

BEFORE  
THE OHIO POWER SITING BOARD

In the Matter of the Application of Oak	)	
Run Solar Project, LLC for a Certificate	)	
of Environmental Compatibility and	)	Case No. 22-549-EL-BGN
Public Need to Construct a Wind-Powered	)	
Electric Generation Facility	)	

In the Matter of the Application of Oak	)	
Run Solar Project, LLC for a Certificate	)	
of Environmental Compatibility and	)	Case No. 22-550-EL-BTX
Public Need to Construct a Transmission	)	
Line	)	

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**APPLICATION FOR REHEARING OF INTERVENORS BOARD OF  
TRUSTEES OF DEERCREEK TOWNSHIP, BOARD OF TRUSTEES OF  
MONROE TOWNSHIP, BOARD OF TRUSTEES OF SOMERFORD  
TOWNSHIP, AND MADISON COUNTY BOARD OF COMMISSIONERS**

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TOWNSHIP, AND MADISON COUNTY BOARD OF COMMISSIONERS**

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Intervenors Boards of Trustees for Deercreek, Monroe, and Somerford Townships (the Townships) and the Madison County Board of Commissioners (“Commissioners,” referred to collectively with Townships as “Intervenors”) hereby submit this Application for Rehearing pursuant to R.C. 4903.10.

As their grounds for rehearing, the Residents submit that the Opinion, Order, and Certificate (“Opinion”) of the Ohio Power Siting Board (“Board”) dated March 21, 2024 granting the certificate requested by Oak Run Solar Project, LLC (“Oak Run Solar”) for its solar-powered electric generation station (the “Project”) is unlawful and unreasonable for the reasons expressed in the following grounds for rehearing:

1. OPSB acted unlawfully and unreasonably by finding that the Project will serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6) despite the overwhelming local public opposition to the Project and evidence of the Project’s harm.

2. The Ohio Power Siting Board acted unlawfully and unreasonably by issuing a certificate without receiving the information required by OAC 4906-4-08(D)(4)(e) and R.C. 4906.10(A)(2), (3), and (6) regarding the Project's visual impacts.

3. The Ohio Power Siting Board acted unlawfully and unreasonably by finding that the Project complies with R.C. 4906.10(A)(3) and (6) despite its enormous adverse impacts on the neighborhood viewshed for which no mitigation has been provided as mandated by OAC 4906-4-08(D)(4)(f).

4. The Ohio Power Siting Board acted unlawfully and unreasonably by issuing a certificate without identifying mitigation measures for construction noise required by OAC 4906-4-08(A)(3)(d) and R.C. 4906.10(A)(2), (3), and (6).

5. The Ohio Power Siting Board acted unlawfully and unreasonably by issuing a certificate to Oak Run Solar without obtaining the information required by OAC 4906-4-07(C) and R.C. 4906.10(A)(2), (3), (5), and (6) concerning the Project's pollution impacts and associated mitigation.

6. The Ohio Power Siting Board acted unlawfully and unreasonably by finding that the Project complies with R.C. 4906.10(A)(2), (3), and (6) despite Oak Run Solar's failure to identify and provide for water supplies and emergency response procedures to fight fires in the battery energy storage systems that would produce toxic gas and spread into the community.

7. The Ohio Power Siting Board acted unlawfully and unreasonably by finding that the Project complies with R.C. 4906.10(A)(2), (3), and (6) without receiving the information required by OAC 4906-4-08(B) and R.C. 4906.10(A)(2), (3) and (6) concerning the Project's potential impacts on plants and wildlife.

8. The Ohio Power Siting Board acted unlawfully and unreasonably by allowing the case to proceed to hearing and decision without a complete application, and assigning to Intervenor the burden to prove that the Project does not comply with the criteria in R.C. 4906.10(A). Intervenor also incorporate this ninth grounds for rehearing by reference into their second, third, fourth, fifth, and seventh grounds for rehearing.

The basis for this Application for Rehearing and more detailed descriptions of the Board's errors are set forth in the Memorandum in Support below, which is incorporated in its entirety as part of this Application for Rehearing.

Respectfully submitted,

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## **MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING**

### **I. Introduction**

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

Applicant's Exh. 26A, Suppl. Direct Testimony of Sarah Moser ("Moser Suppl. Testimony"), Attachment SM-1, Agricultural Economic Impacts in Oak Run Project, p. 4.<sup>1</sup> Although the

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<sup>1</sup> This memorandum uses the following abbreviations for citations: (1) "Application" refers to Applicant's Exhibit 1, the Application submitted by Oak Run Solar on September 2, 2022, including its exhibits; (2) "Application Narrative" refers to the narrative portion of the Application; (3) "Application Exh." refers to the exhibits attached to the Application Narrative; (4) "Applicant's Exh." refers to the Applicant's exhibits introduced at the hearing; (5) "Project Area" refers to the project area for the Project as defined in the Application; (6) "Tr." refers to the transcript of the hearing, which is preceded by the name of the witness and followed by the transcript's volume, page numbers, and line numbers (e.g., "Turvy, Tr. III 364:3-13" refers to Robert Turvy's testimony at lines 3 to 13).

author of this quote was making a statement about solar projects in general, this statement aptly describes the reasons for the public's opposition to the Oak Run Solar Project.

## **II. Standards For Certification Of Major Utility Facilities**

No person may construct a major utility facility without first obtaining a certificate for the facility. R.C. 4906.04. The proposed Project would be a "major utility facility" as defined by R.C. 4906.01(B)(1)(a), because it is designed to generate in excess of 50 megawatts of electricity. For the Board to issue a certificate for a major utility facility, OPSB must hold a hearing on the application. R.C. 4906.07. The Board must render a decision on the record either granting or denying the certificate based on the application as filed, or granting it on such terms, conditions, or modifications as the Board considers appropriate. R.C. 4906.10(A). The Board may not grant a certificate unless it finds and determines, *inter alia*, the following:

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

Oak Run Solar has not demonstrated that the Project complies with these criteria.

## **III. First Grounds for Rehearing: OPSB Acted Unlawfully And Unreasonably By Finding That The Project Will Serve The Public Interest, Convenience, And Necessity Under R.C. 4906.10(A)(6) Despite The Overwhelming Local Public Opposition To The Project And Evidence Of The Project's Harm.**

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on page 364 of transcript volume III); (7) "OAC" refers to the Ohio Administrative Code; (8) "Conditions" refer to the conditions in the Stipulation; (9) "Stipulation" refers to the Joint Stipulation and Recommendation of Oak Run Solar and some of the intervenors identified as Jt. Exh. 1. References to "Oak Run Solar" also include its parent company, Savion, LLC.

For the reasons expressed below, the Board should have denied a certificate for Oak Run Solar's Project for failure to comply with R.C. 4906.10(A)(6).

**A. Madison County Governments And Citizens Overwhelmingly Oppose The Project.**

The OPSB has recognized that its determination of public interest, convenience, and necessity under R.C. 4906.10(A)(6) must be examined through a “broad lens” that balances a project's projected benefits against the magnitude of potential negative impacts on the local community. *In re Republic Wind*, OPSB Case No. 17-2295-EL-BGN, 2021 WL 2667132, at \*1, \*18, ¶ 91 (June 24, 2021). For example, in the *Republic Wind* case, the “especially prominent and one-sided” local opposition to the disapproved wind project was an important factor in OPSB's determination that the Republic Wind project did not serve the public interest, convenience, and necessity under R.C. 4906.10(A)(6). *Id.*, at \*18, ¶ 91. OPSB has denied certificates for solar facilities in several other cases on the same basis. See *In re Cepheus Energy Project, LLC*, OPSB Case No. 21-293-EL-BGN, 2023 WL 370719, at \*30-\*34, ¶¶ 121-131 (Jan. 19, 2023); *In re Kingwood Solar I LLC.*, OPSB Case No. 21-117-EL-BGN, 2022 WL 17850954, at \*36-39, ¶¶ 142-152 (Dec. 15, 2022); *In re Birch Solar I, LLC*, OPSB Case No. 20-1605-EL-BGN, 2022 WL 15476256, at \*12–15, ¶¶ 68-72 (Oct. 20, 2022).

Importantly, OPSB has repeatedly acknowledged that the support or opposition from elected local governments is the strongest indication of local sentiment about a project. The officials elected by the people most directly affected by a project are best situated to gauge the local sentiment. In this case, those officials are the Board of County Commissioners and the three Boards of Township Trustees who govern the area in which the Project is proposed. In Madison County, these officials have correctly figured out that the county's residents are



overwhelmingly opposed to the Oak Run Solar Project and that the Project is contrary to the public interest.

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

A representative of the Madison County Board of Commissioners testified against the Project at the local public hearing, indicating that the "commissioners will fight this project tooth and nail, and if this project is approved it will be in the face of a strong local government opposition." Testimony of Rob Slane, Transcript of the Public Hearing of Apr. 11, 2023, pp. 194-197. He noted that Madison County already has four approved solar projects – more than any other Ohio county – and "we have reached a point of saturation." *Id.*, p. 195. He concluded by saying that "Madison County is strongly opposed" to the Project. *Id.*, p. 196. Adding yet another large solar facility, in this case of 4,400 acres, is too much of an industrial burden for this county. OPSB should not over-saturate the county with solar facilities.

