

THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF
BORDER BASIN I, LLC FOR A
CERTIFICATE OF ENVIRONMENTAL
COMPATIBILITY AND PUBLIC NEED.

CASE NO. 21-277-EL-BGN

ORDER ON REHEARING

Entered in the Journal on September 21, 2023

I. SUMMARY

{¶ 1} The Ohio Power Siting Board denies the application for rehearing filed by Robin L. Gardner, Michael J. Gardner 2011 Marital Trust #1, Gardner Brothers, LLC, Richard Scott Lewis, Sarah Lewis, The Richard S. Lewis Revocable Trust, Deidra L. Noel, Jeff Overmyer, and Shirley Overmyer.

II. PROCEDURAL BACKGROUND

{¶ 2} All proceedings before the Ohio Power Siting Board (Board) are conducted according to the provisions of R.C. Chapter 4906 and Ohio Adm.Code Chapter 4906-1, et seq.

{¶ 3} Border Basin I, LLC (Border Basin or Applicant) is a person as defined in R.C. 4906.01.

{¶ 4} Pursuant to R.C. 4906.04, no person shall construct a major utility facility without first having obtained a certificate from the Board. In seeking a certificate, applicants must comply with the filing requirements outlined in R.C. 4906.06, as well as Ohio Adm.Code Chapters 4906-2 and 4906-4.

{¶ 5} On June 15, 2021—as supplemented on July 21, 2021, August 31, 2021, September 29, 2021, and November 12, 2021—Border Basin filed an application with the Board for a certificate of environmental compatibility and public need to construct an up to

120 megawatt solar-powered electric generation facility in Cass Township, Hancock County, Ohio (Facility or Project).

{¶ 6} Through the course of this proceeding, the administrative law judge (ALJ) granted intervention to the Board of County Commissioners of Hancock County (the County), the Cass Township Board of Trustees (the Township), the Ohio Farm Bureau Federation (OFBF), and Steven and Tonya Miller. The ALJ also granted intervention to Robin L. Gardner, the Michael J. Gardner 2011 Marital Trust #1, Gardner Brothers, LLC, The Richard S. Lewis Revocable Trust, Richard Scott Lewis, Sarah Lewis, Deidra Noel, Jeff Overmyer, and Shirley Overmyer (collectively, Resident Intervenor or the Residents).

{¶ 7} Subsequently, the ALJ established the effective date of the application as January 7, 2022, and issued a procedural schedule instituting various filing deadlines and hearing dates.

{¶ 8} On March 16, 2022, Staff filed a report of investigation (Staff Report).

{¶ 9} Applicant, Staff, and Resident Intervenor Deidra Noel, Sarah Lewis, Richard S. Lewis, Jeff Overmyer, and Robin L. Gardner filed direct testimony. Supplemental testimony was later filed by Applicant and Jeff and Shirley Overmyer (the Overmyers).

{¶ 10} On April 13, 2022, Border Basin filed a joint stipulation and recommendation (Stipulation), which was agreed to by Border Basin, Staff, OFBF, the County, and the Township (Signatory Parties). In the Stipulation, Signatory Parties recommended that the Board approve Border Basin's application subject to 44 conditions.

{¶ 11} The evidentiary hearing commenced on April 19, 2022, and concluded the next day. At the hearing, Border Basin and Staff presented the testimony of 23 witnesses in support of the Stipulation. Resident Intervenor Jeff Overmyer, Sarah Lewis, Richard S. Lewis, Robin L. Gardner, and Deidra Noel testified in opposition to the Project.

{¶ 12} On June 9, 2022, and June 10, 2022, Robin L. Gardner, individually, and as trustee on behalf of the Gardner Brothers, LLC (the Gardners) and Border Basin filed timely initial post-hearing briefs. Also on June 10, 2022, the other Resident Intervenor and Steven and Tonya Miller filed a document entitled “Joinder to Merits Brief,” in which they expressed their intent to join in and incorporate by reference the brief filed by the Gardners. Subsequently, on July 1, 2022, reply briefs were filed by Border Basin, the Gardners, and Staff. The Gardners’ reply brief was, again, the subject of a “Joinder to Reply Brief” indicating other individual intervenors supported and joined in those arguments.

{¶ 13} On February 16, 2023, the Board issued an Opinion, Order, and Certificate (Order) that granted a certificate of environmental compatibility and public need to Border Basin for the construction, operation, and maintenance of the Facility, subject to the conditions set forth in the Stipulation and otherwise consistent with the Order.

{¶ 14} R.C. 4903.10 provides that any party to a proceeding before the Public Utilities Commission of Ohio (Commission) may apply for rehearing with respect to any matter determined in that proceeding within 30 days after the entry of the order upon the journal of the Commission. The statute further directs that an application for rehearing shall set forth specifically the ground or grounds upon which the party seeking rehearing considers an order to be unreasonable or unlawful.

{¶ 15} R.C. 4906.12 states, in part, that R.C. 4903.02 to 4903.16 apply to a proceeding or order of the Board in the same manner as if the Board were the Commission. Similarly, Ohio Adm.Code 4906-2-32 provides that any party may file an application for rehearing within 30 days after an order has been journalized by the Board in the manner, form, and circumstances set forth in R.C. 4903.10.

{¶ 16} On March 20, 2023, Resident Intervenor filed an application for rehearing of the Board’s February 16, 2023 Order.

{¶ 17} On March 30, 2023, Border Basin filed a memorandum contra the Residents' application for rehearing.

{¶ 18} By Entry dated April 12, 2023, pursuant to the authority set forth in Ohio Adm.Code 4906-2-32(E), the ALJ granted Resident Intervenor's application for rehearing for the sole purpose of affording the Board more time to consider the issues raised in the application for rehearing.

III. DISCUSSION

{¶ 19} Resident Intervenor's assert that the Board's Order is unlawful and unreasonable for a variety of reasons argued under ten assignments of error. In introduction to their specific assignments of error, Resident Intervenor's assert several general arguments. Resident Intervenor's allege that the Board erred in granting a certificate where Border Basin failed to demonstrate that the Project represents the minimum adverse environmental impact under R.C. 4906.10(A)(3) where "minimum" should be interpreted to mean "the least quantity assignable, admissible, or possible." The Residents also allege that Applicant has not provided the information required by Board rules and R.C. 4906.10(A)(2) necessary to determine the nature of the Project's probable environmental impact under R.C. 4906.10(A)(3). Nor do Resident Intervenor's believe that Border Basin provided the information required by Board rules necessary to determine compliance with R.C. 4906.10(A)(5), (A)(6), and (A)(8). Subsumed in all these arguments, Resident Intervenor's allege that the evidentiary record lacks information required by Board rules, such as definitive design and mitigation plans for the various types of damage the Facility could cause, rendering the approval of the Facility unlawful and unreasonable. Finally, the Residents assert that the proceeding was marred by procedural flaws.

{¶ 20} Border Basin submits that Resident Intervenor's arguments on rehearing were not previously offered for review during the adjudicatory stage of the proceeding but are instead being presented for the first time on rehearing. As such, Applicant asserts the arguments should be denied as untimely. Notwithstanding Applicant's assertion that

Resident Intervenor's arguments are procedurally late, Border Basin states that the Order reflects that the Board properly determined, based on record evidence, that the Facility satisfies all statutory criteria for issuance of a certificate. Border Basin emphasizes that the Residents' interpretation of what must be demonstrated under R.C. 4906.10(A)(3) is faulty and has previously been rejected by the Board. Border Basin additionally contests the Residents' assertions that the record does not support the Board's findings of compliance with various statutory criteria and that Applicant failed to comply with Board rules in seeking the certificate granted by the Board's Order. Similarly, Border Basin denies that any procedural error prevented the Residents from fully participating in this proceeding. Finally, Applicant submits that each of Resident Intervenor's assignments of error raise issues that were thoroughly considered by the Board in its Order and are otherwise without merit.

{¶ 21} With this general background, the Board turns to the parties' preliminary arguments and then to Resident Intervenor's specific assignments of error.

A. Preliminary Arguments

{¶ 22} Although not raised as specific assignments of error, Resident Intervenor makes several general challenges to the Board's Order. Similarly, Applicant contests the Residents' application on rehearing to the extent it takes exception to the state of the record and raises new arguments for the Board's consideration for the first time on rehearing.

1. THE MEANING OF MINIMUM

{¶ 23} Resident Intervenor alleges that the Board erred in granting a certificate where Border Basin failed to demonstrate that the Project represents the minimum adverse environmental impact under R.C. 4906.10(A)(3) where "minimum" should be interpreted to mean "the least quantity assignable, admissible, or possible." Border Basin on the other hand submits that the Board previously addressed and dismissed this statutory interpretation. Specifically, the Board found that Resident Intervenor's interpretation is

extreme, where the “only Project that could satisfy [the] restrictive interpretation would be one that is not built, as the least quantity of adverse environmental impact possible would be zero.” *In re Application of Harvey Solar I, LLC*, Case No. 21-164-EL-BGN (*Harvey*), Opinion, Order, and Certificate (Oct. 20, 2022) at ¶ 257. Indeed, Applicant stresses that cases addressing the jurisdiction and authority of the Board demonstrate that R.C. 4906.10(A)(3) authorizes the Board to grant certification where the proposed facility does not have greater than a minimum adverse environmental impact. Border Basin urges the Board to reach the same conclusion here, as it did in the underlying Order.

