Supreme Court of Ohio Clerk of Court - Filed June 06, 2022 - Case No. 2022-0054

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Angelina Solar I, LLC for a Certificate of Environmental Compatibility and Public Need	**Case No. 2022-0053** **On Appeal from the Ohio Power Siting Board, Case No. 18-1578-EL-BGN**

MERIT BRIEF OF INTERVENING APPELLEE ANGELINA SOLAR I, LLC

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I. INTRODUCTION

This case is Appellant's ("CCPC") attempted third bite at the apple to challenge whether Angelina Solar I, LLC ("Angelina") provided the Power Siting Board (the "Board") with sufficient evidence to be granted a certificate to construct, operate and maintain a solar project. Based on its review of the entire record, including days of testimony (including testimony from multiple experts on behalf of Angelina and no experts on behalf of CCPC) and dozens of exhibits, the Board has now twice found that Angelina did provide sufficient evidence. That is the Board's role—to weigh all record evidence under the statutory framework, which includes consideration of the "not in my backyard" concerns like those raised in this appeal. In this appeal, the CCPC asks this Court to usurp the Board's role by re-weighing the evidence and second-guessing the Board's factual determinations—the Court must decline that request. Instead, the Court should find that there is nothing unreasonable or unlawful about the Board's decisions, and affirm.

- **The Board thoroughly and carefully considered this case.**

The Board issued a **157-page Opinion**, Order, and Certificate ("Order" or "Certificate") and then a **13-page Order** on Rehearing ("Order on Rehearing"), each of which detailed the **significant record evidence** the Board considered in determining that Angelina's solar project met the statutory requirements of R.C. 4906.10(A). This decision followed an **investigation and report** by Board Staff, **four days of testimony**, and the **admission of dozens of exhibits**. The Board's careful analysis adopted a **Joint Stipulation signed by its Staff, subject-matter experts, and local stakeholders**, including the Board's staff, Angelina, the Ohio Farm Bureau Federation, the Preble County Commissioners, the Preble County Engineer, the Preble Soil & Water Conservation District, the Preble County Planning Commission, the Preble County Engineer, and the Board of Trustees of Dixon Township.

- **The Board's decision is not unlawful or unreasonable.**

The CCPC disagrees with the Board's determination and asks this Court to reweigh the evidence and to substitute its judgment for that of the Board. But that is not this Court's role on appeal. *See Elyria Foundry Co. v. PUC*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 39. Instead, this Court may only reverse the Board's Order if it is unlawful or unreasonable, which means that CCPC has the burden of demonstrating that the Board's decision was so unsupported that it reveals "misapprehension or mistake, or willful disregard of duty." *Id.* at ¶ 13. **CCPC cannot meet this burden**—the Board did its job in this case, the record evidence supports its decision, and the Board's decision should be affirmed.

Each of CCPC's arguments on appeal **are factual issues**—where it asks the Court to make certain determinations contrary to those made by the Board—that they attempt to re-package as legal ones. In so doing, CCPC tries to elevate what are minor disagreements with the Board's decision by improperly shifting the focus. First, CCPC improperly focuses on the Board's administrative rules, which are intended to help the Board identify when an application is complete and the Board can proceed to fact-finding. **Here, the application was deemed complete over two years before issuing the Order, without any objection from CCPC or any other party**. Although Angelina's application met all relevant rule requirements, the focus in this appeal must be on whether the entire record—of which the application is only one part—supports the Board's conclusions under R.C. 4906.10(A). Questions about the completeness of the application under Board rules, however misguided, **should have been raised before it was determined the application was complete** or when the application was admitted into evidence. Moreover, those questions are not relevant after the Board proceeded to fact-finding, held hearings, accepted evidence, and issued an Order.

- **The Board imposed appropriate conditions on the Certificate of the type previously approved by this Court.**

CCPC also argues that the Board's decision must be overturned, because the Board requires Angelina to make post-certificate submissions to ensure compliance with conditions as the project progresses. Here, the Board issued a certificate with **thirty-one stipulated conditions**. Some of those conditions require Angelina to provide plans to the Board to allow the **Board to continue oversight of the facility** and to ensure that Angelina is complying with all conditions. This Court has previously found that such conditions are appropriate. See *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878, ¶ 18.

