]

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

Although the Residents continue to complain about the minimum setbacks approved by the Board, the Board fully considered this argument in its Order and concluded based on all the information taken in context that:

> Adverse impacts are minimal within the context of the state of available technology, the nature and economics of the various alternatives, and other pertinent considerations, not in a vacuum as to one feature. Through the landscaping plan required by Condition 17 of the Stipulation, the Staff-endorsed setbacks will work in concert with the landscaping measures planned, which include an emphasis on locations where an adjacent nonparticipating residence has a direct line of sight to the Facility.[55]

Hence, the Residents' position on rehearing regarding the setbacks for the Project is without merit and should be denied. The record reflects that the Board lawfully and reasonably

[53] Jt. Ex. 1 at 6, Condition 17.
[54] App. Ex. 18 at 7.
[55] Order at 71 ¶ 172.

approved the Stipulation issuing the Certificate to Yellow Wood in compliance with R.C. 4906.10(A)(3).

5. The Board lawfully and reasonably determined Yellow Wood provided the information regard groundwater and water supplies in compliance with R.C. 4906.10(A)(3), and the record contains the information required by O.A.C. 4906-4-08(A)(4)(a).

Contrary to the claims of the Residents, Yellow Wood provided the "evaluation of the impact to public and private water supplies" as part of the Application and as supported by expert testimony.[56]

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

As the record reflects, there are 6 water wells within the Project Area; however, there will be no water wells within the fence line of the Project.[57] Local private well systems are typically located near residences and Project construction is not anticipated to physically damage private wells or affect well yields.[58] Yellow Wood does not anticipate any impacts to public or private wells or water supplies during the construction and operation of the Project, as the Project allows for rainwater to clean the panels and will not have a well to obtain water from at the site.[59] In their brief and in their Application for Rehearing, the Residents attempt to discredit the facts on the record regarding the probable impacts to wells and underground hydrology by posing unproven hypotheticals and misrepresenting the facts in the record.[60] Importantly, neither the Residents nor their counsel are hydrology experts and they did not present expert testimony on the record to refute the facts – for them to try to prove their unsupported hypothetical by misrepresenting the facts is disingenuous. The facts on the record show that the facility will be constructed so as not to have an impact on wells and underground hydrology.[61]

The Board's Order, furthermore, finds fault with the Residents' flawed reasoning, concluding that "the Facility would not pose an unreasonable risk to public or private drinking

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[56] App. Ex. 1, Ex. L; App. Ex. 28; App. Ex. 28A.
[57] App. Ex. 6.
[58] Residents Rehearing App. at 25-30.
[59] App. Ex. 1 at 33-37; App. Ex. 21.
[60] Residents Rehearing App. at 26.
[61] App. Ex. 1 at 33-37; App. Ex. 21.

water supplies," reasoning that the Residents failed to present expert testimony to justify their hypothetical concerns. The Order, furthermore, states:

> Residents did not identify water wells of concern or the depth and location of those wells, but rather presented general and hypothetical concerns alleging that grout to fill karst voids and shallow groundwater depth could interrupt groundwater flow. No expert testimony was presented by Residents to demonstrate that this allegation is possible.[62]

The Residents request that the Board add language to the Certificate prohibiting against siting solar equipment on karst formations unless they are of 'very low risk' and delete the phrase "where possible."[63] However, such modifications by the Board are not necessary as the record reflects that, per the terms of the Stipulation and further emphasized in testimony, Yellow Wood has committed that, should karst features be identified during additional geotechnical exploration or during construction, in accordance with Stipulation Condition 9, Yellow Wood will avoid construction in these areas when possible and if remedial measures are considered, it will be submitted to Staff for review and concurrence prior to implementation.[64] Further, Yellow Wood has committed to: requiring that the contractor implement adequate dewatering measures; and, based on the risk assessment of the karst features, the areas categorized as very low risk sites will be graded per the construction plans and monitored and the three locations of the karst features will be marked with survey grade GPS prior to grading activities.[65]

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

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62 Order at 71 ¶ 173.
63 Residents Br. at 13; Residents Rehearing App. at 30.
64 Jt. Ex. 1 at 4, Condition 9.
65 App. Ex. 1, Ex. L; App. Ex. 28 at 4; App. Ex. 28A at 3-4, Att. RS-1.

6. The Board lawfully and reasonably determined Yellow Wood provided the information required by R.C. 4906.10(A)(2) and (3), and (A)(6) and O.A.C. 4906-4-08(A)(3)(d) regarding the sound level during construction when issuing the Certificate to Yellow Wood.

The Board properly concluded that the Application sets forth the information required pursuant to O.A.C. 4906-4-08(A)(3)(d) describing the construction sound levels and the Applicant meets this requirement with the sound report submitted as part of the Application.[66]

The Residents complain that the construction sound from the driving of piles during this time will be "obnoxious and bothersome."[67] Contrary to the unfounded accusations of the Residents, the Applicant did not attempt to conceal that there will be additional sound during the 18-month period when the Project is under construction. The record reflects that the required sound study was conducted and submitted with the Application, fully considered by the Staff in the Staff Report, and supported by expert testimony.[68] While additional sound from construction may be heard by adjacent residents through some parts of the 18-month construction period, such sound will not be continuous or even necessarily loud during that short period, as the construction crews will be working throughout an approximate 2,397-acre site.[69] The record reflects that construction sound levels range from 37 to 75 A-weighted decibels ("dBA") for most activities, with up to 82 dBA (instantaneous) when pile driving is taking place in the immediate area. At the Project boundary, construction sound levels are predicted to be up to 93 dBA during solar pile driving. However, it is important to note that these are the levels expected when construction equipment is nearby and fully operational.[70]