The Madison County Township Association, an association of all townships in the county, voted during a meeting on September 12, 2022 to oppose all current and future solar projects in Madison County. Sparks Testimony, p. 2, lines 17-21 & Attachment B. All of

Madison County's 14 townships voted to approve the resolution, except for two townships that had no trustees present at the meeting. *Id.*, lines 20-21.

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

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

The Townships have many concerns about the Project's potential negative impacts on the township and its residents. Frey Testimony, p. 2, lines 16-17; Sparks Testimony, p. 3, lines 1-2; Turvy Testimony, p. 2, lines 16-17. Monroe Township's residents and Deercreek Township's residents oppose this Project, as Monroe Township Trustee Lloyd Frey and Deercreek Township Trustee Robert Turvy, Jr. learned in conversations with many of them. Frey Testimony, p. 2, lines 17-18; Turvy Testimony, p. 3, lines 5-6. Somerford Township Trustee Sparks, a pharmacist, heard many customers at the pharmacy express their opposition to the Project. Sparks Testimony, p. 3, lines 2-3. Monroe Township Trustee Frey attended a public meeting on February 16, 2023 at Beck's Hybrids in London, Ohio, which was open to all residents in all Madison County townships and anyone else who wished to attend. Frey Testimony, p. 2, lines

18-20. Approximately 200 people attended that meeting. *Id.*, lines 20-21. About 90% of the approximately 30 people speaking during the first hour of that meeting stated their opposition to the Project.<sup>2</sup> *Id.*, lines 21-22; Frey, Tr. III 383:3 – 384:18.

OPSB's excuse for straying from its precedent for disapproving projects facing overwhelming local opposition is that one county commissioner and some school officials support this Project. As explained in Section III. F. below, which is incorporated by reference in this Section III. A., the supportive county commissioner was voted out of office the day before OPSB's decision precisely because he supported the Project. Accordingly, his support does not reflect the views of the county's residents. Only one of the school officials supporting the Project, the President of London City Schools, is elected. This official is motivated solely by greed for the cash offers dangled by Oak Run Solar for his schools, rather than the public interest. His support does not reflect the public's views about the Project.

The local public hearing held on April 11, 2023 confirmed that local public opposition to this Project is overwhelming. The Madison County residents testifying against the Project outnumbered the Madison County residents testifying in support of the Project by 24 to 5. Transcript of the Public Hearing of Apr. 11, 2023. Madison County residents attending the local public hearing who signed sheets indicating opposition to the Project outnumbered Madison County residents signing sheets in support of the Project by a count of 98 to 3.<sup>3</sup> See the signature sheets filed on the docket as public comments on May 4, 2023 (which also were marked as Townships' Exhs. 8-9). The Board has noted that testimony at the local public hearing is a

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<sup>2</sup> Mr. Frey could attend only the first hour of that meeting due to a township trustees' meeting on the same night, so he heard only the first 30 or so speakers. Frey, Tr. III 384:11-18.

<sup>3</sup> The unions supporting Oak Run Solar sent their members from outside of Madison County to the hearing in an attempt to demonstrate support for the Project. However, even counting the out-of-county signatures, the Project's opponents outnumbered supporters by 116 to 60. *Id.*

credible indicator of the public views on a project, because it is “sworn testimony subject to cross examination.” *In re Birch Solar 1, LLC*, OPSB Case No. 20-1605-EL-BGN, Order on Rehearing, 2023 WL 4105392, at \*6, ¶ 22 (June 15, 2023). The attendance and testimony of local citizens opposing the Project, in contrast to the handful of county residents showing up to support it, demonstrates the pervasiveness of the local opposition to this Project in Madison County. The government officials in Madison County have taken note of this opposition and have duly registered their opposition as well.

OPSB’s Opinion glosses over this important evidence about the overwhelming local opposition to the Project. The Opinion represents that 19 witnesses at the local public hearing supported the Project, while 28 opposed the Project. Opinion, p. 8, ¶ 33. The Opinion fails to mention that only five of the supporting speakers live in Madison County, while 24 of the 28 opposition speakers live in the county. Transcript of the Public Hearing of Apr. 11, 2023. Most of the nonresident supporters are union members hoping to work on Project construction, hopeful vendors for the Project, and trade groups beholden to solar company donations. OPSB has previously noted that while OPSB does not discount the importance of union member comments, “they are generally single-issue focused and supportive of the temporal job creation from the Project,” so “we see benefit to considering the ratio of support / opposition comments absent the IBEW block for purposes of gauging the local perception of the Project.” *In re Kingwood Solar*, Opinion and Order, Dec. 15, 2022, p. ¶ 148, fn. 8. OPSB should do the same in the instant case to maintain consistency with its precedent.

The Opinion also fails to mention that numerous Project opponents left the local public hearing late in the evening without delivering their verbal remarks after being informed by the presiding administrative law judge that they could sign sheets registering their support or

opposition to the Project. Transcript of the Public Hearing of Apr. 11, 2023, pp. 105-106. These citizens had the reasonable expectation that OPSB would assign equal weight to their views on the Project as it did to the indications of support or opposition expressed in the verbal comments of those fortunate enough to testify earlier in the evening. Remarkably, OPSB's Opinion does not even mention that the Madison County residents signing these sheets in opposition to the Project outnumbered resident supporters by an incredible count of 98 to 3. This is a strong indicator of the local public's view about this Project. Rather than ignoring this fact, OPSB should accept this information as dispositive of the public interest and deny the certificate. Approving the Project is a departure from OPSB precedent established in such decisions as *Republic Wind*, *Cepheus*, *Kingwood Solar*, and *Birch Solar*.

**B. Local Government Officials Have Expressed Valid Reasons For Opposing The Project.**

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

The Intervenors are concerned that the Project may flood nearby roads and land by damaging drainage tiles and surface waterways, damage the public roads near the Project Area, and cause soil erosion during Project construction that runs off into and pollutes the area's

streams. Sparks Testimony, p. 3, lines 10-17, & p. 4, lines 36; Frey Testimony, p. 4, lines 8-9, 12-13, 22-23; Turvy Testimony, p. 3, lines 15-22, & p. 4, lines 1-4. This concern is borne out by the testimony of local citizens called to testify by the Townships. Mr. Gattis noted that Dun Ditch received drainage from the Project Area prior to flowing past his house. Gattis Testimony, p. 3, lines 15-16. Ms. Little testified that she is concerned about drainage from the Project Area, because water from the Project Area drains into a tile flowing into the roadside ditch on her yard that already floods some of her yard and some of Juanita Smith's nearby yard during heavy rainfall. Little Testimony, p. 3, lines 13-16. In particular, the drainage of water in Deercreek Township is already a challenge, because the area once was swampland and needs effective tile systems and surface waterways to avoid flooding. Turvy Testimony, p. 3, lines 17-19.

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

The Townships' witnesses testified that the Townships' residents value the area's scenic beauty and rural setting, which are important aspects of the residents' quality of life. Frey Testimony, p. 3, lines 16-17; Sparks Testimony, p. 3, lines 20-21; Turvy Testimony, p. 4, lines 7-9. An important benefit to rural life in Madison County is the peacefulness and beauty of the countryside. *Id.*, lines 9-10. The Intervenor is concerned that the sight of solar panels, substations, and other solar facilities will detract from their citizens' enjoyment of the views from their homes, their yards, and the public roads. Frey, p. 3, lines 17-19; Sparks Testimony, p. 3, line 21 to p. 4, line 2; Turvy Testimony, p. 4, lines 10-12. Many Deercreek Township

residents drive State Road 38 to work at the Honda plant, and they will see the Project located along a long stretch of that road every day they go to work. Turvy, p. 4, lines 12-14.

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

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

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

Oak Run Solar did not inform the public about its plans to build the Project until the summer of 2021, after contracting for options to purchase the land for the Project in the fall of 2020. Moser, Tr. II 215:15 – 216:5. Oak Run Solar provided misleading testimony, which OPSB's Opinion repeats, attempting to portray the impression that Oak Run Solar had engaged the Darby Creek Association and other environmental stakeholders in discussions about the Project starting in 2019. Opinion, p. 110, ¶ 218. Actually, read carefully, Oak Run Solar's testimony actually stated that its 2019 discussions with these stakeholders concerned other solar



projects in Madison County, not the Oak Run Project. Applicant's Exh. 23, Flannery Direct Testimony, p. 10, lines 1-6. Discussions with these stakeholders about the Oak Run Project did not occur until late 2021 and early 2023. *Id.*, lines 6- 12. That is, Oak Run Solar's strategy was to lock the sellers into binding contracts before the members of the public could find out about the Project and express their opposition. Oak Run Solar's inconsiderate misconduct has increased the damage this Project would cause. In Errol Gattis' case, he and his wife were unaware of Oak Run Solar's plans to build the Project when they purchased and extensively renovated their house next to the Project Area during the time Oak Run Solar was secretly collecting land purchase options. Gattis Testimony, p. 2, lines 3-12. Oak Run Solar's decision to conceal the Project from the general public until contractually locking in its land purchase options betrays the company's early recognition that the Project would be unpopular in this community. The company's secrecy prior to the summer of 2021 has inflamed the community's resentment towards the Project.