{¶ 24} As noted by Applicant, the Board previously considered and rejected the exact argument regarding the interpretation of the word “minimum” in R.C. 4906.10(A)(3) in *Harvey*. *Harvey*, Opinion and Order (Oct. 20, 2022) ¶ 248, 257. We hold to that conclusion now. The Board further notes that the Ohio Supreme Court has affirmed that R.C. 4906.10(A)(3) “does not require the board to conclude that the facility will have no adverse environmental impact—only that the adverse environmental impact is minimal in light of the constraints.” *In re Application of Firelands Wind, LLC.*, Slip Opinion No. 2023-Ohio-2555, ¶ 27.

2. ALLEGED PROCEDURAL FLAW

{¶ 25} Resident Intervenor also aver that procedural flaws marred this proceeding. Specifically, the Residents state that Border Basin’s notice of the first public information meeting (PIM) was not sent to all requisite neighbors. And, although Applicant did hold a second PIM in August 2022 to ensure those who did not receive the first notice had an opportunity to participate, the Residents argue that Border Basin’s faulty notice deprived some Resident Intervenor of the time necessary to obtain counsel. For example, Resident Intervenor state that Ms. Gardner found an attorney who helped her by filing her petition to intervene and written testimony but said counsel did not actually represent her in the case. Resident Intervenor state that, as a result of the delay in Ms. Gardner receiving notice, her written direct testimony was excluded from admission at hearing upon Border

Basin's objection due to the fact that the testimony was filed on behalf Ms. Garder and the Michael J. Gardner 2011 Marital Trust #1, which could not proceed without representation of counsel. In short, Resident Intervenor submit that the faulty first notice adversely impacted the Residents' ability to find counsel in time for hearing and impaired their testimony and cross-examination at the hearing.

{¶ 26} Border Basin disputes the Residents' contention. Border Basin notes that Ohio Adm.Code requires an applicant to hold a PIM, to send letters to specified landowners within or contiguous to the planned facility providing notice of the PIM and other information, and to publish notice of the PIM in a newspaper of general circulation in the area. *See* Ohio Adm.Code 4906-3-03. While conceding that not all specified landowners received the required notice for the first PIM, Border Basin contends the error was corrected by way of a second PIM. Specifically, Border Basin scheduled a second PIM, filed a motion to extend the proceeding in light of the second PIM, which would be held in person, sent the requisite letters to all intended landowners containing all required information, and published notice of the second PIM. Moreover, states Border Basin, a review of the procedural history and filed documents reveals ample time existed for the Residents to obtain counsel. For example, the intervention deadline set by the Board was February 18, 2022, which was more than six months after notification of the second PIM was sent to all Resident Intervenor. Applicant notes that all Resident Intervenor were able to timely intervene in the proceeding and, in fact, the Gardners did so through counsel. Border Basin observes that no party requested a continuance or additional time to obtain counsel. Further, Resident Intervenor Gardner was able to, and did, retain counsel to submit post-hearing briefs, neither of which alleged or argued that lack of notice of the first PIM caused harm. Finally, Border Basin notes that Ohio Adm.Code 4906-3-03(B)(2) provides that an inadvertent failure to notify all persons described in the rule does not constitute failure to provide public notice, provided there is substantial compliance with the rules. Similarly, R.C. 4906.06(D) allows a party to cure inadvertent failure of service by Board order designed to provide adequate notice enabling effective participation. Border Basin submits any error

in notice associated with the first PIM was cured by holding and properly noticing the second PIM, all of which was done such that Resident Intervenor had more than sufficient time to engage counsel prior to hearing.

{¶ 27} The Board notes that, in post-hearing briefing, Resident Intervenor previously argued that the error in notice of the first PIM precluded a finding that the Stipulation served the public interest or that the Facility would serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6). In the Order, the Board concluded otherwise. We noted that the inadvertent failure to notify all persons described in Ohio Adm.Code 4906-3-03(B)(2) does not constitute a failure to give notice. We further noted that Border Basin took steps to alleviate its error by holding a second PIM for which separate notice was issued, which was received by the Residents. Finally, the Board concluded that the original failure in notice did not prevent Resident Intervenor's participation in the proceeding (Order at ¶ 137). While the ability to retain counsel is important, simply rephrasing the alleged result of the initial error in notice (impediment to retaining counsel instead of evidence that the Facility is not in the public interest) does not change the Board's determination that the error did not amount to a failure to give notice. Nor did the error prevent meaningful participation in this matter.¹

3. SUFFICIENCY OF INFORMATION PROVIDED

{¶ 28} The Residents also allege that Applicant has not provided the information required by Board rules and R.C. 4906.10(A)(2) necessary to determine the nature of the Project's probable environmental impact under R.C. 4906.10(A)(3). Nor do Resident Intervenor believe that Border Basin provided the information required by Board rules necessary to determine compliance with R.C. 4906.10(A)(5), (A)(6), and (A)(8). Inexorably

¹ The Board further notes that Resident Intervenor, whether individually or as a group, have been represented by no less than three different law firms: one for intervention and the filing of testimony, one for the submission of briefs, and one for the submission of this application for rehearing.

entwined in these assertions is Resident Intervenor's claim that Applicant failed to provide all information required by the Board's rules, which prejudiced the Residents and destroyed the public's right to information and to meaningful input.

{¶ 29} Border Basin disagrees and submits that the Order provides sufficient measures in compliance with the standards for certification under R.C. 4906.10(A)(2), (A)(3), (A)(5), (A)(6), and (A)(8). Initially, Border Basin observes that Resident Intervenor's initial and reply post-hearing briefs argued only that Border Basin did not satisfy R.C. 4906.10(A)(2) and (3), a position that the Board reviewed and rejected based on record evidence. Continuing, Border Basin states that, because the Residents raise objections to R.C. 4906.10(A)(5), (A)(6), and (A)(8) for the first time on rehearing, they have waived their right to assert these new arguments. Notwithstanding that waiver, Applicant argues that the Board properly considered the record evidence and correctly found that the Facility, as presented and subject to conditions in the Stipulation and Order, will comply with R.C. 4906.10(A)(5), (A)(6), and (A)(8).

{¶ 30} Border Basin further states that the Residents' supposition that the Board erred by failing to follow its own rules in granting a certificate where the applicant allegedly failed to provide definitive designs, plans, and other information is procedurally improper and otherwise without merit. Applicant represents that it provided and filed in the record all information that is required under both the statute and the Ohio Administrative Code and further supported that information with extensive expert witness testimony. Border Basin asserts that Resident Intervenor acknowledges the thousands of pages of studies and information provided and included in the record, while simultaneously disregarding their import and Staff's expertise and exhaustive investigation. Applicant contends that the Board's Order applied the proper meaning to the rules to ensure that Border Basin provided all the information necessary for the Board to make its ultimate determination. Applicant maintains that the Board had at its disposal all information required by rule to reach the statutory conclusions necessary to issue a certificate. In short, Border Basin submits that

Resident Intervenor's arguments, improperly raised for the first time on rehearing, elevate form over function and should be rejected.

{¶ 31} The Board acknowledges the arguments made by both parties regarding the sufficiency of the information provided vis-à-vis the Board's determinations under the statutory criteria for the issuance of a certificate for the construction, operation, and maintenance of a major utility facility. Because the sufficiency of information provided, i.e., the sufficiency of the evidentiary record, is inevitably connected to our ultimate conclusions on rehearing, the Board addresses these arguments under Resident Intervenor's specific assignments of error.

4. ARGUMENTS NEWLY RAISED ON REHEARING

{¶ 32} Expounding on its critique of the application for rehearing generally, Border Basin asserts that the Intervenor's improperly challenge the Order based on arguments never raised during the merits phase and before the Board adjudicated the matter. Applicant submits that nine of the ten assignments of error are brand new arguments that were never raised during post-hearing briefing while the tenth has been expanded upon sufficiently to be considered new. Border Basin explains that Resident Intervenor's arguments in both initial and reply post-hearing briefs specifically focused on the location of the substation, not the overall Facility or location of the solar modules, and argued only that the Application and Stipulation did not comply with R.C. 4906.10(A)(2) and (A)(3). Border Basin objects to Resident Intervenor's now expanding on their contentions to add arguments regarding the location of the solar modules and regarding the Board's determinations under R.C. 4906.10(A)(5), (A)(6), and (A)(8). Similarly, Border Basin objects to Resident Intervenor's newly arguing that Applicant failed to comply with Board rules in seeking the certificate. Border Basin submits that, because Resident Intervenor's failed to raise these new arguments, or to adequately develop or support them, during the merit stage of the proceeding, the arguments are waived.