Yellow Wood has committed to implement best management practices ("BMPs") for sound abatement during construction and operation of the facility, including use of appropriate mufflers, proper vehicle maintenance, and adherence of all local speed limits.[71] Sound from construction activities will be controlled primarily through the time-of-day restrictions outlined in Stipulation Condition 28, which requires that general construction and decommissioning activities be limited to the hours of 7:00 a.m. to 7:00 p.m., or until dusk when sunset occurs after 7:00 p.m.;

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66 Order at 83-84 ¶ 211
67 Residents Br. at 15; Residents Rehearing App. at 33.
68 App. Ex. 4; App. Ex. 6, Att. 5; App. Ex. 27.
69 App. Ex. 18 at 17.
70 App. Ex. 4; App. Ex. 6, Att. 5; App. Ex. 27 at 5-6.
71 App. Ex. 1 at 53-54.

impact pile driving be limited to the hours between 9:00 a.m. and 6:00 p.m.; and construction and decommissioning activities that do not involve sound increases above ambient levels at sensitive receptors are permitted outside of daylight hours when necessary.[72] To alleviate any concerns regarding sound at the Project site, the Applicant has committed to use of ambient controlled broadband backup alarms versus tonal alarms, using well-maintained equipment (particularly with respect to mufflers), and maintaining communication with affected residents.[73]

Recognizing these commitments, the Board's order states:

> The construction noise at the Facility will be temporary and intermittent, and Applicant has committed to use BMPs for sound abatement and limit the hours of construction to accommodate neighbors' noise concerns (App. Ex. 27 at 4-5; Jt. Ex. 1 at 9-10). The mitigation measures and hour limitations to which Yellow Wood committed convince the Board that construction noise will not rise to a level to be a reason to deny the Facility certificate.[74]

Construction sound will be limited and mitigated, as committed to in the Application and required by the Stipulation.[75] Thus, contrary to the Residents' allegations, the Board has ample information to make the determinations under R.C. 4906.10(A)(2), (3) and (6) regarding the impacts of sound from the facility and to issue the Certificate to Yellow Wood.

The Residents' position on rehearing regarding the construction sound level is without merit and should be denied. The information on the record reflects that Yellow Wood provided the information regarding construction sound as required by O.A.C. 4906-4-08(A)(3)(d) and the Board lawfully and reasonably approved the Stipulation issuing the Certificate to Yellow Wood in compliance with R.C. 4906.10(A)(2), (3) and (6).

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72 App. Ex. 27 at 5; Jt. Ex. 1 at 9, Condition 28.
73 App. Ex. 27 at 5.
74 Order at 88-89 ¶ 225.
75 The Residents appear to have referenced a different project (Oak Run Solar) by mistake in their Rehearing App. at 34 and Yellow Wood's response to this section presumes the Residents intended to direct their comments to the Applicant in this case, Yellow Wood Solar.

7. The Board lawfully and reasonably determined Yellow Wood provided the information required by R.C. 4906.10(A)(2), (3), and (5), and O.A.C. 4906-4-07(D) regarding the volume of solid waste and debris during construction and operation.

The Residents repeat their assertion that Yellow Wood has not provided sufficient information in response to the questions posed by O.A.C. 4906-4-07(D)(2) for the Board to make a decision on the volume of waste and debris during construction and operation.[76] The rules complained of by the Residents request information estimating the amount of solid waste the Project will generate during construction and operation. However, contrary to the Residents' unfounded accusation, one has only to review the Application, as amply acknowledged in the findings of fact in the Order, to know that all of the essential information in response to this query is contained therein.

The Applicant notes that the rules contained in O.A.C. 4906-4-07(D)(2), as with all the rules in O.A.C. 4906-4, apply to all types of generation facilities, including nuclear, coal, combined cycle gas, solar, and wind. Each generation type has unique characteristics and components that are known to the industry and the regulatory agencies. For example, applicants requesting a certificate for a wind-powered generation facility would need to provide information concerning blade shear, ice throw, and shadow flicker, whereas such information is not applicable or required for a solar facility.[77] Similarly, the type and extent of the information required in response to the O.A.C. rules varies based on the type of generation facility proposed in a given application. Based on the emphasis added by the Residents in their brief, the Residents seem to suggest that Yellow Wood will be storing, treating, and transporting hazardous waste.[78] However, while this information may be applicable to such generation facilities as nuclear and coal, the regulatory agencies are well aware of the fact that solar facilities do not generate hazardous waste.

With regard to the Residents' search for an estimate of the amount of solid waste, which is far less of a concern than hazardous waste, one has only to review the Application to know that all of the essential information in response to this query is contained therein. The Application reflects that the following components will be used for the Project: over 740,000 solar panels; metal racking for the panels; metal piles that will be mounted on the racking; several groups of electronic

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[76] Residents Rehearing App. at 35-37.
[77] *See* O.A.C. 4906-4-08((A)(7) through (9).
[78] Residents Br. at 21.

components, including inverters, step-up transformer, and combiner boxes; collection lines; and a collector substation.[79] As also documented in the Application, these facility components will generate the types of solid waste materials typically found during construction, including "primarily plastic, wood, cardboard and metal packing/packaging materials, construction scrap, and general refuse." The Application goes on to explain that facility operations will not result in generation of debris or solid waste and the small mount generated by the operations and maintenance facility will be nonhazardous and will be managed and disposed of in accordance with federal, state, and local regulations.[80] The Application is a package and the information therein must be reviewed and read in total. Moreover, in the Staff Report, Staff verifies that "[t]he Applicant's solid waste disposal plans would comply with solid waste disposal requirements set forth in R.C. Chapter 3734."[81] Thus, contrary to the Residents' view, the Applicant has provided and the record contains all of the information needed for the Board's review and consideration of the volume and disposal of solid waste.

Additionally, the Residents claim that the Board somehow cannot assess the environmental impact of the Project and is unable to issue a certificate, because Yellow Wood failed to include "an estimate of the . . . amounts of debris and other solid waste" generated during construction and operation.[82] To the contrary, as noted previously, the Board is fully capable, based on the totality of the record, to determine the Project's probable impacts with respect to waste and issue a Certificate for the Project.