C. **Information From Oak Run Solar And Observations About The Disastrous Solar Projects Underway In Madison County Educated The Township Trustees About The Damage Threatened By Oak Run Solar's Project.**

OPSB's Opinion attempts to discount the Township Trustees' views about the Project's harm as "some local opposition that may not be fully aware of the commitments agreed to in the Stipulation and Application." Opinion, p. 117, ¶ 228. Apparently, this statement is based on questions from IBEW's counsel establishing that the trustees had formed their negative views of the Project before the Application was filed. However, the trustees for all three Townships had met with Oak Run Solar prior to the Application to hear the company describe the Project. Certainly, Oak Run Solar does not contend that it withheld the information from the trustees necessary to evaluate the Project at that time.

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

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

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

Thus, the trustees had adequate information from meetings with Oak Run Solar to tell that the Project would be destructive. The trustees had no reason to study the Application after passing their resolutions, because they already had the information they needed. Moreover, the Application lacks the details necessary to address their primary concerns. No one reading that Application can tell how the Project will affect their views from residences, yards, and public roads, because the simulations are designed to avoid accurate portrayals of the views and because no final vegetation plan was included. No one can tell from the Application whether their downstream properties will flood, or whether their streams will turn muddy from erosion, because no water quality or quantity data was provided. The Application fails to reveal how wildlife will be impacted, because Oak Run Solar did not bother to conduct a single wildlife survey other than for bats. Reading the Application would have revealed nothing about these and other issues that most concern the trustees, because Oak Run Solar, like every other solar applicant, has concealed the actual impacts of its Project. OPSB leaves the important details to post-certificate plans concocted in secret and does not require plans for some project hazards at all. No other government agency with land use or environmental authority uses a decision-making process that makes the public wait until construction to find out how a project is designed and what harms it will cause. The cookie-cutter Stipulation incorporated into the certificate does nothing to fill these wide gaps in information, with most of the necessary

information scheduled for submission in secret to OPSB's Staff after issuance of the certificate when the public no longer has a voice in the decision-making process.

The applications' failure to reveal the true nature of the solar projects, and the inadequate designs of approved under these incomplete applications, are why the communities around approved solar projects are shocked at the destruction they see as the projects being built. The trustees, commissioners, and their constituents now have had the opportunities to witness firsthand at Madison Fields Solar Farm, Big Plain Solar Farm, and Fox Squirrel Solar Farm the damage that big solar does to a community. Oak Run Solar acknowledges that the Commissioners changed their position on the Project once they witnessed construction starting on another solar project in the county, including the revocation of their Alternative Energy Zone. Applicant's Exh. 26, Moser Direct Testimony, p. 12, lines 14-20.

Now that the public is reporting on the destructiveness of the approved solar projects, solar companies in OPSB's certification proceedings, including Oak Run Solar, are attempting to distance themselves from the previously approved projects by asserting that every project is different. While each project may have non-material differences, they all cause the same problems in the design being approved by OPSB. Every solar project application filed with OPSB follows the same cookie-cutter approach, with the same lack of attention to the most important details that are being left to post-certificate plans or that are ignored altogether. While IBEW criticized the Madison County Townships Association for opposing all future solar projects over 50 megawatts in size "regardless of the specific issues," the reality is that, as the Association knows, all of these projects have the same general harmful design. In particular, all of them are located too close to neighboring homes and public roads, all of them destroy the scenic viewshed, all of them employ the same damaging grading techniques, all of them make

excruciating noises during construction, all of them destroy public roads during construction, and all of them displace massive amounts of farmland. Now that solar facilities are being built in Ohio, the Madison County Townships Association and everyone else who has observed these facilities know that the incomplete solar facility designs approved by OPSB are causing these problems. To prevent the recurrence of this destruction, OPSB should disapprove the Oak Run Solar Project with its incomplete design and destructive characteristics.

**D. Oak Run Solar's Presumptuous Purchases Of Land Prior To Receiving Project Approval Are Not Grounds For Approving The Project.**

As one reason for finding the Project to be in the public interest, OPSB states that Oak Run Solar paid money for Project development and land purchases relying in good faith, in large part, upon the Commissioners' initial support and encouragement. Opinion, p. 110, ¶218. Most of this capital was spent on land purchases, which did not occur until December 2022 and January 2023. Applicant's Exh. 26, Moser Direct Testimony, p., lines 1-2, and p. 12, lines 25-28. By that time, Oak Run Solar knew about the public's widespread opposition to the Project. All three Townships had passed resolutions opposing the Project in June and July 2022, well before those land purchases. Turvy, Tr. III 347:20 – 348:5; Sparks, Tr. III 370:12 – 371:7; Frey, Tr. III 385:10-13. Oak Run Solar knew full well that there was a risk of Project disapproval when it bought this land.

Prior to Oak Run Solar's land purchases, the company also knew that local opposition was running high against the Project as reflected in the Townships' votes on these resolutions, but just decided to flaunt the views of the township trustees and the local populace. In fact, the Townships' resolutions gave Oak Run Solar fair warning of prevalent local opposition prior to filing of its Application in September 2022, but Oak Run Solar just ignored this warning. There was nothing "good faith" about Oak Run Solar's land purchases or its filing of the Application.

Moreover, the company has purchased only 330 acres, which is a mere five percent of the 6,050 acres in the Project Area. Flannery, Tr. I 45:6-12. Even if the Project does not come to fruition, Oak Run Solar can still use this land for its most beneficial purpose – farming -- or sell it to someone else to use it for its most responsible purpose.

**E. The Project's Experimental Use Of Agrivoltaics On 1,400 Acres Of The Project Area Does Not Compensate For The Loss Of 2,600 Acres Of Farmland For Decades.**

The Intervenor's oppose the Project's plan to convert farmland into an industrial solar facility for decades. Sparks Testimony, p. 5, lines 3-4; Frey Testimony, p. 4, lines 19-20; Turvy Testimony, p. 5, lines 14-15. The Project Area is 6,050 acres. Application Narrative, p. 5. The Project would construct solar equipment on about 4,400 acres of land, including at least 4,316 acres of cropland. Application Narrative, pp. 1, 131. The Project's lifespan is expected to be 30 to 35 years. Applicant's Exh. 9, Response to Sixth Data Request, p. 2. Farmland is needed for food production. Frey Testimony, p. 4, line 20. Some of the best, most fertile farmland in Madison County would be lost to this Project. Frey Testimony, Monroe Township Resolution, Attachment A; Sparks Testimony, Somerford Township Resolution, Attachment A; Turvy Testimony, Deercreek Township Resolution, Attachment A. Oak Run Solar will purchase the land in the Project Area, and the company is making no commitment to return the land to farming after the Project closes down. Application Exh. I, Economic Impact and Land Use Analysis, p. 15; Narrative, pp. 5, 14; Flannery, Tr. I 49:7-16. Consequently, there is no guarantee that the land will return to farming even after 35 years.

Oak Run Solar might contend that the employment of agrivoltaic practices among the solar panels would allow continued agriculture in the Project Area. The term sheet offered by Oak Run Solar to Ohio State University provides for farming on only 2,000 acres. Applicant's

Exh. 14, Suppl. Response to Second Data Request, Attachment 2, p. 2. At least 4,316 acres will be developed into solar equipment. Application Narrative, p. 131. Crops will be planted only “between rows of solar panels.” Applicant’s Exh. 14, Suppl. Response to Second Data Request, Attachment 2, p. 2, ¶ 5.b. Even if agrivoltaic practices are employed, the farm crops will occupy only 50%, at most, of the land used for agrivoltaics. Reutter, Tr. III 309:4-17. This means that only 1,000 acres will continue to grow food, for a net loss of 3,316 acres of the 4,316 acres of fertile farmland converted to solar equipment. OPSB’s Opinion modifies this commitment, but only a little. The Opinion states that 70%, i.e., 2800 acres, of the 4,000 crop acres in the Project Area must contain agrivoltaics. Opinion, p. 112, ¶ 221. At a crop coverage between the rows of 50%, the crops still will occupy only 1400 acres of the 4,000 acres currently in crop production. With a loss of 2,600 acres of farmland, this mammoth Project would devour more valuable farmland than any other solar project considered by the Board.

Notably, agrivoltaics is an experimental use for solar facility land. OPSB’s Opinion acknowledges that Oak Run Solar’s Project would have the “first of its kind utility-scale energy agrivoltaics plan for livestock grazing and row crops.” Opinion, p. 7, ¶ 29. The largest agrivoltaics operation in the world is the Madison Fields Solar Farm in Madison County, which started operation only this year by planting a mere 30 acres of soybeans among the solar panels. Moser, Tr. II 205:18 – 206:18. Oak Run Solar agrivoltaics employee Sarah Moser guessed that Jack’s Solar Garden in Colorado, with four acres of agrivoltaics, might be the second largest agrivoltaics operation in the world for agricultural activities other than sheep grazing. Moser, Tr. II 206:19 – 209:7. Ms. Moser was aware of agrivoltaics operations in other countries, but could not say how large they are. *Id.* Nor could she identify the size of the Fraunhofer ISE agrivoltaics operation touted in her written direct testimony, which has operated since only 2016.

Moser, Tr. II 208:17-24; Moser Testimony, p. 4, lines 16-17. Ms. Moser's testimony acknowledges that "[a]s early as 1981, the concept of combining agricultural and energy production has been proposed; however, to date, especially in the United States, no utility-scale solar energy ('USSE') developer has dedicated time or resources to fully investigate the challenges and possibilities of real execution." *Id.*, lines 9-12. Consequently, the effective use of agrivoltaics is just an experimental goal.