{¶ 33} The Board finds that it is improper for a party to raise an issue for the first time on rehearing. *Harvey*, Order on Rehearing (Apr. 20, 2023) at ¶ 59 citing R.C. 4903.10; 4906.12. This is particularly true where the arguing party had the opportunity to bring the issue to light throughout the proceeding. *Id.* The Board reaffirms that conclusion here. The Supreme Court of Ohio has noted that the availability of the “[rehearing] process does not mean that a party may sit idly and withhold all objections before and during a board hearing and then belatedly raise them in a rehearing application.” *In re Application of Buckeye Wind, LLC*, 148 Ohio St.3d 69, 2016-Ohio-5664, 68 N.E.3d 786, ¶ 18. While the *Buckeye Wind* case addressed a procedural issue regarding the appearance of witnesses at hearing, something that is more obviously curable before an order on certificate is issued, the Board concludes that similar treatment is necessary and appropriate where a party had the opportunity to raise certain challenges to the state of the record, i.e., whether required studies are present, or to the merits of an application for the Board’s review and failed to do so. Otherwise, a party could continuously raise new arguments on a piecemeal basis to challenge an Order.

{¶ 34} Notwithstanding these conclusions, the Board makes no overall finding as to the propriety of all the Residents’ arguments raised on rehearing. Some of the issues raised can be fairly interpreted to have been broached, or at least tangentially identified, during this proceeding leading up to the Board’s February Order. Some cannot. Accordingly, and similar to our position regarding the preliminary arguments on the sufficiency of information in the record, the Board will address Applicant’s arguments regarding the propriety of any assignment of error below.

B. Assignments of Error

1. ASSIGNMENTS OF ERROR NO. 1 AND NO. 2

{¶ 35} In the first assignment of error, Resident Intervenors argue that the Board acted unlawfully and unreasonably by issuing a certificate without receiving information required by Ohio Adm.Code 4906-4-08(D)(4)(a) and (e) and R.C. 4906.10(A)(2), (A)(3), and (A)(6) regarding the Project’s visual impacts. In the second, the Residents argue that the

Board acted unlawfully and unreasonably by issuing a certificate without requiring mitigation of the adverse visual impacts as mandated by Ohio Adm.Code 4906-4-08(D)(4)(f) and R.C. 4906.10(A)(2), (A)(3), and (A)(6). In the narrative, Resident Intervenor state the first assignment of error pertains to the substation's visual impact, while the second deals with aesthetic problems from both the solar arrays and the substation. Because both assignments of error hinge on the Project's visual impacts, the Board addresses them together.

{¶ 36} Resident Intervenor state that eight non-participating residences are in close proximity to the substation site, one of which is the Overmyers' residence. The Residents observe that, although Applicant's acoustics consultant identified the Overmyers' residence as a noise sensitive receptor, Border Basin failed to include the Overmyers' home in the original project constraints map until the Overmyers brought the oversight to Applicant's attention. Additionally, despite the Overmyers' requests that the substation be moved farther away from their home, Applicant moved the substation 300 feet further away for a total distance of 660 feet. Resident Intervenor contend that the substation will impair the Overmyers' enjoyment of their property and injure other nearby non-participating residents. In short, Resident Intervenor submit that the substation is too close to these homes and, therefore, the Project should not have been approved.

{¶ 37} Resident Intervenor claim that Border Basin has not provided sufficient information regarding the appearance of the substation in violation of Board rules. Specifically, Resident Intervenor state that Ohio Adm.Code 4906-4-08(D)(4)(e), in part, requires an applicant to provide photographic simulations or artist's pictorial sketches of the proposed facility. Resident Intervenor stress that the rule does not except any part of the facility from its requirements and it is not enough for an applicant to provide portrayals of certain, less impactful aspects of the facility while hiding the worst. Yet, states the Residents, Border Basin's application provides only scant details on the appearance of the substation and otherwise failed to provide details regarding its dimensions despite its occupying 2.7 acres. Resident Intervenor critique the Board's conclusion on this issue as

allowing an applicant to pick and choose what Project features it will portray. They condemn the Visual Impact Analysis (VIA) for containing only five simulations of the Project's appearance, none of which portray the substation. Without this information required by Ohio Adm.Code 4906-4-08(D)(4)(e), Resident Intervenor state that the Board cannot assess the substation's visual impacts on nearby residents, motorists, or the public. And, in the absence of the information, the Residents submit that the Board erred by finding the Project complied with R.C. 4906.10(A)(2), (A)(3), or (A)(6).

{¶ 38} Responding, Border Basin submits that, as explained in detail in its reply brief, Applicant completed a VIA of the entire Facility to evaluate the potential visual effects of the proposed Project, including solar panels and an onsite substation. Border Basin states that the VIA conservatively modeled the area and recognized that the visual impacts would vary depending on factors such as the distance of the viewer, whether views were unobstructed or screened by vegetation, terrain, or development, and the attitudes of the viewer towards solar energy. Applicant contends that the Residents simultaneously accuse Border Basin of concealing the appearance of the substation while also providing record details of its siting, potential appearance, and impacts, which belies their assertion that the record is lacking. Similarly, Resident Intervenor cite to evidence depicting the visibility of the substation site from the Overmyers' property while complaining that there is insufficient representation of views from nonparticipating residences in close proximity to the Facility. Border Basin submits that the Board properly acknowledged that the VIA, as submitted and supported by expert testimony, provides sufficient information to determine the potential visual impacts of the Project, including the panels and substation. Applicant further submits that the Board correctly concluded that Border Basin submitted all that was required under Ohio Adm.Code 4906-4-08(D)(4)(a) and (e) for Board review and consideration. And that information, combined with all commitments made by Applicant in the application, subsequent supporting documents, and the Stipulation, support the Board's determination of the probable visual impact of the Facility under R.C. 4906.10(A)(2).

{¶ 39} Continuing to the second assignment of error, Resident Intervenor also assert that the Board unlawfully and unreasonably failed to require mitigation of adverse visual impacts as mandated by rule and statute. The Residents argue that, although the Board accurately observes that the Project will likely be visible in the immediate vicinity and that viewers in close proximity may have unobstructed or partially screened views, the Board failed to require mitigation of such adverse impacts. The Residents stress the Overmyers' nearness to and currently unobstructed view of the substation site, as well as all residents' and motorists' views of solar arrays, in arguing that the Project will ruin nearby residents' enjoyment of their properties. Resident Intervenor contend that the setbacks approved for the Project are insufficient to protect the community's aesthetic values and guarantee exposure to unavoidable views of the solar arrays and other Project components.

{¶ 40} Resident Intervenor assert that Ohio Adm.Code 4906-4-08(D)(4)(f) requires an applicant to describe the measures that will be taken to minimize any adverse visual impacts created by the facility, including visual screening, which is a vital component in assuring minimum adverse impacts as required by R.C. 4906.10(A)(3) and the public interest, convenience, and necessity under R.C. 4906.10(A)(6). Yet, they say, the Board's Order allowed Applicant to skirt this requirement. Resident Intervenor characterize Border Basin's best management practices and commitment to vegetative screening as disappointing. Furthermore, Resident Intervenor state that Applicant failed to provide the Board with a landscape plan depicting the locations and species of vegetation to be used at each location until after certification and final design. The Residents submit that Condition 23 of the Stipulation does not sufficiently satisfy Ohio Adm.Code 4906-4-08(D)(4)(f)'s directive because the condition is vague and provides no objective standards to ensure that Border Basin's plan will satisfactorily mitigate the visual impacts of the Project. Leaving the final plan to the discretion of the Applicant and Staff through Condition 23 is not enough; instead, Resident Intervenor assert that the Board should have required the inclusion of a binding landscape plan in the record. Resident Intervenor state that the Board's failure to do so is inexcusable and constitutes a failure to comply with R.C. 4906.10(A)(2), (A)(3), or

(A)(6). As such, the Residents contend that the Board should rehear and correct this issue or deny the certificate where effective mitigation cannot be accomplished.

{¶ 41} As to Resident Intervenor's arguments regarding mitigation of the identified visual impacts, Border Basin submits that the record contains the information required by Ohio Adm.Code 4906-4-08(D)(4)(f) and, with the Stipulation, provides for proper mitigation of any adverse visual impacts such that R.C. 4906.10(A)(2), (A)(3), and (A)(6) are satisfied. Border Basin disagrees with Resident Intervenor's arguments that unfinalized mitigation plans cannot support the Board's decision, observing that the plans can be changed only to increase commitments made to make them more robust; Applicant cannot decrease or reduce the commitments regarding mitigation measures. Border Basin explains that this is clear in Stipulation Condition 1, which includes extensive and significant commitments and conditions by which Border Basin must construct, operate, and decommission the Facility, including measures to mitigate visual impacts. Border Basin further states that the Residents' complaint that the landscape plan is insufficient because it will not fully screen the solar equipment from view goes beyond what is required by statute or rule. Applicant reiterates that the final landscape plan mandated by Condition 23 will provide for the visual screening required for the Facility to represent the minimum adverse environmental impact bearing in mind all pertinent considerations. Border Basin asserts that record evidence demonstrates that Applicant provided the information required by Board rules regarding visual impacts and that the Board appropriately determined that the Facility is in compliance with statutory requirements for certification. Therefore, Border Basin submits that Resident Intervenor's position on rehearing regarding mitigation of identified adverse visual impacts is without merit and should be denied.

{¶ 42} The Board finds Resident Intervenor's first two assignments of error unavailing. Though somewhat rephrased and entirely broadened to encompass the entire Facility rather than just the substation, the arguments raised in the assignments of error were thoroughly addressed in the February 16, 2023 Order. We affirm our findings here.