The truth is that the rules do not require, as the Residents suggest, that the Application include the "volume" of waste or that its "estimate of the . . . amounts" of waste be numerical. Similarly, a plain reading of the rules shows that they do not require that the Application identify the "destinations of disposal" of the waste. What the Application does, in fact, provide are estimates of the amount of waste and Yellow Wood's plans or "proposed methods" to manage the waste. Such information in the record is more than sufficient for the Board to assess the Project's environmental implications with respect to waste. For example, Yellow Wood estimated that some amount of solid waste would be generated during construction, but it would be very limited.[83]

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79 App. Ex. 1 at 5-10.
80 *Id*. at 43.
81 Staff Ex. 1 at 36.
82 Residents Br. at 26-27; Residents Rehearing App. at 35-37.
83 App. Ex. 1 at 43.

Finally, as committed to in the Application, all waste will be reused, recycled, or disposed of in accordance with applicable law. Notably, construction and operation of the Project will generate no hazardous waste.[84] Regardless, Yellow Wood has committed that, at the time of Project decommissioning and removal, retired panels and their components that are not recycled or repurposed, which are then marked for disposal, will be sent to an engineered landfill with various barriers[85]

Thus, the Board properly concluded that Yellow Wood met the certification criteria in R.C. 4906.10(A)(2), (3), and (5). Contrary to Residents' preference, the Board notes that it would be unreasonable to assume that an applicant in this stage of the certification process could predict the exact numerical weight or volume of solid waste that will be generated by a facility. The Board explains that Yellow provided "estimates of the amount of solid waste to be generated and a description of Yellow Wood's plans to manage and dispose of such waste. The Board, therefore, agrees with Yellow Wood and Staff that the plans outlined by Yellow Wood are reasonable and finds that the Application complies with the solid waste requirements."[86]

Consequently, the Residents' position on rehearing is without merit and should be denied. The information on the record reflects that Yellow Wood provided the information regarding solid waste and debris as required by O.A.C. 4906-4-07(D) and the Board lawfully and reasonably approved the Stipulation issuing the Certificate to Yellow Wood in compliance with R.C. 4906.10(A)(2), (3), and (5).

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84 *Id*. at 43-45.
85 Jt. Ex. 1 at 12.
86 Order at 76-77, ¶191

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

Claiming that construction of the Project will involve various transportation deliveries that will, according to the Residents, "clog" and damage the roads and expresses in a few sentences their opinion that the Project should not be approved because it will cause these problems."[87] The Residents cite to no record support for their view and, in fact, totally ignore the Stipulation condition that requires Yellow Wood to:

> Prior to commencement of construction activities that require transportation permits, the Applicant shall obtain all such permits. The Applicant shall coordinate with the appropriate authority regarding any temporary road closures, road use and maintenance agreements with the County and applicable townships, as the case may be, driveway permits, lane closures, road access restrictions, and traffic control necessary for construction and operation of the proposed facility. Coordination shall include, but not be limited to, the county engineer, the Ohio Department of Transportation, local law enforcement, and health and safety officials. The Applicant shall detail this coordination as part of a final transportation management plan submitted to Staff prior to the preconstruction conference for review and confirmation by Staff that it complies with this condition. The Applicant shall update the transportation management plan with any transportation permits received after the pre-construction conference.[88]

Further, although discounted by the Residents, Yellow Wood also conducted a Conceptual Construction Route Study that was submitted with the Application to evaluate the anticipated impact of the construction of the Project on roads and bridges, reviewed the need for improvements prior to construction or likely repairs needed following construction, and evaluated the need for any transportation-related permits and the potential impact on local traffic.[89] Per the study, there are no significant environmental concerns for use of the existing roads for the Project from a transportation perspective.[90] The study also reflected that the roadways within the study area are generally well-maintained rural routes, are in fair to good condition, and are wide enough

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87 Residents Rehearing App at 37.
88 Jt. Ex. at 8, Condition 9.
89 App. Ex. 1, Ex. B.
90 *Id*. at 32, Ex. B; App. Ex. 20 at 3.

to handle two-way construction traffic.[91] Yellow Wood has committed that all Project impacts to the local roads, including construction access permits, will be included in the RUMA the Applicant will develop with Clinton County.[92]

The Board rightly determined that the Residents' general allegations that construction deliveries will clog and damage local public roads are "unconvincing on this point considering the specific actions and commitments that Applicant has included in the record."[93]

Consequently, the Residents' position on rehearing is without merit and should be denied. The information on the record reflects that Yellow Wood provided the information regarding local road use and the Board lawfully and reasonably approved the Stipulation issuing the Certificate to Yellow Wood in compliance in compliance with R.C. 4906.10(A)(3) and (6).

9. The Board lawfully and reasonably determined Yellow Wood provided information regarding drain tiles and waterways to determine that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternative, and other pertinent consideration, and complies with R.C. 4906.10(A)(3) and (6).

The Residents argue that the Application does not identify the locations of the Residents' tiles nor describe specific measures that will be taken to avoid damage to the Project Area tiles that are connected upstream or downstream from the Residents' tiles. Based on the Residents' arguments, it appears that the Residents failed to review the Drain Tile Mitigation Plan submitted with the Application, the Staff Report, or the expert testimony on the record supporting these documents, all of which delineate the studies conducted regarding drain tile in the Project Area.

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

- Ensure neighboring non-participating drainage (including tile) that is connected to the Project Area drainage be maintain or improved as part of the overall Project stormwater and drainage management.[94]

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91 App. Ex. 1, Ex. B; App. Ex. 20 at 3-4.
92 App. Ex. 1 at 32.
93 Order at 89, ¶225.
94 Jt. Ex. 1 at 10-11, Conditions 30-31.