The Intervenors believe that solar facilities should not be placed on productive farmland. Sparks Testimony, p. 5, lines 3-4; Frey Testimony, p. 4, lines 20-1. This land may not be suitable for growing crops after the Project is decommissioned, especially given the nature of the earthmoving activities witnessed at Big Plain Solar in Madison County that are grading, stripping topsoil, and flattening the ground. Turvy Testimony, p. 5, lines 15-19; Sparks Testimony, p. 5, lines 4-6. The Deercreek Township Board of Trustees is concerned that the Project may damage the fields' soil permanently through compaction, flatten the fields' raised areas, change drainage patterns, and mix topsoil with subsoil through grading and other earthmoving. Turvy Testimony, p. 5, lines 15-18; Turvy Testimony, Deercreek Township Resolution, Attachment A. The Staff notes that "topsoil once disturbed and/or removed is unlikely to retain its productivity." Staff Exh. 1, Staff Report, p. 48. Oak Run Solar admits that grading damages the soil's capability for growing crops and other vegetation by removing nutrients and compacting the soil. Ivy, Tr. I 95:3-17. Farmland used for solar energy production will never again be as productive as it is now. Turvy Testimony, Deercreek Township Resolution, Attachment A.

The Townships are concerned that the Project's displacement of farmland will reduce the income of local fuel companies, seed companies, fertilizer suppliers, farm implement dealers, and other businesses that sell their goods and services to farmers who otherwise would be



farming land in the Project Area. Frey Testimony, p. 5, lines 1-4; Turvy Testimony, p. 5, line 22 to p. 6, line 3; Sparks Testimony, p. 5, lines 9-12. Two examples of these local businesses are a nearby John Deere dealer and the Beck's Hybrids store at which the meeting referenced above was held. Sparks Testimony, p. 5, lines 9-12; Frey Testimony, p. 5, lines 4-6; Turvy Testimony, p. 6, lines 3-4.

Oak Run Solar boasts that the jobs and economic benefit from the Project's construction activities will be substantial, but these jobs and income are temporary. During operation, the Project's benefits to Madison County and the State of Ohio would hardly be the bonanza that Oak Run Solar portrays them to be. The company's economic analysis represents that the Project would result in the direct and indirect employment of 63 people in Ohio, including 35 in Madison County. Application Exh. I, Economic Impact and Land Use Analysis, p. 25, Table 5. The Project's total annual output is expected to be \$8,367,839 for operation and maintenance, including \$3,073,093 in Madison County. *Id.*, p. 28; Application Narrative, p. 54. In comparison, grain production in the Project Area would result in the direct and indirect employment of 50 people in Ohio, including 30 in Madison County, and would have a total annual output of \$8,942,684 in Ohio, including \$6,275,030 in Madison County. Moser Suppl. Testimony, Attachment SM-1, Agricultural Economic Impacts in Oak Run Project, p. 20. That is, the Project would produce only slightly more operational jobs than the current agricultural activities, and would produce less financial output for both the state and the county. The Project would result in a loss of more than \$3,000,000 per year in economic output for Madison County. Adding agrivoltaics would increase the Project's jobs and income, but the use of agrivoltaics is speculative given its experimental nature.

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

**F. OPSB Should Reopen The Evidentiary Record To Admit Important New Evidence Of Local Public Opposition To The Project.**

In addition, OPSB should reopen the evidentiary record to admit important new evidence about public opposition to the Project. This evidence was not available during the hearing, and thus is eligible for consideration upon rehearing. See R.C. 4906.10 (stating that additional evidence cannot be considered upon rehearing if this evidence could have been, with reasonable diligence, been offered during the original hearing).

During the Board members' meeting to vote on the certificate, OPSB also mentioned that a state senator "from the area" had expressed some support. This statement appeared to allude to a public comment filed on Mar. 21, 2024 by State Senator Stephanie Kunze. However, another public comment from Brendan Shea, the newly nominated Republican candidate for County Commissioner, reveals that Senator Kunze's district will no longer include any of Madison County in the next term. Public Comment of Brendan Shea, filed on Mar. 20, 2024 at 5:25 p.m. Starting in 2025, Madison County will be represented by State Senator Michelle Reynolds, who opposes the Project. *Id.*

In contrast, State Representative Brian Stewart's district includes all of Madison County, and he observed that the Project faces "overwhelming opposition from the community and its

elected leaders.” Public Comment of Rep. Brian Stewart, filed Mar. 20, 2024. He urged OPSB to deny the certificate. The Board should have ascribed particular importance to his judgment that the Madison County community opposes this Project.

Just before OPSB issued its Opinion on March 21, 2024, Madison County’s voters sent OPSB a loud and clear message about their view of the Project during the Ohio primary election on March 19, 2024. Candidate Brendan Shea defeated incumbent Commissioner Mark Forrest by making the race a referendum on Mr. Forrest’s support for the Project. Public Comment of Brendan Shea, filed on Mar. 20, 2024 at 12:53 p.m. Mr. Shea’s campaign literature placed his opposition to the Project and other solar development front and center in his race against Mr. Forrest. *Id.*, pp. 2-3 (campaign letter); Public Comment of Brendan Shea, filed on Mar. 20, 2024 at 5:25 p.m., p. 2 (campaign flyer). He pledged that his first act upon winning the nomination would be to inform OPSB of his opposition to the Project and urge OPSB to disapprove the Project. *Id.* He fulfilled this promise by filing two comments on the docket to do just that. Mr. Shea received 57.4% of the vote in a four-candidate race, compared to Commissioner Forrest’s 21.3%. Public Comment of Brendan Shea, filed on Mar. 20, 2024 at 5:25 p.m. Another candidate opposed to this solar development received 18.1% of the vote. *Id.* Thus, 78.7% of the voters favored the two candidates who made based their campaigns on their opposition to this Project, compared to the 21.3% who supported Mr. Forrest. *Id.* Because OPSB’s Opinion ascribes particular importance to Mr. Forrest’s personal support for the Project, OPSB should hear the new evidence demonstrating that Mr. Forrest’s support for the Project does not reflect the county’s views.

Mr. Shea will be unopposed in the general election. *Id.* Incumbent Commissioner Chris Wallace, who opposes the Project, ran unopposed in the primary. *Id.* This means that all three county commissioners in office starting in 2025 are opposed to the Project. *Id.*

Intervenors request that OPSB reopen the evidentiary record to hear testimony about the evidence emerging since the evidentiary hearing about public opposition in Madison County to this Project, including testimony from Commissioner Wallace and Mr. Shea about their and their constituents' opposition to the Project as revealed in their campaign and nominations. State Senator Reynolds and State Representative Stewart should also be allowed to testify if they wish to do so. If OPSB declines to reopen the evidentiary record, Intervenors request that OPSB consider the public comments of Commissioner Wallace, soon-to-be Commissioner Shea, State Senator Reynolds, and State Representative Stewart as persuasive evidence that the Project is contrary to the public interest under R.C. 4906.10(A)(6).

**IV. Second Grounds for Rehearing: The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Issuing A Certificate Without Receiving The Information Required By OAC 4906-4-08(D)(4)(e) And R.C. 4906.10(A)(2), (3), And (6) Regarding The Project's Visual Impacts.**

OPSB's rules are designed to provide the information needed to assess the aesthetic impacts of a solar facility. To evaluate a project's visual impacts, OAC 4906-4-08(D)(4)(e) requires an applicant to do the following:

(4) Visual impact of facility. The applicant shall evaluate the visual impact of the proposed facility within at least a ten-mile radius from the project area....The applicant shall:

(e) Provide photographic simulations or artist's pictorial sketches of the proposed facility from public vantage points that cover the range of landscapes, viewer groups, and types of scenic resources found within the study area. The applicant should explain its selection of vantage points, including any coordination with local residents, public officials, and historic preservation groups in selecting these vantage points.

Emphasis added. The purpose of this requirement is clear on its face: an applicant must provide a visual image of its project so that the public and the Board can visualize its appearance to determine whether the Project satisfies the R.C. 4906.10(A) criteria and should be approved. The required visual images are necessary to formulative measures for the certificate to mitigate the Project's visual impacts. In fact, OPSB relied on simulations of solar panels for its conclusion about the panels' appearance at distances greater than 0.4 mile away. Opinion, pp. 71, 114, ¶¶ 145, 223.

However, the Project contains other structures that destroy a community's aesthetics. The Project would include two collector substations and one step-up substation. Flannery, Tr. I 68:10-17. Each of these substations would have structures as high as 85 to 115 feet tall. Applicant's Exh. 9, Response to Sixth Data Request, p. 18. Each collector substation would occupy about 15 acres, and the step-up substation would consume about 17.6 acres. Application Narrative, p. 25. Despite the size, height, and intrusiveness of these looming structures, Oak Run Solar has provided no simulations or artist's pictorial sketches for them. Application Exh. X, Visual Resources Technical Report, Appx. A, Figures 5a-15b, pdf pp. 21-31; Dohoney, Tr. I 150:7-11.

OAC 4906-4-08(D)(4)(e) requires an applicant to "[p]rovide photographic simulations or artist's pictorial sketches of the proposed facility." Emphasis added. The rule does not state that an applicant need only simulate or sketch just part of the facility, and it certainly does not state that an applicant need only simulate or sketch whatever part of the facility it wishes to portray. This rule language requires Oak Run Solar to simulate or sketch each component of the entire facility, rather than hiding the facility's worst features.