{¶ 43} The Board previously noted that, in initial and post-hearing briefs, the Residents challenged the Project's compliance with R.C. 4906.10(A)(2), in part, due to the application's alleged failure to evaluate visual impacts of the substation, especially from the vantage point of nearby residences. The Residents further complained that the VIA focused on the potential visual effects of the solar panels while ignoring the substation. Citing Ohio Adm.Code 4906-4-08(D)(4)(e) and (D)(4)(f), Resident Intervenors additionally argued that the VIA was deficient. The Residents took issue with the photographic simulations and vantage points chosen for the VIA, asserting that they were either from too great a distance or were non-representative of nonparticipating properties adjacent to the Project. Additionally, to the degree any impacts were identified, the Residents argued that the record does not definitively describe measures that will be taken to minimize adverse impacts (*See* Order at ¶ 141-143). Resident Intervenors also argued that the Stipulation was not in the public interest due to lack of an aesthetic mitigation plan for the substation (*Id.* at ¶ 127).

{¶ 44} The Board, however, found that the nature of the Facility's probable visual impacts had been properly evaluated and determined under R.C. 4906.10(A)(2) (Order at ¶ 152, 155.) The Board specifically found that the VIA evaluated the potential effects of the Project, "including solar panels *and an onsite substation * * **" and demonstrated the potential visibility of the Project in the surrounding area, noting that the VIA included the local residents within the represented viewer groups ((Emphasis sic.) Order at ¶ 152).

{¶ 45} The Board further found that the Stipulation required mitigation of the adverse aesthetic impacts of the substation, as it is part of the Project as a whole (Order at ¶ 136). As such, the Board has already found that the Stipulation adequately requires that the adverse visual impacts of the Facility as a whole, and not just the substation, be mitigated such that the Project represents the minimum adverse impact (Order at ¶ 136, 153). In reaching that decision, the Board also previously rejected the Residents' argument regarding vegetative screening (Order at ¶ 153).

{¶ 46} Nothing in Resident Intervenor’s application for rehearing causes us to revise our previous conclusions. Moreover, the Residents’ complaint that leaving the final mitigation plan to the discretion of Staff through Condition 23 is insufficient has been consistently rebuffed by the Board and affirmed by the Supreme Court of Ohio. *Harvey*, Opinion, Order, and Certificate (Oct. 20, 2022) at ¶ 261; Order on Rehearing (Apr. 20, 2023) at ¶ 35; *In re Application of Angelina Solar I, LLC*, Case No. 18-1579-EL-BGN, Opinion, Order, and Certificate (June 24, 2021) at ¶ 360; *In re Application of Buckeye Wind, LLC*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, ¶ 17. The Board denies the first two assignments of error.

2. ASSIGNMENT OF ERROR NO. 3

{¶ 47} In their third assignment of error, Resident Intervenor’s assert that the Board acted unlawfully and unreasonably by approving the Project without requiring Border Basin to provide the information required by Ohio Adm.Code 4906-4-07(C) and R.C. 4906.10(A)(2), (A)(3), (A)(5), and (A)(6) regarding the Project’s drainage impacts and associated mitigation to prevent flooding.

{¶ 48} Regarding flooding, Resident Intervenor’s restate record evidence from Border Basin’s hydrologic report indicating that certain parts of the project area may be subject to occasional flooding. They also point to testimony discussing and photographs demonstrating flooding in the area near the proposed substation site. Additionally, Resident Intervenor’s explain that, although the project area contains no streams large enough to be classified by the Federal Emergency Management Agency (FEMA), Applicant’s consultant performed an analysis to delineate floodplains in the area; the consultant recommended against constructing solar arrays and associated infrastructure in those floodplains and, where avoidance could not be achieved, identified mitigation measures. The Residents relate that the consultant’s report shows that solar arrays are located within the consultant’s created floodplain.

{¶ 49} Resident Intervenor's argue that the Board's Order ignores record evidence indicating future flooding and drainage problems and, instead, makes uninformed guesses about whether the Project's design and construction will increase the runoff of stormwater from the site by altering terrain. Resident Intervenor's assert that, rather than doing so, the Board should have required Applicant to provide the information listed in Ohio Adm.Code 4906-4-07(C). This information would include an estimate of the quality and quantity of aquatic discharges from site clearing and operations; a description of any plans to mitigate the above effects; a description of any changes in flow patterns; and a quantitative flow diagram or description for water showing potential sources of pollution including run-off. Resident Intervenor's assert that Border Basin's application does not provide any of this data and was thus deficient. The Residents contend that the rule requires numeric and volumetric calculations of drainage volumes and stormwater so that the Board can make an independent assessment of whether the Project will cause flooding and identify any mitigation measures necessary to prevent the same. Without this information, the Residents maintain that the record does not and cannot identify any mitigation measures that may be necessary to protect neighbors from flooding and drainage problems that will be caused by the Project.

{¶ 50} Resident Intervenor's further contend that the conditions in the Stipulation do not change this result. The Residents state that Condition 34, directing that construction within the FEMA delineated 100-year floodplain shall be coordinated with the local floodplain program administrator, is pointless window dressing in the absence of a designated FEMA floodplain. Resident Intervenor's additionally maintain that Applicant's commitments to continue to extensively study hydrology and drainage and to follow the Ohio EPA's stormwater permit and guidance on post-construction stormwater management—as well as to work with the county engineer and Soil and Water Conservation District to benchmark conditions for drainage tiles, streams, and ditches—are meaningless without specific measures in place to avoid flooding.

{¶ 51} Initially, Border Basin observes that Resident Intervenors again expand their arguments, this time regarding flooding and drainage, beyond the substation and to the entirety of the Project for the first time on rehearing. Applicant asserts that the Residents ignore facts in the record, as argued on brief and accepted by the Board in its Order, to contend Applicant's alleged noncompliance with Ohio Adm.Code 4906-4-07(C) left the Board without the information it needed to determine the Facility's probable environmental impact related to flooding and/or whether mitigation plans to address any flooding will represent the minimum adverse environmental impact.

{¶ 52} Border Basin states that, to support their arguments, the Residents selectively cite only a portion of Stipulation Condition 34 and completely ignore Condition 42. Applicant states that, the existence of a FEMA floodplain aside, Condition 34 obligates Applicant to coordinate with the local floodplain administrator and obtain any required permit before commencing construction, which is an important commitment for regulatory compliance. Here, Applicant also posits that Resident Intervenors' application for rehearing confuses the 100-year floodplain with stormwater management and drainage in the project area. Thus, it is not the floodplain condition they complain about, it is the flow of water over and away from the project area. The FEMA mapping of the 100-year floodplain, which the Project is not located in, is different than the study of water flowing over the project area, which was thoroughly assessed by Applicant's experts and reported in the hydrology study attached to the application. Notwithstanding that confusion, Applicant submits that through Condition 28 Border Basin made, and the Order mandates, extensive commitments to ensure that the Project and surrounding areas are protected. Yet the Residents ignore those commitments in their application for rehearing.

{¶ 53} Border Basin states that the Residents further ignore Condition 42, which addresses any drainage issues and potential flooding caused or exacerbated by construction of the Project. Among others made in Condition 42, Border Basin highlights commitments to avoid or minimize to the extent practicable any damage to functioning field tile drainage systems and soils, to promptly repair damaged field tile systems at Applicant's expense,

and to design the Project to ensure nearby parcels are protected from unwanted drainage problems due to construction and operation of the Project. Border Basin stresses that the record is replete with information regarding the prospects for flooding and what mitigation measures have been and will be put into place to ensure minimal adverse impacts are realized.

{¶ 54} The Board finds Resident Intervenor's third assignment of error to be without merit. Once again, on rehearing the Residents expand their arguments regarding drainage and flooding from the area immediately surrounding the substation to the entirety of the project area. And, once again, this expansion does not prompt the Board to reconsider our findings and conclusions expressed in the Order.

{¶ 55} The Board has already considered and declined Resident Intervenor's arguments regarding any alleged failure to account for ponding and flooding hazards near the substation (Order at ¶ 128, 136). The same is true regarding mitigation measures in place to ensure compliance with R.C. 4906.10(A)(3) (Order at ¶ 153). Even though the Board addressed these issues in the context of the substation per the Residents' previous arguments, the Board's conclusions are applicable to the entirety of the project area. That is always the focus of the Board's inquiry when considering an application: the Board must find and determine whether the proposed facility meets the statutory requirements of R.C. 4906.10, not whether an individual aspect of the facility does so. Furthermore, the Residents must look beyond the confines of the application and consider the record as a whole. It is from the evidentiary record as whole, and not just the application, that the Board gleans the pertinent information needed to identify a Project's probable environmental impacts, to determine whether those impacts constitute the minimum adverse impacts, and whether the Facility will serve the public interest, convenience, and necessity. For example, although not specifically challenged before rehearing and, therefore, not specifically discussed in the Order, the record provides ample evidence from which the Board determined drainage impacts and whether the Facility would represent the minimum adverse environmental impacts regarding the same (*See, e.g.,* App. Ex. 1, Ex. O; Staff Ex. 1; Jt. Ex. 1 at 8-10; Tr. I at

34-35, 57-59; 260-263). Finally, while Resident Intervenor announce a challenge to R.C. 4906.10(A)(5), they present no argument or explanation as to how the Board's Order is deficient in our finding that the record establishes that the Facility, subject to the conditions set forth in the Stipulation and consistent with the Order, will comply with R.C. Chapters 3704, 3734, 6111, and R.C. 4561.32 and all rules and regulations promulgated thereunder, to the extent applicable, consistent with R.C. 4906.10(A)(5) (Order at ¶ 184). Resident Intervenor's third assignment of error is denied.