- If any County maintained or private tile that was not previously known or found to connect to the Project Area is discovered, it must be mapped, inspected (visually), and incorporated into the design, the updated design must be provided to the Engineer of Record for approval. Thus, if Yellow Wood changes, alters, or improves site drainage, it must maintain inflow and outflows and ensure non-participating neighbors drainage is not negatively impacted by Project construction or operation.[95]

- As a function of designing the facility, Yellow Wood will: incorporate benchmark conditions of surface and subsurface drainage systems prior to construction, including the location of laterals, mains, grassed waterways, and county maintenance/repair ditches into the civil design calculations for the Project; make efforts to conduct a perimeter dig utilizing a tile search trench and consult with owners of all parcels adjacent to the property, the Clinton County Soil and Water District, and Clinton County to request drainage system information over those parcels; and consult with the County engineer for tile located in a county maintenance/repair ditch.[96]

- With regard to drainage and the complaint resolution plan, for the 5 years of operations of the Project, Yellow Wood will set aside a fund of $50,000.00 for the purpose of investigating claims regarding drain tile. The $50,000 fund represents an initial commitment and is not be construed as a cap. If a claim is submitted through the complaint resolution plan process regarding potentially modified drainage properties on to an adjacent, non-participating parcel, this fund will be used to hire a civil engineer that has done previous work in Clinton County, or an adjacent county, and who is not the Engineer of Record for the Project, to assess the validity of the claim. If it is found that the design or improvements of the Project have adversely modified drainage properties to the detriment of the non-participating landowner, Yellow Wood will immediately correct the drainage configuration and will compensate parcel owners affected for any damage to crops or other agricultural.[97]

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

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95 *Id.* at 10, Condition 30.
96 *Id*. at 11, Condition 31(a).
97 *Id.*, Condition 31(b).

10. The Board lawfully and reasonably determined Yellow Wood provided the information required by R.C. 4906.10(A)(2), (3), and (5), and O.A.C. 4906-4-07(C) regarding drainage and flooding.

The Residents claim that the Board cannot issue a certificate without certain information enumerated in O.A.C. 4906-4-07(C) regarding the Project's compliance with water quality regulations.[98] The Residents contend Yellow Wood has not provided the information pursuant to O.A.C 4906-4-07(C), namely:

- During construction: an estimate of the quality and quantity of aquatic discharges and plans to mitigate the effect.
- During operation: a quantitative flow diagram or description for water and water-borne waste through the facility that shows the potential sources of pollution.

On the contrary, the Application included the information relative to the applicable water quality requirements in accordance with the requirements of O.A.C. 4906-4-07, as the rule expressly allows an applicant to substitute all or portions of documents filed to meet federal, state, or local regulations. In the Application, the Applicant specifically identified the permits it needs for the Project to demonstrate compliance with water quality issues. As explained further below, those permits are comprised of nationwide and general permits issued pursuant to state and federal water quality regulations. For example, the Project will comply with and obtain the Ohio Environmental Protection Agency ("Ohio EPA") Stormwater Pollution Prevention Plan ("SWPPP"), National Pollutant Discharge Elimination System ("NPDES") OH000005 general permit.[99] The SWPPP permit application, as well as the other applications, which will be reviewed by the state and federal agencies charged with determining compliance with water quality regulations, do not require submission of the categories of information that the Residents are seeking. Because that information is not relevant to the agencies' determination of compliance with applicable water quality regulations, it should not be deemed a necessary element of this Application.

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

[98] Residents Rehearing App at 38-44.
[99] App. Ex. 1 at 37.

preparation and grading activities, during earthwork for the grading of roads and other components, the main use of water will be for compaction and dust control. All water used will be brought in from off-site sources as needed. Water for site preparation, grading, concrete, and dust control will be brought by 3,500-gallon water trucks. Operation of the facility will not require the use of water for cooling or any other activities, nor will the facility operation involve the discharge of water or waste into streams or water bodies and is not expected to impact water quality.[100]

Further, this is a good example of how the Residents have confused how this rule applies to this renewable energy Project versus how its applicability to historic fossil fuel and nuclear facilities. There is no dispute that the construction and operation of fossil fuel and nuclear facilities result in aquatic discharges and sources of pollution. Where, as the record in this case confirms, solar facilities, such as Yellow Wood, do not result in aquatic discharges and do not create a source of pollution.[101] Once again the Residents confuse this solar facility with other generation facility types, such as fossil fuels and nuclear, whose responses to these questions would be more in-depth because they actually utilize water for cooling and other activities, whereas solar facilities do not.

As the Board concluded, contrary to the unsubstantiated claims of the Residents, the record reflects that Yellow Wood has complied with O.A.C. 4906-4-07(C) and the Board was able to determine the environmental impacts from the facility regarding drainage and surface water runoff and that the facility represents the minimum adverse environmental impact in compliance with R.C. 4906.10(A)(2), (3),[102] and (5).

Therefore, Residents' position on rehearing regarding this the prospects for surface water runoff and the proper mitigation factors is without merit and should be denied. The information on the record reflects that Yellow Wood provided the information as required by O.A.C. 4906-4-07(C) and the Board lawfully and reasonably approved the Stipulation issuing the Certificate to Yellow Wood in compliance with R.C. 4906.10(A)(2) and (3).

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[100] *Id*. at 10-11.
[101] *Id*. at 54-55.
[102] Order at 74-75 ¶ 186.

11. The Board lawfully and reasonably determined Yellow Wood provided the information required by R.C. 4906.10(A)(2), (3), and (5), and O.A.C. 4906-4-07(C) regarding probable pollution impacts and mitigation.