The term “facility” as used in OAC 4906-4-08(D)(4)(e) is defined by OAC 4906-1-01(W) to mean “the proposed major utility facility and all associated facilities.” A “major utility facility” is “a facility that meets the definition of major utility facility set forth in section 4906.01 of the Revised Code.” OAC 4906-1-01(A)(A). The “associated facilities” of an electric power generation plant include “rights-of-way, land, permanent access roads, structures, tanks, distribution lines and substations necessary to interconnect the facility to the electric grid, water lines, pollution control equipment, and other equipment used for the generation of electricity.” OAC 4906-1-01(F)(3) (emphasis added). Thus, the requirement in OAC 4906-4-08(D)(4)(e) to simulate or sketch the proposed “facility” mandates a visual portrayal of the entire facility, including substations. Surely Oak Run Solar has the resources to create a simple simulation or draw a sketch to depict the substation.

Oak Run Solar’s omission of an image for the substations violates OAC 4906-4-08(D)(4)(e), which requires simulations or sketches “from public vantage points that cover the range of landscapes, viewer groups, and types of scenic resources found within the study area.” Emphasis added. The term “range” means “the amount, number, or type of something between an upper and a lower limit.” The Cambridge Dictionary, “Range,” <https://dictionary.cambridge.org/us/dictionary/english/range> (last accessed on July 10, 2023). Thus, Oak Run Solar must cover the entire range of landscapes, viewer groups, and scenic resources. At the very least, Oak Run Solar must simulate the worst-case views in that range -- and those were the views that the company omitted from the Application and the record. The rule does not allow Oak Run Solar to skip the landscapes, viewer groups, and scenic resources that will suffer the greatest visual impacts from the Project.

The Board should not tolerate the company's concealment of this important information. OPSB should require Oak Run Solar to provide this information and reopen the evidentiary record to hear testimony about it. Without this information, the Board lacks the information necessary to comply with OAC 4906-4-08(D)(4)(e) and R.C. 4906.10(A)(2), (3), and (6) and should deny the certificate.

V. **Third Grounds for Rehearing: The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Finding That The Project Complies With R.C. 4906.10(A)(3) And (6) Despite Its Enormous Adverse Impacts On The Neighborhood Viewshed For Which No Mitigation Has Been Provided As Mandated By OAC 4906-4-08(D)(4)(f).**

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

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

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

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

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



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

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

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

OPSB sidestepped the evidence in the record about the Project's aesthetic damage. The Opinion acknowledges that the Staff realized that people will see the solar panels "in a majority of the farmland within the foreground (0.25 mile), adding a more mechanized visual character to the rural agricultural landscape. Opinion, p. 13, ¶ 44. Nevertheless, OPSB focused on the less imposing views of the Project at distances of 0.4 mile or longer, instead of addressing the actual problem of the community's awful views of solar equipment from nearby locations, including

the next-door neighbors who will be forced to look at this industrial facility every day for decades. Opinion, pp. 71, 114, ¶¶ 145, 223.

For the foreground viewers of the Project, it is essential that effective mitigation be provided in order to satisfy the mandates of R.C. 4906.10(A)(3) and (6). For that purpose, OAC 4906-4-08(D)(4) requires an applicant to do the following:

(4) Visual impact of facility. The applicant shall evaluate the visual impact of the proposed facility within at least a ten-mile radius from the project area....The applicant shall:

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(f) Describe measures that will be taken to minimize any adverse visual impacts created by the facility, including, but not limited to, project area location, lighting, turbine layout, visual screening, and facility coloration. In no event shall these measures conflict with relevant safety requirements.

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

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

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

any documentation or results of any outreach to neighboring residents about the vegetative screening next to their properties is a major failure.

Oak Run Solar claimed on October 14, 2022 that it had contacted all nonparticipating residential landowners on the 59 parcels of land adjacent to the Project Area to discuss their preferences for vegetative screening. Applicant's Exh. 5, Response to Second Data Request, pp. 6-7. This representation is false, as Kathy Little testified that the company never contacted her for that purpose. Little Testimony, p. 4, lines 9-14. Subsequently, Oak Run Solar admitted on March 3, 2023 that it had not reached about 10 adjacent homeowners. Applicant's Exh. 12, Response to Eighth Data Request, pp. 8-9. At that time, Oak Run Solar stated that there are 48 adjacent homeowners (*id.*), whereas its Response to the Second Data Request had stated that there are 59. In response to another Staff request for a vegetative screening plan, the company again refused to provide a plan on the grounds that its discussions with adjacent homeowners had not been completed, and it again provided the same one-sheet conceptual schematic of plantings it had provided earlier. *Id.*, p. 9 & Attachment 1. Thus, up to the time of hearing, the company's efforts to prepare a vegetative screening plan and to find out the neighbors' screening preferences not only were still lacking, but the company even appeared to lack an accurate count of adjacent homeowners.

OPSB, for its part, has done nothing to address this problem. OPSB merely states that Oak Run Solar has committed to working with local residents to develop a vegetative screening plan. Opinion, pp. 88, 89, 91, 114, ¶¶ 174, 176, 179, 223. But Condition 14 of the Stipulation does not obligate Oak Run Solar to work with the local residents to develop a plan, or to even consult with them. This vegetative plan must be developed and submitted to OPSB for approval so that the next-door neighbors and other members of the public will have input into the

vegetative screening. Furthermore, without a completed vegetative screening plan vetted in the record, there is no basis for OPSB to conclude that the Project's aesthetic impact will be minimal. The hearing record should be reopened to introduce and consider a completed vegetative screening plan.

This enormous, sprawling Project will destroy the pleasant viewshed enjoyed by the residents of the Townships. Despite that impact, Oak Run Solar has not complied with the mandate in OAC 4906-4-08(D)(4)(f) to "minimize" the Project's adverse visual impacts. Without reopening the record to provide for a complete vegetative screening plan, the Project does not represent the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations as required by R.C. 4906.10(A)(3). Nor does the facility serve the public interest, convenience, and necessity as required by R.C. 4906.10(A)(6). Accordingly, the Board should reopen the record to correct this deficiency or disapprove this Project.

**VI. Fourth Grounds for Rehearing: The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Issuing A Certificate Without Identifying Mitigation Measures For Construction Noise Required By OAC 4906-4-08(A)(3)(d) And R.C. 4906.10(A)(2), (3), and (6).**

The Project's construction will produce long-lasting noises in extreme volumes involving the operation of such heavy equipment as excavators, graders, dump trucks, flatbed trucks, cranes, and pile drivers. Application Narrative, pp. 81-82. Maximum noise levels from earthmoving and pile driving will be as loud as 71 A-weighted decibels (dBA) and 91 dBA, respectively, at a distance of 170 feet. Application Narrative, p. 82; Application Exh. R, Sound Level Assessment Report, p. 8-2, Tables 8-1 and 8-2. These noise levels are far louder than the average ambient sound level of 41 dBA Leq to 50 dBA Leq normally experienced in the community during the daytime. *Id.*, p. 5-8, Table 5-2. In comparison to the 30 dBA to 41 dBA

increase in noise level caused by solar construction machinery, an increase of 10 dB is perceived by the human ear as twice as loud. *Id.*, p. 3-1. Approximately 261,800 piles will be hammered 10 feet into the ground (Application Narrative, p. 21), so this noise will be pervasive and long-lasting. Construction of this enormous facility will last for four excruciating years. Application Narrative, p. 29.

OPSB's Opinion claims that "the Applicant will manage each tranche of the Project as a separate construction effort" in order to minimize the noise impacts "ongoing at the site at once." Opinion, p. 115, ¶ 224. However, OPSB's Opinion observes that Oak Run Solar admits that "the actual physical construction of any portion of the Project will take about two years." Opinion, p. 67, ¶ 138. Two years is an unbearably prolonged time to be exposed to industrial noise at a person's home. This dispels any notion that Project construction will be no worse than ordinary farm machinery operation as posited by the Staff. Moreover, given the loudness of earthmoving machines and metal pile drivers pounding on metal posts, this noise will carry for long distances to bother neighbors even when the construction activities are not located in their backyards.

Remarkably, OPSB's Opinion appears to rule that it is okay for energy projects to cause noise nuisances. See Opinion, p. 69, ¶ 141, stating that "Ohio Adm.Code 4906-4-08(A)(3) ... does not state that projects cannot cause any noise nuisances." Preventing noise nuisances is exactly what the rule is intended to prevent. Allowing energy projects to cause nuisances, whether from noise or other problems, would not satisfy R.C. 4906.10(A).