3. ASSIGNMENT OF ERROR NO. 4

{¶ 56} For their fourth assignment of error, Resident Intervenor argue that the Board acted unlawfully and unreasonably by failing to require Border Basin to provide the information required by Ohio Adm.Code 4906-4-07(C) and R.C. 4906.10(A)(2), (A)(3), (A)(5), and (A)(6) regarding the Project's pollution impacts and associated mitigation.

{¶ 57} Similar to an aspect of their third assignment of error, the Residents state that Ohio Adm.Code 4906-4-07(C) requires the Board to obtain data about a project's potential for water pollution from an applicant prior to approval so that potential pollution problems can be diagnosed prior to construction. The Residents maintain that the rule requires an applicant to submit information about the quality of surface water flows from the project area during construction and operation, such as sediment from erosion. This is because Project construction will expose the soils to precipitation and stormwater runoff and will include stripping soils of vegetation, grading the site, and moving dirt (App. Ex. 1, Ex. L, at 9-10).

{¶ 58} Despite this, according to the Residents, Border Basin failed to provide any of this data. Instead, the Residents allege that Applicant evaded the information by claiming that there would be no receiving streams and, therefore, provided no information regarding water quality of receiving streams. The Residents state that the purpose of the needed baseline water quality data is to enable an applicant and government officials to compare the water quality of streams in and around the project area prior to construction with water

quality during construction and operation. Without the data, the Residents indicate it is impossible to know whether the Project has impaired existing water quality. Resident Intervenor's allege the same is true of information on the quality and quantity data for aquatic discharges from site clearing and construction.

{¶ 59} The Residents maintain that Border Basin's commitment to follow best management practices pursuant to a Storm Water Pollution Prevention Plan (SWPPP) to reduce any soil erosion and sedimentation into receiving streams is not a sufficient data point for the Board to make necessary determinations regarding whether the Project will harm receiving streams and water quality; nor is that commitment a sufficient replacement for the desired data. Resident Intervenor's state that the Board's reliance on a SWPPP that does not yet exist is a default of its statutory duty to ascertain the nature of the probable environmental impact and/or what mitigation measures will be required to ensure such impacts are minimized. Resident Intervenor's point to similar alleged deficiencies regarding the description of any equipment to be used for controlling stormwater discharges. The Residents say that Border Basin cannot merely pronounce that the Project will not harm water quality, they must prove that assertion by providing water quality data. Resident Intervenor's state that the Board should have found Applicant's failure to provide the data fatal to the application and seek to have the Board rehear the matter to obtain the data or deny the certificate.

{¶ 60} Initially, Border Basin argues that Resident Intervenor's waived any argument under assignment of error number four due to their failure to address potential pollution impacts or associated mitigation prior to rehearing. Nevertheless, Border Basin submits that a review of the application and record supports a finding that Border Basin provided the requisite information in response to items requested in Ohio Adm.Code 4906-4-07(C). Border Basin notes that Ohio Adm.Code 4906-4-07 expressly allows an applicant to substitute all or portions of documents filed to meet federal, state, or local regulations, and the application specifically identified the permits, issued pursuant to state and federal water quality regulations, Applicant needs to demonstrate the Project will

comply with water quality issues. Applicant explains that the permit applications, which will be reviewed by state and federal agencies charged with determining compliance with water quality regulation, do not require some of the specific categories of information Resident Intervenors are seeking, but are permissible substitutions under the rule.

{¶ 61} Border Basin relates that Ohio Adm.Code 4906-4-07(C) requires an applicant to “provide information on compliance with water quality regulations,” and it has done so. Border Basin observes that the rule is applicable to any type of generation facility seeking certification, whether solar, wind, natural gas, coal-fired, or nuclear, and that many of Resident Intervenors’ complaints fail to recognize that not every data point is relevant to every type of generation facility. For example, unlike other generation facilities that discharge into a receiving stream, there will be no discharges from the Project into any of the four streams identified in the project area. Thus, where it requires a description of the water quality of “the receiving stream,” Border Basin correctly responded that because there is no point source water discharge into streams and no waterbodies associated with the Facility, there will be no receiving streams. Similarly, asked to provide an estimate of the quality and quantity of aquatic discharges during construction, Applicant explained that no point source aquatic discharge to streams and wetlands will occur during construction. Additionally, Border Basin clarifies that, in the case of solar-powered generation facilities such as the Project, there are no pollutants discharged by the Facility into waterbodies. Still, although no discharges are anticipated during construction, Applicant has committed to implement a Spill Prevention, Control, and Countermeasure (SPCC) Plan to mitigate against accidental spills during construction. Similarly, Applicant states that it is taking additional measure to ensure water quality protection consistent with state and federal requirements by developing a SWPPP and Horizontal Directional Drilling Inadvertant Release Contingency Plan.

{¶ 62} Moreover, Border Basin asserts that the Residents overlook the importance of commitments made outside the confines of the application with regard to mitigation measures. For example, in Stipulation Conditions 28 and 39, Applicant commits, and is

required, to adhere to the Ohio EPA's Guidance on Post-Construction Storm Water Controls of Solar Panel Arrays and to coordinate with the Ohio EPA's Division of Drinking and Groundwater to identify any additional measure needed during construction to ensure public water supplies are not impacted. Additionally, under Condition 34, Applicant has committed that post-construction runoff control will be implemented with best management practices to ensure that the Project does not generate more storm water runoff than existed preconstruction.

{¶ 63} In short, given the robust evidentiary record, Border Basin states that Resident Intervenor's position on rehearing with regard to the provision of information applicable to water quality compliance under Ohio Adm.Code 4906-4-07—as well as the Board's related findings regarding the Project's pollution impacts and associated mitigation under R.C. 4906.10(A)(2), (A)(3), (A)(5), and (A)(6)—is without merit and should be denied.

{¶ 64} The Board concurs with Applicant that the arguments raised under this assignment of error are procedurally improper as being raised for the first time on rehearing. At no time prior to rehearing did the Residents question the quality of surface water flows or the alleged lack of information regarding water quality of receiving streams. Nor did the Residents challenge the information regarding these issues as presented within the record.

{¶ 65} Regardless, the Board concludes that the record contains the information needed to identify the Project's potential water pollution impacts and any associated mitigation measures. As noted in the Order, the Board is required to either accept an application as complete and compliant with the content requirements of R.C. 4906.06 and Ohio Adm.Code 4906-1 through 4906-7 or to reject the application as incomplete. In this case, the Board, through Staff, issued correspondence finding that the application, as supplemented, complied with Chapters 4906-01, et seq., and Staff had received sufficient information to conduct its review. (Order at ¶ 12, 15.) As the case progressed, additional information was provided through supplemental responses to data requests. Using this information and institutional expertise, Staff completed an investigation of the application

pursuant to R.C. 4906.07(C). The Board acknowledged and discussed the Staff Report at length and noted the Staff Report's recommended findings regarding R.C. 4906.10(A) (Order at ¶ 37). Later, the Stipulation and witness testimony augmented the record. All of this information combined provided a sufficient record from which the Board made its determinations pursuant to R.C. 4906.10(A).

{¶ 66} Furthermore, although not specifically discussed within the Order, as the issue was not raised in brief, the Board did cite several points of discussion within the Staff Report and witness testimony (Order at ¶ 69, 77, 111, 113). The Board further noted that "[a]ny evidence not specifically addressed [was] nevertheless considered and weighed by the Board in reaching its final determination" (Order at ¶ 32). Evidence regarding surface water flows and information regarding water quality and permits is provided within the application and its supplements, expounded on in the Stipulation, and explained in the transcript. In short, there is sufficient evidence to support the Board's findings that the Facility satisfies the statutory criteria under R.C. 4906.10(A)(2), (A)(3), (A)(5), and (A)(6); the fourth assignment of error is denied.

4. ASSIGNMENT OF ERROR NO. 5

{¶ 67} Next, Resident Intervenors assert that the Board acted unlawfully and unreasonably by finding that Border Basin has provided the information about the Project's potential impacts on wildlife and plants required by Ohio Adm.Code 4906-4-08(B) and R.C. 4906.10(A)(2), (A)(3), and (A)(6). Resident Intervenors remark that Ohio Adm.Code 4906-4-08(B) requires an applicant to provide the results of a literature survey of plant and animal life within a quarter mile of the project area boundary and to conduct and provide the results of field surveys of the plant and animal species identified in the literature survey. The Residents state that, without this information, the Board can neither determine the nature of the probable environmental impact under R.C. 4906.10(A)(2) nor find that the Project represents the minimum adverse environmental impact under R.C. 4906.10(A)(3).