The Residents reiterate their claim that the Board cannot issue a certificate without certain information enumerated in O.A.C. 4906-4-07(C) regarding the Project's compliance with water quality regulations asserting pollution from the facility.[103] On the contrary, the Application included the information relative to the applicable water quality requirements in accordance with the requirements of O.A.C. 4906-4-07, as the rule expressly allows an applicant to substitute all or portions of documents filed to meet federal, state, or local regulations. As noted above, the Applicant specifically identified the permits it needs for the Project to demonstrate compliance with water quality issues.[104] Those are comprised of nationwide and general permits issued pursuant to state and federal water quality regulations.

O.A.C. 4906-4-07 states that it is to be used to determine whether the facility will comply with regulations for, *inter alia*, water pollution and asks that the applicant provide information on compliance with water quality regulations. In order to assess such compliance, it is appropriate to identify what water quality regulations apply to the proposed Project. The Application confirms that the Project will not generate industrial wastewater or storm water from its operations. Rather, the Project will involve application under the Clean Water Act for Section 404 nationwide permits, a Section 401 water quality certification from the Ohio EPA, and, like any construction project where earthwork is involved, the Project will have to comply with, and obtain the Ohio EPA SWPPP, NPDES OH000005 general permit.[105] These are the applicable water quality permits for the Project. Further review of these permits confirms that the categories of information identified in O.A.C. 4906-4-07(C) are not required to be submitted to the environmental agencies tasked with evaluating compliance with water quality regulations, as they are not required to be included in the applications for coverage under these permits. The Applicant again notes that, with regard to the quantity of water, the Residents ignore that Yellow Wood is held to the standard established

[103] Residents Rehearing App at 44-47.
[104] App. Ex. 1 at 37.
[105] *Id*.

by the Ohio courts that landowners cannot unreasonably interfere with the flow of surface water to the detriment of their neighbor.[106]

O.A.C. 4906-4-07(A) provides that "[w]here appropriate, the applicant may substitute all or portions of documents filed to meet federal, state, or local regulations." Had the Applicant submitted the documents filed to meet the federal, state, and local water quality regulations, those applications before those other agencies would not have included any of the information the Residents seek. This further confirms that the information the Residents are seeking is not required for the Board to evaluate the Project's compliance with water quality regulations. The Applicant has confirmed that these permit applications will be submitted to the applicable regulatory agencies prior to the commencement of construction with the Project, demonstrating compliance with the applicable water quality regulations.[107]

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

For these reasons, the Board properly concluded as follows:

> [u]pon review of the record, the Board finds that the Facility will comply with Ohio law regarding water pollution control. As noted by Applicant, potential water quality impacts are unlikely and, to the extent they occur, will be mitigated through compliance with applicable required permits. The Board further notes that there is no record evidence submitted to dispute this conclusion. [108]

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

[107] App. Ex. 1 at 37.

[108] Order at 74-75 ¶ 186.

Thus, the Board correctly concluded that the Applicant has identified all permit requirements applicable to water quality compliance with R.C. 4906.10(A)(2), (3), and (5), and O.A.C. 4906-4-07(C). Therefore, Residents' position on rehearing is without merit and should be denied. The information on the record reflects that Yellow Wood provided the information required by O.A.C. 4906-4-07(C) and the Board lawfully and reasonably approved the Stipulation issuing the Certificate to Yellow Wood in compliance with R.C. 4906.10(A)(2), (3), and (5).

12. The Board lawfully and reasonably determined Yellow Wood provided the information required by R.C. 4906.10(A)(2) and (3), and by O.A.C. 4906-4-08(B) regarding wildlife and plants when issuing the Certificate to Yellow Wood.

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

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

The Residents complain that the Applicant only performed a literature search of the Project Area for threatened and endangered ("T&E") species of plants and animals and did not search the literature for evidence that species of commercial or recreational value or any other plant or animal species.[109] The Residents ignore the fact that the rules require a literature survey of species that are of commercial or recreational value **OR** species designated as T&E – not both under O.A.C. 4906-4-08(B)(1)(c).

Further, the Residents insist that, regardless of the fact that the field survey was only required to identify the T&E species identified in the literature survey (which the Applicant's field survey did) all species not just the T&E species should have been part of the field survey under O.A.C. 4906-4-08(B)(1)(d).[110]

The Residents reiterate their contention that Yellow Wood failed to conduct the requisite plant and wildlife literature review and field surveys and, by so doing, failed to provide the required

[109] Residents Rehearing App. at 47-52.
[110] *Id*. at 49.

information.[111] This argument continues to be without merit. The Board acknowledged that Yellow Wood conducted a literature review and field surveys as required by the rules, which included requested information from the Ohio Department of Natural Resources ("ODNR") and the United States Fish and Wildlife Service ("USFWS") regarding state and federal listed threatened and endangered species. The record indicates that the Applicant has fully complied and provided the above requisite information in accordance with O.A.C 4906-4-08(B) pertaining to plants and wildlife.[112]

The only support for the Residents' accusations are responses during cross-examination of Applicant Witness Rupprecht, which the Residents misconstrue and misinterpreted phrases from the Application.[113] Mr. Rupprecht's prefiled testimony states that the information on the existing wildlife and plant species in the Project Area was obtained from a variety of sources, including: desktop review and field verification of ecological and environmental resources within the Project Area; observations during on-site surveys, and correspondence with federal and state agencies."[114] The fact that the Applicant did conduct a literature review is further supported by the record evidence in the Application itself and the numerous explanations of the surveys and studies conducted for the Project.[115]

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

- Adhere to seasonal cutting dates of October 1 through March 31 for the removal of trees three inches or greater in diameter to avoid impacts to Indiana bats, Northern Long-eared bats, Little Brown bats, and Tricolored bats, unless coordination with ODNR and USFWS allows a different course of action.[116]

- Contact Staff, the ODNR, and the USFWS within 24 hours if, during construction, Yellow Wood encounters state or federally listed species. In addition, construction activities that could adversely impact the identified plants or animals shall be immediately halted until an appropriate course of action has been agreed upon.[117]

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111 *Id*. at 47-52.
112 Order at 58-59 ¶ 139.
113 *See* App. Ex. 1; Tr. I at 86.
114 App. Ex. 1, Ex. S; App. Ex. 21 at 18.
115 App. Ex. 1, Exs. C (Site Characterization Study Report), S (Ecological Assessment), and R (Wetland and Waterbody Delineation Report).
116 Jt. Ex. 1 at 6, Condition 18.
117 *Id*. at 7, Condition 19.