OAC 4906-4-08(A)(3)(d) requires Oak Run Solar to "[d]escribe equipment and procedures to mitigate the effects of noise emissions from the proposed facility during construction and operation, including limits on the time of day at which construction activities may occur." Oak Run Solar's noise "mitigation" measures are illusory, consisting of no more

than limiting “general construction activity” to 12 hours every day between 7 a.m. and 7 p.m. or until dusk when dusk occurs after 7 p.m. and giving the public a telephone number to make complaints. Application Narrative, p. 86. Condition 40 contains the same pathetic limitations. Staff Exh. 1, p. 61. OPSB can take judicial notice of the fact that dusk in central Ohio occurs as late as 9:35 p.m. during the summer. See <https://www.gaisma.com/en/location/columbus-ohio.html>. The “[g]eneral construction activities” allowed by Condition 40 during those long hours include the operation of such heavy equipment as dump trucks, flatbed trucks, excavators, and graders. Application Exh. R, Sound Level Assessment Report, p. 8-1, § 8.1. Thus, a certificate containing Condition 40 would allow Project construction to destroy the neighbors’ quality of life for up to 12 to 14.5 hours per day during summertime. Stipulation Condition 40 would allow impact pile driving between 9 a.m. and 6 p.m. without noise level restrictions. Condition 40 would even allow Oak Run Solar to conduct all of these intrusive construction activities during weekends and holidays. Enabling loud noise lasting up to 12 to 14.5 hours for seven days per week for four years is not a noise mitigation measure. In reality, the Application’s promises and Condition 40 would give nearby residents little relief from this noise.

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

**VII. Fifth Grounds for Rehearing: The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Issuing A Certificate To Oak Run Solar Without Obtaining The Information Required By OAC 4906-4-07(C) And R.C. 4906.10(A)(2), (3), (5), And (6) Concerning The Project’s Pollution Impacts And Associated Mitigation.**

OAC 4906-4-07(C) requires the Board to obtain data about a project’s potential for water pollution from an applicant prior to approving a project, so that potential pollution problems can

be diagnosed prior to construction. Rather than making uninformed guesses about whether the Project's disturbance of the soil will increase the runoff of soil-laden water into streams, the Board has promulgated this rule to answer this question prior to construction rather than finding out after water pollution damages the streams and the community.

OAC 4906-4-07(C)(1)(d) and OAC 4906-4-07(C)(2)(b), (c), and (e) require Oak Run Solar to provide water quality data so the Board can evaluate these discharges' impacts:

(C) The applicant shall provide information on compliance with water quality regulations.

(1) The applicant shall provide information regarding preconstruction water quality and permits.

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(d) Describe the existing water quality of the receiving stream based on at least one year of monitoring data, using appropriate Ohio environmental protection agency reporting requirements.

(2) The applicant shall provide information regarding water quality during construction.

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(b) Provide an estimate of the quality and quantity of aquatic discharges from the site clearing and construction operations, including runoff and siltation from dredging, filling, and construction of shoreside facilities.

(c) Describe any plans to mitigate the above effects in accordance with current federal and Ohio regulations.

(d) Describe any changes in flow patterns and erosion due to site clearing and grading operations.

(e) Describe the equipment proposed for control of effluents discharged into bodies of water and receiving streams.

(3) The applicant shall provide information on water quality during operation of the facility.

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

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

Emphasis added. The emphasized language requires an applicant to submit information about the quality and quantity of surface water flows from the Project Area during construction and operation, such as sediment from erosion carried into the streams.

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

Oak Run Solar's expert witness on drainage issues admitted the company has not submitted one year of monitoring data for the existing water quality of the receiving streams. Ivy, Tr. I 102:2-6. This failure violates OAC 4906-4-07(C)(1)(d). Seeking to justify its rule violation, Oak Run Solar contends that this data is required only for point sources of pollutants,



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

In addition, no estimates of the quantity and quality of aquatic discharges from site clearing and construction operations have been provided. Ivy, Tr. I 102:7-14. This failure violates OAC 4906-4-07(C)(2)(b).

Oak Run Solar’s expert acknowledged that the SWPPP developed after certification would contain these water quantity and quality calculations. Ivy, Tr. I 106:6-25 & 110:13-21. Thus, Oak Run Solar admits that these calculations are feasible and necessary. Nevertheless, the company has refused to provide these calculations prior to certification, thus depriving the public

and the Board of the opportunity to vet those calculations and to determine what water pollution problems must be addressed.

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

In addition, the Ohio Environmental Protection Agency has classified Spring Fork as Exceptional Warmwater Habitat, meaning that this stream possesses excellent water quality and high biological diversity. Flannery Testimony, Attachment SF-3, letter dated Oct. 28, 2022 from Robert Gable, Jr., Scenic Rivers Program Manager of the Ohio Department of Natural Resources, to Sean Flannery of Savion Energy, p. 1 (pdf p. 78). The ecological importance of the Big Darby Watershed has led to the investment of an estimated \$100 million in habitat protection by private and public stakeholders. *Id.*, p. 3 (pdf p. 80). The Board should not allow Oak Run Solar to squander these ecological resources by taking shortcuts in water quality planning in violation of OAC 4906-4-07(C).

OPSB's response to Oak Run Solar's refusal to produce the rule-required water quality data is to hold that it will not require the company to produce it. Opinion, p. 79, ¶ 156. The Opinion states that it will just let Ohio EPA deal with water quality issues. Opinion, pp. 79, 91, 94-96, ¶¶ 156, 179, 187, 188, 190. This position does not comply with OPSB's own rule, and it defaults on OPSB's duty to determine whether the Project complies with the R.C. 4906.10(A) criteria.

OPSB should find that Oak Run Solar's failure to provide this data violates OAC 4906-4-07(C) and R.C. 4906.10(A)(2), (3), (5), and (6) and should reopen the record to obtain this data. Without this data, OPSB should deny the certificate.

**VIII. Sixth Grounds for Rehearing: The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Finding That The Project Complies With R.C. 4906.10(A)(2), (3), And (6) Despite Oak Run Solar's Failure To Identify And Provide For Water Supplies And Emergency Response Procedures To Fight Fires In The Battery Energy Storage Systems That Would Produce Toxic Gas And Spread Into The Community.**

The Project will include two battery energy storage systems (BESSs) of 11 acres each. Applicant's Exh. 5. Response to Second Data Request, p. 8; Application Narrative, p. 22. The BESSs will hold approximately 328 battery containers and 92 transformers, with each container being about 28.9 feet by 5.4 feet and 9.2 feet tall. Application Narrative, p. 22. Oak Run Solar would use lithium ion batteries in these facilities. Flannery, Tr. I 61:3-8; Zavala-Iraheta, Tr. II 185:7-9.

Despite the BESS' enormous size, they will store only four hours of the Project's electrical production. Zavala-Iraheta, Tr. II 186:3-6. This miniscule contribution to the grid is hardly worth the risk of catastrophic fire and toxic smoke from these facilities, as described below.

Lithium batteries can catch on fire, including situations in which the battery cells rapidly release heat in a process known as thermal runaway. Zavala-Iraheta, Tr. II 187:17 – 188:9. The Ohio Department of Health has studied the risks from lithium batteries and has published a bulletin to advise the public on the risks of this technology, concluding:

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

Townships' Exh. 6, "Battery Energy Storage Summary and Assessments," p. 4 (emphasis added). Oak Run Solar's Application cites this bulletin. Application Narrative, pp. 78-79; Flannery, Tr. I 59:2 – 61:2. As stated in this bulletin, although the batteries are not likely to harm the public "under normal conditions," a battery fire is not a normal condition. Public exposure to lithium is unlikely, but only "if the battery systems are well maintained and monitored, and secured." Townships' Exh. 6, "Battery Energy Storage Summary and Assessments," p. 4. The batteries will release toxic gas if exposed to fire, mechanical shocks, decomposition, or added electric stress by misuse. *Id.*, p. 3. Although Oak Run Solar represents that the batteries are safe, even the most advanced technology poses risks from operator error. Even the Tesla promotional brochure introduced by Oak Run Solar admits that "the risk of fire for any energy infrastructure is never zero." Applicant's Exh. 38, p. 2. Tesla's advertisement claims that air emissions from a battery fire are expected to be negligible (*id.*), but ODH's bulletin treats hydrogen fluoride gas as "the greatest risk" from a battery fire (Townships' Exh.

6, p. 4). This is a valid concern to nearby residents such as Errol Gattis, who observed that a battery energy storage facility would be located across the road from his house. Gattis Testimony, p. 3, lines 16-18. Oak Run Solar tried to disguise this threat at the hearing by stating that the neighboring homes are at least 4,800 feet away from the BESSs (Flannery, Tr. I 78:7-19), but that would not prevent smoke from blowing onto neighboring public roads and properties.

Lithium can damage the kidneys, thyroid glands, parathyroid glands, heart, and digestive system. Townships' Exh. 6, "Battery Energy Storage Summary and Assessments," p. 4. Gastrointestinal side effects include nausea, vomiting, diarrhea and abdominal cramping. *Id.* The most frequent neurologic side effects are lethargy, fatigue, weakness, tremor and cognitive impairment. *Id.* OPSB must consider the risks from a mammoth collection of lithium ion batteries when deciding whether to approve this Project.

Oak Run Solar has confirmed that there is no effective way to put out a fire in the battery energy storage areas, stating that a fire in a battery storage container cannot be extinguished and must burn itself out with a total loss of its contents. Applicant's Exh. 9, Response to Sixth Data Request, pp. 3-4. Contrary to Oak Run Solar's representations, the BESSs do not "self-extinguish" fires by compartmentalizing the burning units. No fire suppression system is planned. *Id.*, p. 3. Instead, Oak Run Solar plans to just let the burning units burn uncontrolled until they consume all combustible contents. Once a fire starts, the only recourse is for the fire department to take a defensive position to prevent the fire from spreading to other battery containers and the surrounding community. *Id.*, pp. 3-4; Frey Testimony, p. 4, lines 9-11; Turvy Testimony, p. 4, lines 4-6; Sparks Testimony, p. 4, lines 15-17. But Oak Run Solar has not even done the elementary planning necessary to figure out whether the water necessary to

prevent a fire's spread is available for the fire department use. Flannery, Tr. I 57:2 – 58:4. Instead, the company just states that it will work with the local fire department to look for sufficient water to serve that need. Applicant's Exh. 34, Direct Testimony of Marvin Zavala-Iraheta, p. 4, lines 17-19. The Board should not approve this Project without that important safety information.