{¶ 68} Resident Intervenor challenge the Board's findings regarding plant or animal species listed on field surveys. The Residents believe that the Board's findings suffer from an inaccurate assumption that a field survey was actually done for birds and other animals. The Residents aver that Applicant found no listed species because it did not look for them; Border Basin did no field survey. Instead, Resident Intervenor state that Applicant and Staff relied on letters to Applicant's consultant from the Ohio Department of Natural Resources (ODNR) and the U.S. Fish and Wildlife Service (USFWS), which letters warn that there are areas in Ohio that have not been completely surveyed. Resident Intervenor submit that reliance on ODNR and USFWS correspondence is not an adequate substitute for Applicant performing its own field surveys. Additionally, the Residents allege that Border Basin mischaracterizes the study it did perform in the application section labeled "Literature Survey of Plant and Animal Life." According to the Residents, Applicant searched only for a list of threatened and endangered species from ODNR and USFWS and did not conduct a literature search for all species.

{¶ 69} Resident Intervenor state that Border Basin did not provide a literature survey for all plant and animal life in and near the project area as required by the first sentence of Ohio Adm.Code 4906-4-08(B)(1)(c); it obtained literature only for rare plant and animal species as required by the second sentence. Resident Intervenor contend that it is erroneous to interpret the rule such that the second sentence is a limitation on the first, as it would render the first sentence superfluous. Moreover, argue Resident Intervenor, Border Basin's literature failed to list any species of commercial and recreational value. Worse, the Residents claim that Applicant looked only for habitat suitable for species identified in the surveys that were performed rather than look for the actual species. Resident Intervenor surmise that one will not notice listed species if one is looking only for their habitat, which is why no eagles were noted even though the Residents presented evidence of their presence.

{¶ 70} The Residents assert that Border Basin's failure to catalogue and evaluate all species in the area leaves too large a gap in the record about information regarding

ecological resources in the project area. Without the necessary data, the Residents submit that the Board has no basis to conclude that the Project will not harm wildlife. And without knowing what wildlife is present, the Board cannot ascertain whether mitigation measures are necessary to ensure minimum adverse environmental impacts. Thus, the Residents request that the Board rehear the matter or deny the certificate.

{¶ 71} Border Basin responds that the Resident's fifth assignment of error is without merit, as the record demonstrates that the Applicant fully complied with Ohio Adm.Code 4906-4-08(B) by providing the Board with all requisite information pertaining to plants and wildlife. Applicant asserts that the rule requires that Border Basin provide the results of a literature survey of the plant and animal life within at least one-fourth mile of the project area boundary and to provide the results of field surveys of the plant and animal species identified in the literature survey. Border Basin submits it did both and provided all information as part of its application. Border Basin states that the Board acknowledged that a literature review and field surveys were conducted and included information from ODNR and USFWS. Contrary to the Residents' unsupported assertions, Border Basin avers that the record shows it did conduct studies and the data collected was found to be generally consistent with the results of the desktop review.

{¶ 72} Continuing, Border Basin states that Resident Intervenors continue to ignore the totality of the evidentiary record and base their assumptions on single sentences in an attempt to discredit the Board's Order. In addition to the documentation provided within the application, Border Basin highlights that the Stipulation requires Border Basin to comply with numerous safeguards for plants and animals. For example, Condition 25 requires Applicant to have a Staff-approved environmentalist on site during construction activities that might affect sensitive areas, including locations of threatened or endangered species, while Condition 27 obligates Applicant to include the location of any new listed plant or animal species or suitable habitat of these species, if encountered, in the final engineering drawings and explain how impacts to these species will be avoided during construction. Additionally, Conditions 29 and 30 provide limitations on construction activities to avoid

impacts to listed bats as well as indigenous aquatic species and their habitat, while Condition 31 obliges Applicant to contact Staff, ODNR, and USFWS within 24 hours if state or federal listed species are encountered during construction activities and lists further steps to take to avoid impacts to those species.

{¶ 73} Applicant submits that the Board correctly concluded that the information and documentation found in the record provides all information necessary for compliance with Ohio Adm.Code 4906-4-08(B). Furthermore, Applicant avers that the probable ecological impacts of the Facility on wildlife and plants were thoroughly evaluated and determined. As such, Applicant requests that the Board deny Resident Intervenor's argument on rehearing.

{¶ 74} The Board finds that the record contains adequate information regarding the Project's potential impacts on wildlife and plants as required by Ohio Adm.Code 4906-4-08(B) and R.C. 4906.10(A)(2), (A)(3), and (A)(6) and, therefore, denies the fifth assignment of error. There is no dispute that Border Basin prepared and submitted a literature survey; Resident Intervenor is simply dissatisfied with the survey's contents and conclusions. Contrary to the Residents' position, Ohio Adm.Code 4906-4-08(B) requires a literature survey to "include aquatic and terrestrial plant and animal species *that are of commercial or recreational value, or species designated as endangered or threatened.*" (Emphasis added.) There is no requirement to identify birds and other animals if they do not fall within the specified categories. See *In re Application of South Branch Solar, LLC*, Case No. 21-669-EL-BGN, Order on Rehearing (June 15, 2023) at ¶ 26. It would be unduly burdensome to require an applicant to conduct a literature survey of each and every possible living thing – flora or fauna – within a quarter mile of a project area. Furthermore, the Board finds that the record fully supports our previous statutory determinations regarding plants and wildlife. As stated in the Order, "the Stipulation makes mandatory all commitments to mitigating measures, whether made in the application, supplemental materials, data requests, or in the Stipulation" (Order at ¶ 135). In addition to the information supplied with the application and reviewed by Staff, the Stipulation adds further steps for

identification and protections in mitigation of any adverse impacts (Jt. Ex. 1 at 6-7). In short, the Residents' arguments regarding the sufficiency of information on impacts to plants and wildlife is unsupported by the record and is denied.

5. ASSIGNMENT OF ERROR NO. 6

{¶ 75} For their sixth ground for rehearing, Resident Intervenors assert that the Board acted unlawfully and unreasonably by erroneously finding that the Project provides for water conservation measures as required by Ohio Adm.Code 4906-4-07(C)(3)(e) and R.C. 4906.10(A)(2), (A)(3), (A)(6), and (A)(8).

{¶ 76} The Residents claim that Ohio Adm.Code 4906-4-07(C)(3)(e) requires an applicant to describe how a facility incorporates maximum feasible water conservation practices in order to meet the requirements of R.C. 4906.10(A)(8), as well as to achieve satisfaction of R.C. 4906.10(A)(2), (A)(3), and (A)(6), but that the application contains no such measures. Resident Intervenors observe that, if rain does not keep solar panels clean, Border Basin could use upwards of 299,000 gallons of water in a single cycle to clean the panels (App. Ex. 1, at 36). Yet, the application disclaims any intent to implement water conservation practices. The Residents remark that this refusal renders the application in violation of statutory requirements.

{¶ 77} Border Basin states that the Residents' claims regarding water conservation measures are erroneous. Applicant asserts that the record reflects that there will be no onsite operations facility, so there will be no regular onsite water use during operations. Further, the only water used during operation would be for limited cleaning of the solar modules, which is likely unnecessary because rain will be sufficient to keep the modules clean. Given the disclosed, yet unlikely, use of water in the manner complained of by Resident Intervenors, Applicant contends it is unclear what more the Residents expect by way of information. Applicant further argues that Resident Intervenors unnecessarily expand the necessity of the Board's determination regarding water conservation by requiring the Board to make duplicative findings under R.C. 4906.10(A)(2), (A)(3), (A)(6), and (A)(8) where only

R.C. 4906.10(A)(8) directs the Board to find that the facility will incorporate maximum feasible water conservation practices. Border Basin submits that the Facility's minimal to zero approach to water utilization represents Applicant's commitment to implement and maximize water conservation practices, as described in information provided by Border Basin as required by Ohio Adm.Code 4906-4-07(C)(3)(e). Applicant further submits that the Board's determination that the record establishes that the Project meets the requirements of R.C. 4906.10(A)(8) should remain undisturbed.

{¶ 78} The Board finds that the sixth assignment of error, like the fourth, is procedurally improper because it raises a challenge to the sufficiency of the record with regard to the Facility's incorporation of maximum feasible water conservation practices for the first time on rehearing. For that reason alone, the assignment of error can be denied. *Harvey*, Order on Rehearing (Apr. 20, 2023) at ¶ 59.

{¶ 79} Nevertheless, the Board reaffirms our above summation of the completeness of the record as a whole. And, as to this assignment of error, we specifically note that the evidence supports the conclusion that the Project incorporates maximum feasible water conservation practices under R.C. 4906.10(A)(8). (Order at ¶ 108-109, 187; *See also* App. Ex. 25 at 15; App. Ex. 1 at 36.) The Residents' sixth assignment of error is denied.

6. ASSIGNMENT OF ERROR NO. 7

{¶ 80} For their seventh assignment of error, Resident Intervenors argue that the Board acted unlawfully and unreasonably by issuing a certificate without obtaining the information required by Ohio Adm.Code 4906-4-08(A)(3) and R.C. 4906.10(A)(2) and (A)(3) regarding the Project's potential operational noise impacts.