- Conduct no in-water work in perennial streams from April 15 through June 30 to reduce impacts to aquatic species and their habitat; avoid construction in upland sandpiper preferred nesting habitat types shall during the species' nesting period of April 15 through July 31; and avoid construction in Northern Harrier preferred nesting habitat types during the species' nesting period of April 15 through July 31, unless coordination with the ODNR reflects a different course of action.[118]

- Take steps through appropriate seed selection and annual vegetative surveys to prevent the establishment and/or further propagation of invasive plant species and noxious weeds during implementation of any pollinator-friendly plantings, as well as during construction, operations, and decommissioning activities - if noxious and invasive weeds are found to be present, the Applicant will remove and treat them with herbicide as necessary and allowed by law.[119]

However, as evidenced on the record, the Applicant did conduct studies and the data collected was found to be generally consistent with the results of the desktop review.[120] Yellow Wood provided all of this information as part of its Application. Yellow Wood's reply brief and the Board's Order expound upon the fact that the information required by O.A.C. 4906-4-08(B) is in the record. The Board correctly concluded that the information and documentation found in Application Exhibit S (Ecological Assessment), along with Application Exhibits C (Site Characterization Study Report) and R (Wetland and Waterbody Delineation Report) and of the Application,[121] and the supporting testimony thereto, provides all of the requisite information and more in compliance with O.A.C 4906-4-08(B). Therefore, the Board properly concluded that the facility's probable ecological impacts were properly evaluated and determined.[122]

Accordingly, the Residents' position on rehearing regarding this issue is without merit and should be denied. The information on the record reflects that Yellow Wood provided the information regarding potential impacts to wildlife and plants as required by O.A.C. 4906-4-08(B) and the Board lawfully and reasonably approved the Stipulation issuing the Certificate to Yellow Wood in compliance with R.C. 4906.10(A)(2) and (3).

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118 *Id*. at 7-8, Conditions 22-24.
119 *Id*. at 8, Condition 25.
120 App. Ex. 1, Ex. P, 5.1.
121 App. Ex. 1, Exs. O, P; Tr. II at 250-256.
122 Order at 72 ¶ 175.

D. The assignments of error alleged by County reiterate the arguments set forth in County's initial brief, have been thoroughly considered by the Board in its Order, and are without merit.

1. The Board properly determined that the Project has support and is in the public interest under R.C. 4906.10(A)(6).

As in its initial brief, Clinton County disputes that the Stipulation and record in this case satisfy the criterion in R.C. 4906.10(A)(6) regarding the public interest, claiming that the County and not the Board should make the sole necessary determinations in this case.[123] Like the Residents, Clinton County references past Board decisions to argue that the Project is not in the public interest. These arguments were thoroughly considered by the Board in its Order, are groundless, and should be rejected. Yellow Wood incorporates its arguments made in above, in Section II.C.1, and applies them equally here to arguments made by Clinton County.

This argument represents an attempt to circumvent the General Assembly's 50-year statutory dictate for the Board to be the objective authority to determine if a major utility facility should be sited in Ohio, but totally disregards Yellow Wood's grandfathered status under Substitute Senate Bill 52 ("SB 52"). SB 52 modified certain procedural requirements for obtaining a certificate of environmental compatibility and public need, namely by requiring that certain projects seeking development in Ohio after October 11, 2021, would first be reviewed at the county level before going through the Board process under R.C. 4906. However, under SB 52, the General Assembly determined that, as a matter of public policy, certain solar projects (including Yellow Wood) should instead continue to be evaluated and approved by the Board in accordance with the standards and procedures historically undertaken by the Board.[124] That being said, it should be noted that Yellow Wood **does** meet the design criteria subsequently published after the passing of SB 52 by the April 2022 Comprehensive Plan issued by the Clinton County Planning Commission regarding land uses of this type.[125]

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123 Clinton County Rehearing App. at 4-5.

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

125 www.clintoncountyrpc.org/uploads/1/2/4/4/124485524/cc-plandocument220518-small.pdf

Clinton County has chosen to ignore the testimony at the local hearing from their constituents that support the Project who cited to benefits from the Project including the economic development and increased tax base and school funding, the desire for a cleaner electric grid, minimal impact to community resources, the support of farmers' private property rights, and the jobs created by the Project, to name a few.

Adopting the view of public interest posited by Clinton County would directly contradict the Board's long-established mission to "to support sound energy policies that provide for the installation of energy capacity and transmission infrastructure for the benefit of the Ohio citizens, promoting the state's economic interests, and protecting the environment and land use."[126] Integral to this mission is the concept that applicants, Staff, and intervening parties to generation cases should work together to resolve disputes through negotiation. No one party or interests should have the ability to override negotiations with veto authority. Adopting such a view of stipulation negotiations would directly contradict long-held precedent used to evaluate the reasonableness of stipulations in the context of the Board's partner regulatory agency, the Public Utilities Commission of Ohio ("PUCO"). The PUCO has long held that no single party should be afforded veto power to void a stipulation negotiation.[127] Furthermore, the Board follows the procedures of the PUCO per R.C. 4906.12. The Board, therefore should adhere to this PUCO precedent and should not allow any single party, namely Clinton County, in this case or even the Residents, the ability to preclude a settlement simply by withholding its signature.

Hence, Clinton County's position on rehearing regarding local support for the Project and public interest criteria is without merit and should be denied. The record reflects that the Board lawfully and reasonably approved the Stipulation issuing the Certificate to Yellow Wood in compliance with R.C. 4906.10(A)(6).