OPSB responds to this concern by repeating Oak Run Solar's argument that the public's exposure to toxic gas is unlikely if the BESSs are properly maintained, monitored, and secured. Opinion, p. 117, ¶ 227. This is akin to stating that no one needs to keep a fire extinguisher in a building because fires are unlikely if the building is properly maintained, monitored, and secured. OPSB does not properly dispatch its duty to the public by just hoping a fire never occurs.

Remarkably, IBEW initial post-hearing brief admitted that the construction of the Project would be a training exercise for its inexperienced electrical apprentices. IBEW initial post-hearing brief at pp. 2, 4-6. The fact that novices will install this dangerous source of electricity, especially BESSs that can burn and emit toxic smoke, dispels any notion that the BESSs will be perfectly safe.

Nor has OPSB satisfied its duties to evaluate and remedy the BESSs' risks by requiring Oak Run Solar to coordinate with local authorities after certification to find an adequate water supply for firefighting and to report the results to OPSB's Staff. Oak Run Solar also promises to prepare an emergency response plan to train emergency responders and provide them with equipment necessary to deal with fires and other emergencies, and OPSB apparently believes a promise to develop a future plan is enough to determine the R.C. 4906.10(A) criteria are met. Opinion, pp. 87, 88, ¶¶ 173, 174. But no details are provided in the evidentiary record so that the

Board and the public can vet these measures. The public has no way of knowing whether any meaningful action will be taken to protect them from fires and toxic fumes.

This procedure abdicates the Board members' duty to evaluate and decide these important safety issues and deprives the public of its rightful input into those issues. OPSB should reopen the hearing record and require Oak Run Solar to provide this information.

OPSB should not approve a project at which a fire could pose such grave consequences for the public. Nor should the Board approve a project that has not produced evidence that it will be prepared to prevent the spread of such a fire from one battery container to other battery containers or to the neighborhood. Approving this Project under these circumstances violates R.C. 4906.10(A)(2), (3), and (6).

**IX. Seventh Grounds for Rehearing: The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Finding That The Project Complies With R.C. 4906.10(A)(2), (3), And (6) Without Receiving The Information Required By OAC 4906-4-08(B) And R.C. 4906.10(A)(2), (3) And (6) Concerning The Project's Potential Impacts On Plants And Wildlife.**

OAC 4906-4-08(B) requires an applicant to conduct surveys of the plant and animal species in the Project Area to assess and mitigate a project's potential ecosystem impacts:

(B) The applicant shall provide information on ecological resources.

(1) Ecological information. The applicant shall provide information regarding ecological resources in the project area.

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(c) Provide the results of a literature survey of the plant and animal life within at least one-fourth mile of the project area boundary. The literature survey shall include aquatic and terrestrial plant and animal species that are of commercial or recreational value, or species designated as endangered or threatened.

(d) Conduct and provide the results of field surveys of the plant and animal species identified in the literature survey.

Emphasis added. Without this information, OPSB can neither determine the nature of the probable environmental impact under R.C. 4906.10(A)(2) nor find that a project complies with R.C. 4906.10(A)(3) and (6).

The Project Area contains a considerable amount of habitat that can host non-crop plants and wildlife, including 154 acres of upland forest, 6 acres of wetlands, 32 acres of grasslands, and 37 acres of scrub-shrub. Application Exh. T, Threatened and Endangered Species Habitat Survey Report, Table 1, pp. 5-6. The Staff Report found that the Project Area is spotted with woodlots and windrows. Opinion, p. 13, ¶ 44. Although Oak Run Solar contends it will not develop most of these wildlife areas, the Project's impacts still may drive away or otherwise harm the wildlife in these areas. For example, bulldozers, pile drivers, and other construction machinery will produce up to 91 decibels of earsplitting noise during years of Project construction, in contrast to the normal 41-50 Leq decibel level present there during daytime. Application Exh. R, Sound Level Assessment Report, p. 5-8 and p. 8-2, Table 8-2. Yet Oak Run Solar did no surveys to find out what species are present and need protection in these areas.

In order to informedly identify and avoid the Project's harm to plants and wildlife, it is necessary to first find out what species of plants and wildlife exist in and near the Project Area. That is why OAC 4906-4-08(B)(1)(c) requires applicants to conduct literature searches to identify the species that are potentially present and perform field surveys to look for them. Oak Run Solar did a woefully incomplete literature search and did no field surveys other than to look for bats.

Oak Run Solar performed a literature search only for threatened and endangered species of plants and animals. Dohoney, Tr. I 142:15 – 143:20; Application Narrative, p. 100. Thus, Oak Run Solar did not search the literature for evidence that species of commercial or



recreational value or any other plant or animal species that might inhabit the Project Area or the surrounding quarter mile as required by rule. No literature search for waterfowl was performed. Dohoney, Tr. I 146:8-15. OAC 4906-4-08(B)(1)(c) also requires Oak Run Solar to conduct a literature search for all listed and unlisted plant and animal species, but Oak Run Solar ignored that requirement.

OAC 4906-4-08(B)(1)(d) requires Oak Run Solar to perform field surveys to find out which plant and animal species identified by the literature search as potentially present are actually present in the Project Area and within a quarter mile of its boundaries. Oak Run Solar did not search in the field for any species other than bats. Dohoney, Tr. I 144:3-13. No waterfowl surveys were conducted. Dohoney, Tr. I 146:3-15. Indeed, Oak Run Solar did not even conduct field surveys for threatened and endangered species other than bats, even though correspondence from the Division of Wildlife of the Ohio Department of Natural Resources (“ODNR”) advised that the Project is in the range of 25 species of threatened and endangered plants and animals and even though the Project Area contains suitable habitat for seven listed species, including six that are land-based. Dohoney, Tr. I 144:3-13; Application Narrative, pp. 101-103; Application Exh. T, Threatened and Endangered Species Habitat Survey Report, p. 25 & Table 2, pp. 8-24; Application Exh. U, letter dated Apr. 1, 2022 from Mike Pettigrew of the Ohio Department of Natural Resources to Courtney Dohoney of Stantec, pp. 1-4 (pdf pp. 3-6). The Application indicates that Oak Run Solar assessed habitat availability for listed species, but did not actually look for those species. Application Narrative, pp. 103-104. The company’s consultant found habitat in the Project Area suitable for a variety of listed birds, fish, and mussels. *Id.*, p. 104. Nevertheless, Oak Run Solar did not conduct a field survey to look for either listed or unlisted species of plants or animals, other than bats. The company did not even

bother to determine what habitat exists in and around the Project Area for unlisted species of commercial or recreational value.

OPSB states that Oak Run Solar will hire an environmental consultant to watch for threatened and endangered species at locations near wetlands and streams during construction. Opinion, p. 115, ¶ 225. See Stipulation Conditions 30 and 37. This procedure does little to compensate for ignoring the requirement in the rule for finding out what species are in the area before certification so that OPSB, with the public's input, can figure out whether the Project satisfies the criteria in R.C. 4906.10(A) and identify the mitigation measures necessary to avoid negative impacts to plants and wildlife. The Stipulation's focus solely on threatened and endangered species also ignores all other plant and wildlife species.

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

**X. Eighth Grounds for Rehearing: The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Allowing The Case To Proceed To Hearing And Decision Without A Complete Application, And Assigning To Intervenors The Burden To Prove That The Project Does Not Comply With The Criteria In R.C. 4906.10(A).**<sup>4</sup>

OAC 4906-3-06(A) requires OPSB's chairperson to determine whether an application is complete and complies with the content requirements of the Board's rules, including OAC Chapter 4906-4, before the application can be processed. On November 1, 2022, the Staff filed a letter stating that Oak Run's Application "has been found to comply with Chapters 4906-01, et seq. of the Ohio Administrative Code." However, the letter cautioned that "[t]his means the Board's staff (Staff) has received sufficient information to begin its review of this application."

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<sup>4</sup> Intervenors hereby incorporate this grounds for rehearing by reference into their second, third, fourth, fifth, and seventh grounds for rehearing.

The letter further advised that “[d]uring the course of its investigation, the Staff may request additional information to ensure Staff can continue to conduct its review of the application,” and listed four categories of information missing from the Application. OPSB has violated the mandate in OAC 4906-3-06(A) to require a complete application prior to proceeding with the investigation and hearing. Oak Run Solar’ Application lacked much of the information required by OAC Chapter 4906-4, and the company failed to provide that information even at the hearing.