{¶ 81} The Residents believe that solar facilities are noisy and observe that the Project is expected to contain 54 noise generating inverter stations and a substation, with the inverters as close as 326 feet from the nonparticipating residences. The Residents state that Border Basin is required by Ohio Adm.Code 4906-4-08(A)(3) to identify operational noise

levels expected at the nearest property boundary and indicate the operational noise level at each habitable residence under both day and nighttime operations so the Board can determine whether the Project complies with R.C. 4906.10(A)(3). Resident Intervenor contend that the application does not contain all required information. Specifically, they state that Border Basin failed to identify the amount of noise coming from the Project at its property boundaries or at neighboring habitable residences. Instead, Border Basin measured only the community's ambient sound levels using five short-term attended and one long-term unattended monitoring stations. According to the Residents, the measurements revealed that nighttime ambient sound levels are consistently and substantially lower than the daytime ambient sounds, which means the same volume of Project noise can exceed the nighttime ambient level by more than five dBA even if the noise is less than five dBA above daytime ambient level. Resident Intervenor state that this difference makes it vital for the Board to know nighttime noise levels for the Project. The Residents reject the notion that nighttime noise levels for the solar facility will be inherently lower such that no nighttime noise information need be provided. They argue instead that, because the record indicates some equipment will remain operational at night, that noise must be measured. Resident Intervenor insist that the Board may not issue a certificate without this data. As such, they maintain that the Board should reopen the record to require Border Basin to submit information about the Project's nighttime noise levels.

{¶ 82} Border Basin responds that Resident Intervenor's assertion that an applicant must identify the amount of sound coming from the Facility at night is not supported by Ohio Adm.Code 4906-4-08(A)(3), which does not require sound modeling for every hour of a 24-hour day. Instead, the rule requires an applicant to describe operational noise levels. Applicant states that, for each type of generation facility, operational hours may vary; but for a solar-powered facility that captures the power of the sun, the operational hours are during the day. Thus, unlike generation facilities that may run 24-hours in a day, an analysis of nighttime sound is not required by the rules. Border Basin contends that the Residents' allegation that there is insufficient evidence to conclude that nighttime noise will be minor

is contrary to record evidence establishing that no noise producing equipment would operate at nighttime. In short, Border Basin submits that the Board properly concluded the application sets forth the information required under Ohio Adm.Code 4906-4-08(A)(3) describing the operational noise levels expected at the nearest property boundary through the sound report.

{¶ 83} The Board finds the Residents' seventh assignment of error to be without merit. Although Resident Intervenor cross-examined Applicant's acoustic expert regarding potential noise impacts resulting from the substation, including during construction, the Residents raised no further challenge to the information in the record regarding noise impacts, whether during the day or night (Tr. I at 112-117). Thus, once again, the assignment of error is procedurally improper in raising a new argument for the first time on rehearing.

{¶ 84} Furthermore, in pursuing the argument, Resident Intervenor ignores record evidence. The acoustic report submitted with the application indicates that ambient sound measurements were taken to characterize the existing acoustic environment in the project area during both daytime and nighttime periods (App. Ex. 1, Ex. N). The record additionally indicates that operational noise impacts will occur only during the day (Order at ¶ 56). The Board rejects Resident Intervenor's contention that Border Basin must measure operational noise impacts that will not exist. It is sufficient to indicate the operational noise level under nighttime operations, which is all that is required by Ohio Adm.Code 4906-4-08(A), is expected to be zero. Moreover, Stipulation Condition 41 mandates that operational sound levels shall not exceed ambient sound levels plus five dBA at non-participating receptors (Order at ¶ 119; Jt. Ex. 1 at 9). As such, even if nighttime operations of the Facility do produce sound, the Board is assured that the Facility will represent the minimum adverse environmental noise impact in accordance with R.C. 4906.10(A)(3). Resident Intervenor's seventh assignment of error is denied.

7. ASSIGNMENT OF ERROR NO. 8

{¶ 85} Next, Resident Intervenor argue that the Board acted unlawfully and unreasonably by issuing a certificate without identifying mitigation measures for construction noise as required by Ohio Adm.Code 4906-4-08(A)(3)(d) and R.C. 4906.10(A)(2), (A)(3), and (A)(6).

{¶ 86} Resident Intervenor declare that the Project's construction will produce long-lasting noises in extreme volumes involving the operation of pile drivers, dump trucks, forklifts, scrapers, compactors, excavators, loaders, backhoes, and graders. And, although the application admits that construction noise will rise up to 20 dBA above moderate levels, it provides no description of the "equipment and procedures [it will use] to mitigate the effects of noise emissions from the proposed facility during construction and operation, including limits on the time of day at which construction activities may occur" as required by Ohio Adm.Code 4906-4-08(A)(3)(d).

{¶ 87} The Residents argue that Border Basin sought to disguise the actual impact of construction noise in contending that construction hours will be limited, which Staff characterized the noise as temporary and intermittent. Resident Intervenor assert that Condition 35 of the Stipulation accepted by the Board provides little relief as nonparticipating residents will still be subjected to the noise from general construction activities for 12 hours each day, if not longer, including weekends and holidays, for approximately 15 months. As such, Condition 35 does nothing to protect them from prolonged exposure to machinery generating noise up to 44 dBA higher than daytime ambient levels for a prolonged, not limited or infrequent, duration of time. Further, the Residents state that the setbacks between the edges of the project area and nonparticipating residences are insufficient to provide mitigation. They similarly dismiss any possible effectiveness of the noise control measures (mufflers, daytime construction, good maintenance of tools and equipment, and closed housing doors or noise-insulation on combustion engines) as empty promises to contain construction noise to typical construction

levels. In short, the Residents state that the Board should not have approved the Project under R.C. 4906.10(A)(2) and (A)(3) without requiring meaningful mitigation to address construction noise impacts.

{¶ 88} Border Basin contends that the Board, based on the evidentiary record, correctly determined both the nature of the probable environmental impacts of construction noise and that the mitigation measures identified in the record demonstrate that the Facility represents the minimum adverse environmental impact under the terms of R.C. 4906.10(A)(2) and (A)(3). Applicant argues that the Board correctly found that noise impacts from construction will be temporary and intermittent, taking place over a number of months and not during the lifetime of the Project. Border Basin asserts that the Residents continue to ignore that the record must be viewed in its entirety and, instead, isolate and manipulate minute points to support their arguments. Border Basin disputes any attempt to disguise construction noise impacts, stating there is no hiding that the Facility will be under construction for a number of months and noise associated with that period will be equivalent to any large construction project. To counter the obvious impacts, Border Basin submits that the record contains numerous measures that Applicant must observe to mitigate any adverse impacts from construction noise, such as setbacks and hourly limitations on noise-intense construction activities. In addition, and as acknowledged by the Residents, Applicant explains that the complaint resolution plan will be in place during construction and operation of the Facility to address any complaints that may be lodged against the Project.

{¶ 89} For the reasons stated above regarding operational noise impacts, the Board also denies the Residents' eighth assignment of error. Again, beyond cross-examination of Applicant's acoustic expert, Resident Intervenors did not raise any issues regarding construction noise impacts prior to their application for rehearing. No aspect of the noise expected to be produced by the Facility during construction was identified as a potential issue for cross-examination by the Residents nor discussed in their post-hearing briefs. Use

of an application for rehearing to raise an issue for the first time is not proper and serves as a basis to deny the assignment of error. *Harvey*, Order on Rehearing (Apr. 20, 2023) at ¶ 59.

{¶ 90} Notwithstanding the procedural posture, the Board further finds that the record is replete with information regarding construction noise, its impacts, and the measures in place to ensure minimum adverse environmental impacts (App. Ex. 1, Ex. N; App. Ex. 25; App. Ex. 29; App. Ex. 29A; Staff Ex. 6; Jt. Ex. 1 at 8; Tr. I at 113-118). The Residents' disagreement and dissatisfaction with the information and, more specifically, the Board's Order, does not make the former insufficient or the latter unlawful and unreasonable. The eighth assignment of error is overruled.

8. ASSIGNMENT OF ERROR NO. 9

{¶ 91} In the ninth assignment of error, Resident Intervenor argue that the Board acted unlawfully and unreasonably by issuing a certificate without evaluating the Project's negative economic impacts as required by Ohio Adm.Code 4906-4-06(E)(4) and R.C. 4906.10(A)(6).

{¶ 92} Resident Intervenor state that Ohio Adm.Code 4906-4-06(E)(4) requires an applicant to "provide an estimate of the economic impact of the proposed facility on local commercial and industrial activities," which they assert is necessary for the Board to determine whether "the facility will serve the public interest, convenience, and necessity" under R.C. 4906.10(A)(6). The Residents state that Applicant provided information on only the Project's anticipated economic benefits and ignored the potential adverse economic impacts, such as the economic losses to local businesses and individuals. In fact, say the Residents, the economic report submitted with the application does not attempt to estimate job losses or even net gains, it merely presents total jobs that would be supported by development of the Project.