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[126] *See* Board mission accessible at: https://opsb.ohio.gov/#:~:text=Our%20mission%20is%20to%20support,the%20environment%20and%20land%20use.

[127] *See, e.g., In re Campbell Supply Soup Supply Company L.L.C.*, Case No. 21-1047-EL-AEC, Opinion and Order (June 1, 2022) at ¶ *51; In re Duke Energy Ohio, Inc.,* Case No. 19-791-GA-ALT, Opinion and Order (Apr. 21, 2021) at ¶ *50; In re Application of Columbia Gas of Ohio, Inc.*, Case No. 16-2422-GA-ALT, Opinion and Order, ¶ 70 (Jan. 31, 2018); *In re Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 16-743-EL-POR, Opinion and Order, ¶ 61 (Nov. 21, 2017); *Dominion Retail v. Dayton Power & Light Co.*, Case No. 03-2405-EL-CSS, Opinion and Order, (Feb. 2, 2005) at 18.

2. The Board properly determined that that the Applicant has appropriately committed to repair drain tile.

Clinton County takes a sentence of the Board's Order out of context to suggest that the Applicant has not pledged to properly repair drain tile.[128] Clinton County erroneously claims that because Board's Order describes the Applicant's commitment to provide $50,000 for a drain tile repair investigatory fund to argue that the Applicant has not otherwise committed to promptly repair and replace drain tile. This argument is disingenuous and misleading as it lacks a complete understanding of the Applicant's commitments to repair drain tile and the complaint resolution plan described in the record.

As stated above, the $50,000 fund represents an initial commitment and is not be construed as a cap.[129] If a claim is submitted through the complaint resolution plan process regarding potentially modified drainage properties on to an adjacent, non-participating parcel, this fund will be used to hire a civil engineer that has done previous work in Clinton County, or an adjacent county, and who is not the Engineer of Record for the Project, to assess the validity of the claim. If it is found that the design or improvements of the Project have adversely modified drainage properties to the detriment of the non-participating landowner, Yellow Wood will immediately correct the drainage configuration and will compensate parcel owners affected for any damage to crops or other agricultural. If functioning, non-project related infrastructure is damaged during construction or operations, the Applicant shall promptly repair such damage at the Applicant's expense.[130] The Applicant states that its complaint resolution plan will allow community members to voice concerns to Yellow Wood during construction and operation, responding to complaints within 48 hours. [131] Any complaints received through that process would be monitored by Board Staff in the Applicant's quarterly complaint summary reports which are filed on the public docket.[132]

The Board properly concluded, furthermore, that the Applicant provided sufficient information and committed to protect and repair drain tiles in the Project Area. [133] Hence, Clinton County's position on rehearing regarding drain tile remediation is without merit and should be

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[128] Clinton County Rehearing App. at 6.
[129] Jt. Ex. 1 at 10-11, Conditions 30 and 31.
[130] *Id*., Condition 30.
[131] App. Ex. 1, Exhibit G.
[132] Jt. Ex. 1 at 10, Condition 27.
[133] Order at 72 ¶ 174.

denied. The record reflects that the Board lawfully and reasonably approved the Stipulation issuing the Certificate to Yellow Wood in compliance with R.C. 4906.10(A)(6).

3. The Board lawfully and reasonably determined Yellow Wood provided the information required by R.C. 4906.10(A)(6) and O.A.C. 4906-4-06(E)(4) regarding the Project's economic impact.

Clinton County, like the Residents, argues that the Board cannot make a determination of the public interest of the facility because Yellow Wood did not conduct a negative economic impact study.[134] The Residents' argument is without merit because there is no requirement either in the statute or the rules that an applicant specifically investigate every possible facet of economic impact, only that the impacts be studied and reported. O.A.C. 4906-4-06(E)(4) requires applicants to "provide an estimate of the economic impact of the proposed facility on local commercial and industrial activities." Yellow Wood incorporates its arguments made in above, in Section II.C.2, and applies them equally here.

Clinton County believes that its position takes precedence over the Board's statutory obligation to objectively review and consider the record. Clinton County presented one exhibit – the Resolution that parrots 'concerns' with the Project that are resolved or unfounded as noted above. Clinton County did not sponsor any witnesses and did not attend or participate in the evidentiary hearing, except to move the admission of its sole exhibit (the Resolution) at the beginning of the hearing – after which counsel for Clinton County left and did not participate in cross examination of the expert witnesses and did not present any witnesses to support the County's claims. Presumably because it believed the only thing it had to do was submit the Resolution and the Project would be denied.

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

Thus, Clinton County's position on rehearing regarding economic benefits for the Project and public interest criteria is without merit and should be denied. The record reflects that the Board lawfully and reasonably approved the Stipulation issuing the Certificate to Yellow Wood in compliance with R.C. 4906.10(A)(6).

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[134] Clinton County Rehearing App. at 6-8.

III. THE STIPULATION SATISFIES THE THREE-PART TEST UTILIZED BY THE BOARD FOR REVIEW AND CONSIDERATION OF STIPULATIONS

A. The Stipulation satisfies the first part of the three-part test for evaluation of contested settlements and is the product of serious bargaining among capable knowledgeable parties.