OAC Chapter 4906-4 is an integral component of the process set up by R.C. 4906.06 and R.C. 4906.07 to provide members of the public with the information they need to provide OPSB with informed input on a project that could impact them. OAC Chapter 4906-4 was promulgated pursuant to the mandate in R.C. 4906.03(C) that OPSB “[a]dopt rules establishing criteria for evaluating the effects on environmental values of proposed and alternative sites.” R.C. 4906.06(A) requires an application to contain all of the information required by OAC Chapter 4906-4:

(A) An applicant for a certificate shall file with the office of the chairperson of the power siting board an application, in such form as the board prescribes, containing the following information:

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(6) Such other information as the applicant may consider relevant or as the board by rule or order may require. Copies of the studies referred to in division (A)(2) of this section shall be filed with the office of the chairperson, if ordered, and shall be available for public inspection.

Emphasis added. This statutory mandate requires an applicant to submit the information required by OPSB’s rules. OPSB has no discretion to allow an applicant to get away with not complying with the rules. OPSB has promulgated OAC Chapter 4906-4 to implement R.C. 4906.03(C) and R.C. 4906.06. These rules describe the information that OPSB needs in order to

determine whether the applicant has demonstrated compliance with the criteria in R.C. 4906.10(A).

Consistent with R.C. 4906.06(A)(6), OAC 4906-2-04(B) requires an application to include the information required by OAC Chapter 4906-4. Notably, OAC 4906-4-01(B) provides that “[t]he board may, upon an application or motion filed by a party, waive any requirement of this chapter other than a requirement mandated by statute.” This rule allows OPSB to waive a requirement in that chapter only if a party has filed an application or motion justifying such a waiver. Oak Run Solar has not requested or obtained any waivers of the rule requirements at issue in this brief. OPSB cannot allow an applicant to ignore a rule requirement unless the Board follows the procedure in its waiver rule.

Administrative regulations issued pursuant to statutory authority have the force and effect of law, so an administrative agency such as OPSB is required to follow its own rules. *State ex rel. Cuyahoga Cty. Hosp. v. Ohio Bureau of Workers’ Comp.*, 27 Ohio St.3d 25, 27–28, 500 N.E.2d 1370, 1372–73 (1986); *Parfitt v. Columbus Corr. Facility*, 62 Ohio St.2d 434, 436, 437, 406 N.E.2d 528, 530 (1980); *Clark v. Ohio Dep’t of Mental Retardation and Developmental Disabilities*, 55 Ohio App.3d 40, 42 (6th Dist. 1988). A litigant is entitled to enforce such an agency’s rule against the agency if the litigant is a member of the class which the rule was intended to benefit. *Parfitt*, 62 Ohio St.2d at 436.

Neither R.C. 4906.10(A) nor OAC Chapter 4906-4 allows OPSB to pick and choose which rule requirements it will consider in deciding whether the criteria in R.C. 4906.10(A) are met. Just because an application contains thousands of pages of information on some potential Project impacts does not mean that the applicant or OPSB is allowed to ignore or gloss over

other harmful impacts. In this case, the gaps in rule-required information are myriad and substantial.

R.C. 4906.07(A)'s requirement for a complete application "complying with section 4906.06 of the Revised Code" is designed to provide the public with the information necessary to meaningfully participate in the evidentiary hearing. The applicant is required to publish public notices notifying the public about the application and where to find a copy of the application for review. R.C. 4906.06(C); OAC 4906-3-06(C)(4) & (5), 4906-3-07, & 4906-3-09. R.C. 4906.07(A) instructs OPSB to schedule the hearing only after receiving a complete application "complying with section 4906.06 of the Revised Code." Thereafter, the Board must conduct a hearing to obtain evidence from the parties and the public, including intervenors. R.C. 4906.07(A).

The fairness and accuracy of this process depend on the applicant's provision of rule-compliant information. That is why the rules require the applicants, not the Staff or intervenors, to produce the necessary information. Moreover, it is only fair to require applicants to produce the information necessary to prove that the developments from which they will benefit financially will not harm the public.

In this case, the evidentiary record lacks much of the information required by OAC Chapter 4906-4. OPSB may not issue a certificate without this information. The missing information is necessary for Intervenors to participate meaningfully in the hearing process. This information is also needed for OPSB to make sound decisions under the R.C. 4906.10(A) criteria, namely, whether to approve the Project, and if so, how it should be designed to minimize the Project's impacts on intervenors such as the Townships and Commissioners.

Because a complete application is required by law to enable the public's informed participation in the OPSB proceeding, the Townships filed a motion on April 6, 2023 for supplementation of the application. Nevertheless, OPSB's denial of this motion and its Opinion ruled that the Townships' motion was premature, because the missing information could be supplied during the evidentiary hearing. Opinion, pp. 59-60, ¶ 119. These rulings are erroneous, because they deprive the Townships and the public of the information necessary for their informed participation in the case.

The Opinion also states that the Townships could have conducted discovery to fill in the information gaps. To the contrary, an intervenor's right to conduct discovery cannot compensate for an applicant's failure to comply with OAC Chapter 4906-4. Many of the studies required by these rules do not exist until an applicant generates them, so intervenors are unable to obtain this information through discovery. Moreover, if these studies do not exist, they cannot be produced during the hearing either. This is the reality for most of the topics addressed by this Application for Rehearing for which the Townships' motion requested supplementation, as illustrated in Paragraphs 1-4 below:

1. Request #1 for supplementation in the Townships' motion requested a simulation or sketch for the substations so the Townships could see how the substations will affect the public's views. No simulation or sketch was produced during the hearing either.
2. Request #2 for supplementation in the Townships' motion requested a compliant vegetative screening plan. Discovery and cross-examination at the hearing could not produce a plan that does not exist.

3. Request #4 for supplementation in the Townships' motion requested water quality data and mitigation measures. Discovery and cross-examination at the hearing could not produce the data or a mitigation plan, because Oak Run Solar had not generated them.
4. Request #5 for supplementation in the Townships' motion requested complete field surveys for plants and animals. Discovery and cross-examination at the hearing could not produce the surveys, because Oak Run Solar did not conduct them. Nor could the Townships or the public perform the surveys, because they have no access to the land in the Project Area.

These examples demonstrate why R.C. 4906.10(A), R.C. 4906.07(A), R.C. 4906.06(A), and OAC Chapter 4906-4 assign to the applicant the burden to prove its energy project complies with R.C. 4906.10(A). OPSB has unlawfully flipped this burden of proof to the Intervenors by requiring them to find and produce evidence to prove that the Project does not comply with this statute. OPSB's failure to require Oak Run Solar to complete its Application has eviscerated the public's right to meaningful input into OPSB's decision-making on this Application, as well as depriving itself of the evidence necessary to determine whether the Project complies with R.C. 4906.10(A).

Oak Run Solar has been provided with ample opportunities to complete its Application. The Staff has served Oak Run Solar with multiple data requests seeking to supplement the incomplete information in the Application. Oak Run Solar could have supplemented the Application without the Staff's prompting. Nevertheless, Oak Run Solar has failed to complete its Application, in some instances even refusing to provide information requested by the Staff in its data requests.

Few, if any, other government entities approve building projects without first reviewing final design plans. This procedure is all the more egregious given that the OPSB process supplants local zoning that most certainly would have required design plans so that the approving authority, with public input, could tell what it is approving. In this case, Oak Run Solar's disregard for the Board's rule requirements has produced a Project design that violates the criteria in R.C. 4906.10(A). OPSB should reopen the record, require Oak Run Solar to produce the missing information required by OAC Chapter 4906-4 as described in the second, third, fourth, fifth, and seventh grounds for rehearing, and reopen the evidentiary hearing to take evidence on these issues.

## **XI. Conclusion**

By now, the members of OPSB should be asking why the solar projects they have approved are resulting in such adamant opposition to additional solar development in the same counties. Madison County is just one example of this trend, where the construction activities in the Madison Fields Solar Farm, Big Plain Solar Farm, and Fox Squirrel Solar Farm have repulsed that county's citizens and galvanized opposition to Oak Run Solar as people witness firsthand how destructive OPSB's approved projects are. OPSB's refusals to implement the requirements of its own rules and its performance of most of its regulatory oversight outside of the public participation process through post-certificate plans are resulting in destructively constructed energy projects. One of the first acts of citizens learning of proposed plans for a new solar project near them is to visit solar projects already built or under construction to witness firsthand how their community will be impacted by a new solar project. OPSB's failures to minimize environmental destruction at these sites are producing more opposition at new sites.



As explained above, there are a multitude of important reasons to deny the certificate sought by Oak Run Solar. The Project is immensely unpopular with the local community and is opposed by local government officials. The problems prevalent at other OPSB-approved projects have not been resolved for the Oak Run Solar Project, and the public knows it. Oak Run Solar has failed to provide the information on the Project's adverse impacts and mitigation measurements necessary to minimize them that is required by the Board's rules. The Board cannot violate its own rules by approving the Project without this information. Nor do the criteria in R.C. 4906.10(A)(2), (3), (5), and (6) authorize the issuance of this certificate without this information, because the rule-required information is designed to evaluate the Project's compliance with these statutory criteria. The Board should reopen the hearing record to admit additional evidence pertinent to the issues described in this Application for Rehearing and then decide whether the R.C. 4906.10(A) criteria are met.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, I hereby certify that, on April 19, 2024, a courtesy copy of the foregoing document also is being served by electronic mail on the following:

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Summary: App for Rehearing electronically filed by Mr. Jack A. Van Kley on behalf of Deercreek, Monroe, and Somerford Boards of Township Trustees and Madison County Board of Commissioners.