{¶ 93} Resident Intervenor surmise that the estimated economic impacts presented by Applicant are fleeting, in the case of construction jobs, and speculative. They

further observe that Applicant makes no effort to calculate the number of jobs destroyed by the Project, including the loss of direct, indirect, or induced jobs. For example, the Project will remove 953 acres of farmland from production, but Border Basin did not study the value of the loss of 30 years of agricultural production or the economic losses to the farmers who have been farming those acres. Nor has Applicant studied financial losses to vendors who would otherwise be supplying agricultural products necessary to farm the land.

{¶ 94} The Residents submit that the incomplete, one-sided economic analysis does not present a true estimate of economic impacts and thus fails to satisfy Ohio Adm.Code 4906-4-06(E)(4). Without a full understanding of the economic impact of the Project on local commercial and industrial activities, the Board cannot find that the Project “will serve the public interest, convenience, and necessity” under R.C. 4906.10(A)(6). As such, the Residents submit that it was error for the Board to issue the certificate.

{¶ 95} Border Basin avers that the Residents’ argument that the Board cannot make a determination as to the Facility’s compliance with R.C. 4906.10(A)(6) without a negative economic impact study is without merit. Border Basin states that there is no requirement in rule or statute that an applicant specifically investigate every possible facet of economic impact. Ohio Adm.Code 4906-4-06(E)(4) requires only that an applicant provide an estimate of the economic impact of the proposed facility on local commercial and industrial activities, which Border Basin contends was done through the economic and fiscal impact assessment report submitted with the application. Border Basin asserts that the report used standard economic models and reflects the facts as they were discovered by the experts in an objective and nonbiased manner as to the socioeconomic impacts associated with the Project. Additionally, testimony supporting the report addressed local impacts of the Project.

{¶ 96} Border Basin maintains that the Residents’ opposition on this point is simply negative opinions by opponents, none of which are based on measurable facts. Applicant asserts that the alleged lost value of agricultural products that will not be produced if the Project proceeds will accrue to the landowners who want to participate in the Project.

Regardless, neither the Board nor the socioeconomic study are required to address what is in the best economic interest of these landowners. Border Basin similarly rejects Resident Intervenor's criticism of the economic report's lack of consideration of lost agricultural sales from taking the land out of production or the possibility that tenant farmers will lose their livelihood. Applicant contends that such losses are speculative and are greatly outweighed by the enormous positive local economic benefits identified in the socioeconomic report and supporting testimony. Border Basin advocates that the Board follow its past precedent in determining that unsubstantiated worries expressed by local opponents are not sufficient to conclude that a Project is contrary to the public interest under R.C. 4906.10(A)(6). As such, Border Basin declares that the Board rightfully determined, based on record evidence, that the Project will serve the public interest, convenience, and necessity as required by statute and, accordingly, the Residents' argument on rehearing should be denied.

{¶ 97} The Board finds Resident Intervenor's tenth assignment of error to be without merit. Although rephrased from the Residents' arguments in their post-hearing reply brief, the gist remains the same: Applicant and the Board give too much weight to the anticipated positive impacts to the local economy while ignoring or failing to evaluate negative economic impacts, thus undermining any determination that the Project will serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6). The Board considered the Residents' concern that too much weight was being given the positive economic impacts, specifically the potential PILOT funds, in comparison to potential negative impacts and found that, notwithstanding those concerns, there could be no dispute that the Project will bring additional revenues to local taxing districts and impart beneficial impacts on the community (Order at ¶ 134, 136). No claim made in the application for rehearing alters that conclusion. While it is possible that the Project may result in some economic losses, those losses are entirely speculative. Furthermore, it is not incumbent upon an applicant to speculate as to whether cropland will be productive in any given year, what crops may or may not thrive, or what vendors may or may not experience losses as opposed to gains. As argued by Resident Intervenor, the applicant is expected to provide

an estimate of the economic impact of the proposed facility on local commercial and industrial activities. Ohio Adm.Code 4906-4-06(E)(4). Applicant did so, and the record supports the conclusion that an evaluation of the expected economic impacts help demonstrate that the Project will serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6) (App. Ex. 1; App. Ex. 1, Ex. G; App. Ex. 25; Order at ¶ 138). Resident Intervenor's ninth assignment of error is denied.

9. ASSIGNMENT OF ERROR NO. 10

{¶ 98} Finally, Resident Intervenor's argue that the Board acted unlawfully and unreasonably by issuing a certificate lacking a deadline for decommissioning where such a deadline is necessary to comply with R.C. 4906.10(A)(3).

{¶ 99} Resident Intervenor's note that the application contains no deadline for finishing decommissioning after the Project stops operating and neither the Stipulation nor the Board's Order fill that void. According to the Residents, although Condition 36 requires an updated decommissioning plan before construction, that plan is not required to include a deadline for completion of all decommissioning—only a timeframe for removal of equipment. The amount of time to complete other decommissioning activity (road removal, soil decompaction, soil grading, and soil restoration) is not identified and, thus, is at best vaguely defined. Resident Intervenor's state that this scenario does not represent the minimum adverse environmental impact required under R.C. 4906.10(A)(3). To remedy the situation, the Residents request that the Board modify the Stipulation by replacing the phrase “for removal of the equipment” with “for finishing decommissioning activities” in Stipulation Condition 36.

{¶ 100} Border Basin responds that Resident Intervenor's assertions regarding decommissioning are baseless, arguing that the Residents once again dismiss the entirety of a Stipulation condition to focus on a single phrase. Applicant states that the Residents fail to account for language in Condition 36 that requires Border Basin to submit a final decommissioning plan to Staff prior to construction. Further, that final plan must meet the

minimum requirements listed in the Stipulation, including the removal of all equipment within a year. Border Basin additionally relates that the substantial total decommissioning cost for the Project provides incentive to complete decommissioning in a reasonable amount of time; otherwise, Applicant will have to pay premiums to maintain the performance bond, which terminates only upon satisfactory completion of decommissioning activities. Moreover, should Applicant fail to timely decommission the Facility, the Board as obligee to the bond could pursue a non-performance claim and use the proceeds to decommission the Project. In short, Border Basin submits that Resident Intervenors' assignment of error regarding the decommissioning timeline is without merit and should be denied.

{¶ 101} The Board has never concluded that R.C. 4906.10(A)(3) mandates a specified deadline for all decommissioning activities. In fact, when presented with the same argument in *Harvey*, the Board specifically noted that “[w]hile there is not a date certain included in the Order, the Board is satisfied that adequate protections are in place to ensure that decommissioning occurs in a reasonable timeframe * * *.” *Harvey*, Order on Rehearing at ¶ 62. We reach the same decision here. Although not presented with a challenge to the decommissioning plan before rendering our February 16, 2023 Order, that Order did address Applicant’s decommissioning plan as discussed in the application, by the Staff Report, and refined with the Stipulation (Order at ¶ 51-53, 81-82, 119). All record evidence supports the conclusion that decommissioning will occur over a reasonable amount of time allowing land to be restored to prior use. Applicant’s updated decommissioning plan indicates that decommissioning and restoration activities will occur over a 12-month period, with restoration activities including topsoil replacement, seeding, and overall restoration of the land (App. Ex. 5 at 3-4). The commitments made within the application and solidified within the Stipulation, including Stipulation Condition 36, represent the minimal elements of any final decommissioning plan submitted to Staff (Jt. Ex. 1, Condition 36; Staff Ex. 6 at 3). The Board is satisfied that, when finalized and submitted to Staff in accordance with all commitments adopted and approved by the Board’s Order, the final decommissioning plan will represent the minimum adverse environmental impact, in light of all statutory

considerations, under R.C. 4906.10(A)(3). Accordingly, Resident Intervenors' tenth assignment of error is denied.

IV. CONCLUSION

{¶ 102} The Board has reviewed and considered all arguments made by Resident Intervenors in the application for rehearing, including those posed for the first time on rehearing. Based on that review, the Board concludes that Resident Intervenors failed to bring to our attention any error demonstrating that our prior consideration of this matter was inadequate nor raise any argument signifying that our Order was unlawful or unreasonable. Accordingly, we deny each assignment of error and affirm the determinations made in our February 16, 2023 Order.

V. ORDER

{¶ 103} It is, therefore,

{¶ 104} ORDERED, That Resident Intervenors' application for rehearing be denied.
It is, further,

{¶ 105} ORDERED, That a copy of this Order on Rehearing be served upon all parties and interested persons of record.

BOARD MEMBERS:

Approving:

Jenifer French, Chair
Public Utilities Commission of Ohio

Jack Christopher, Designee for Lydia Mihalik, Director
Ohio Department of Development

Damian Sikora, Designee for Mary Mertz, Director
Ohio Department of Natural Resources

Drew Bergman, Designee for Anne Vogel, Director
Ohio Environmental Protection Agency

Sarah Huffman, Designee for Brian Baldrige, Director
Ohio Department of Agriculture

PAS/dr

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Case No(s). 21-0277-EL-BGN

Summary: Opinion & Order on Rehearing denying the application for rehearing filed by Robin L. Gardner, Michael J. Gardner 2011 Marital Trust #1, Gardner Brothers, LLC, Richard Scott Lewis, Sarah Lewis, The Richard S. Lewis Revocable Trust, Deidra L. Noel, Jeff Overmyer, and Shirley Overmyer electronically filed by Debbie S. Ryan on behalf of Ohio Power Siting Board.