The Residents erroneously claim that the Stipulation is not the product of serious bargaining and is entitled to no weight.[135] Counsel for all of the parties represented by counsel and all intervenors were invited to all settlement negotiations. During the deliberations leading up to the Stipulation, representatives of all the parties were aware of and knowledgeable about the issues addressed in the Stipulation and were kept informed on the progress of the deliberations. All of the issues and proposals raised by all of the parties were taken into consideration and appropriate safeguards addressing the all of the parties' issues were included in the final Stipulation. Unfortunately, despite the good faith negotiations by the Signatory Parties, which resulted in a Stipulation that resolved and addressed all concerns consistent with the statutory framework solely reserved to the Board for the siting of electric generation facilities in Ohio, for reasons beyond the statute, Clinton County and the Residents chose to not join the Stipulation. The Board's order properly counters this argument, finding that:

> as a package, the Stipulation appears to be the product of serious bargaining among capable, knowledgeable parties. The Board recognizes that counsel for parties and all intervenors were invited to all settlement conversations. Furthermore, party representatives involved in deliberations were aware of and knowledgeable about the issues addressed in the Stipulation. While we note that Residents and Clinton County are not Signatory Parties, a stipulation in which some but not all parties agree to its terms, may still be considered by the Board. In fact, for some cases in which stipulations have been agreed to by some but not all parties to the proceeding, the Board has noted that adoption of such agreements would aid in ensuring that projects would represent the minimal adverse environmental impact and would serve the public interest, convenience, and necessity.[136]

[135] Residents Rehearing App. at 52.
[136] Order at 94 ¶ 241.

B. The Stipulation satisfies the second part of the three-part test for evaluation of contested settlements and, as a package, benefits ratepayers and the public interest.

The Residents also argue that the Stipulation is inconsistent with the public interest.[137] As clearly demonstrated throughout the record and extensively summarized herein, as a package, the Stipulation ensures that the construction and operation of the facility benefits the public interest, convenience, and necessity. The record evidence, together with the commitments in the Stipulation, ensures that the Project will represent the minimum adverse environmental impact for both construction and operations. The added aesthetic components to the Project (setbacks, landscape screening, and 'deer fencing'), along with other robust commitments and obligations (pollinators with significant weed management, drainage protection, sound limits), allow the Project to benefit the local and regional economy through jobs created during construction and operation in addition to new sources of tax revenue. These benefits do not just serve the public interest – but they are a public necessity.

The Stipulation further benefits the public interest by requiring the Project to meet certain requirements during construction of the Project specifically designed to minimize the temporary construction impacts of the Project.[138] The Project will further benefit the local and regional economy through jobs created during construction and operation, in addition to new sources of revenue. The Stipulation further benefits the state economy by adding low cost electricity to the supply of energy for decades to come.

The Board properly concluded in its Order that the Stipulation benefits the public interest:

> The Facility will add low-cost electricity to the State of Ohio's supply of energy for decades to come. Further, the Board finds that through the Facility's interconnection network upgrades, the Facility will improve components of the local PJM transmission grid, as well as contribute to the diversity of generation assets on the grid (App. Ex. 18 at 13). We are persuaded that the Facility will benefit the local and regional economy through jobs created during construction and operation, in addition to new sources of tax revenue (App. Ex. 18 at 18). In fact, the Facility will generate 1,235 jobs and $102.5 million in annual earnings for the State of Ohio during construction, and Facility operation is estimated to provide $2.1 million annually for the local taxing districts (Staff Ex. 1 at 14-15). We are encouraged that in addressing concerns raised by the public, the Applicant committed to 150 feet minimum setbacks from nonparticipating boundary lines and

[137] Residents Rehearing App. at 52.
[138] App. Ex. 18 at 18-19; Jt. Ex. 1.

> rights-of way; and 300 feet minimum setbacks from nonparticipating residences (App. Exs. 12; 18 at 6). We also find that Yellow Wood commits to multiple conditions in its Application and the Stipulation that were not required or common practices several years ago, including, but not limited to: extensive landscape screening; additional noise limitation provisions; deer fencing, which is not institutional chain link and barbed wire fencing; and a drain tile plan that includes funding for perceived drainage issues.[139]

C. The Stipulation satisfies the third part of the three-part test for evaluation of contested settlements and does not violate any important regulatory principle or practices.

The Residents argue that the Stipulation violates regulatory principles.[140] This argument is meritless. The record reflects that the Applicant has complied with every requirement, both statutory and regulatory, that is necessary in proceedings requesting a certificate to site a generation facility in Ohio. The Board has jurisdiction under R.C. 4906 to review the record in this case and determine if the record, as a whole, supports a finding that the Stipulation meets the requisite criteria in R.C. 4906.10. It is further well-documented that all of the important regulatory principles and practices – both substantive and procedural – have been met and, in some situations, exceeded. No regulatory principle will be violated by virtue of the Board acknowledging the expansive record that supports adoption of the Stipulation submitted by the Stipulating Parties. Board states that it is "convinced that the Stipulation does not violate any important regulatory principle or practice."[141] Therefore, the third and final test supporting the Board's adoption of the Stipulation has been met.

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[139] Order at 95 ¶ 242.
[140] Residents Rehearing App. at 52.
[141] Order at 95 ¶ 243.

IV. CONCLUSION

The Board's Order rests on a robust evidentiary record and sound legal authority. In approving the Stipulation, the Board correctly determined that the Project would meet the applicable requirements of R.C. 4906.10, including representing the minimum adverse environmental impact taking into account pertinent considerations and serving the public interest, convenience, and necessity. The Board considered each of the arguments made by the Residents and Clinton County in their respective initial and reply briefs, but ultimately rejected them based on extensive expert testimony from Yellow Wood and other Stipulating Parties. Although the Residents and Clinton County now repeat those same arguments at length in their Rehearing Applications, they have not identified any flaws in the Board's reasoning that would merit a grant of rehearing in this case. Therefore, the Applications for Rehearing filed by the Residents and Clinton County should be denied in their entirety and the Order reaffirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to these cases. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons below this 27th day of July, 2023.

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Summary: Memorandum Contra Application for Rehearing of Intervenors Brad Cochran, Brad Cochran Farms LLC, JWP Family Farms LLC, Diane Rhonemus, and Charles Thompson, and the Clinton County Board of Commissioners electronically filed by Christine M.T. Pirik on behalf of Yellow Wood Solar Energy LLC.