And when all else fails, CCPC's brief simply misstates or ignores the record:

- For example, CCPC claims that Angelina used the Amended Joint Stipulation "as a pretext for Angelina to change some Project design details and to introduce new studies." (CCPC Merit Br. p. 2.) However, a review of the alleged "studies" show that they are **not studies** at all, **but rather are typical plans and other documents supporting the Project's construction and operation**. (ICN 140, June 24, 2021 Opinion, Order and Certificate ¶ 363–64; ICN 139, Jan. 4, 2021 Angelina Reply Br. pp. 4–7.) The Amended Joint Stipulation also consisted of Angelina agreeing to additional or more stringent conditions on the Project.
- As another example, CCPC claims that the Ecological Assessment did not include any "field surveys at all." (CCPC Merit Br. p. 10.) Yet, Cardno, the consultant that conducted the Ecological Assessment did **three separate field studies** of the Project Area. (ICN 10, Ecological Assessment pp. 4-5 to 4-8.)
- CCPC also argues that Angelina provided no evidence to refute CCPC's unsupported assertion that the Project will result in increased runoff, which will in turn worsen the

Project Area's "flooding problems." (CCPC Merit Br. p. 11.) However, Angelina's expert, Mr. Waterhouse, testified that the Project **should not result in an increase in runoff from the Project Area.** (ICN 54, Waterhouse Direct Testimony p. 4.) Mr. Waterhouse then specifically opined "that a typical project of this nature will ultimately see a reduction of runoff, not an increase, based on that change in land use." (*Id.*; TR at 150:2–12.)

The Board did its job in this case. It carefully reviewed the vast record and made extensive findings and determinations for each of the relevant factors in R.C. 4906.10(A). CCPC has failed to meet its burden of demonstrating that the Board willfully disregarded its duty. **The Board's decisions should be affirmed.**

II. STATEMENT OF CASE AND FACTS

A. Angelina filed an application for a solar project in Preble County.

On December 3, 2018, Angelina filed with the Board an application—along with nine exhibits—for a certificate to build an 80 MW solar-powered generating facility in Preble County, Ohio (the "Project"). (ICN 3, Application pp. 3, 5.) In the application, Angelina cited the various Board application requirements followed by a response addressing each requirement. (*See generally id.*) At the time of application, and pursuant to Ohio Admin. Code 4906-4-01(B), Angelina sought waivers from various aspects of Ohio Admin. Code 4906-4.

As set forth in the application, the Project will consist of large arrays of ground-mounted solar panels. The Project also includes support facilities, such as access roads, meteorological stations, buried electrical collection lines, inverter pads, and a substation. The Project will occupy up to 827 acres within a 934-acre project boundary (the "Project Area"). (*Id.* at p. 1.) The solar panel arrays will be grouped in large clusters that would be fenced for public safety and equipment security, with locked gates at all entrances. (*Id.* at pp. 7–8). The entire perimeter of the Project

Area will be fenced with locked gates for security and safety. (*Id.* at p. 8). Within the Project Area, Angelina will install an underground collector system made up of a network of electric and communication lines that would transmit the electric power from the solar arrays to a central location. (*Id.* at p. 7.)

- **The Project will provide income and jobs to the community.**

The Project will bring numerous benefits to the community, including increased **emission-free power**, **greater revenues** to local government, and **significant job creation**. The addition of emission-free power will assist in the attainment of air quality goals in southwestern Ohio. (*Id.* at p. 42.) Angelina will be making **annual service payments** to the local government amounting to at least $560,000 per annum. (ICN 36, Staff Report p. 15.) The Project will also create **518 to 1,076 direct and indirect construction-related jobs** with corresponding payrolls of **$25.4 million to $55.6 million.** (ICN 3, Application pp. 31–32; ICN 6.) Following construction, during the operation phase of the Project, the Project will create approximately **twenty-two direct and indirect jobs** with corresponding annual payrolls of approximately **$630,000**. (*Id.*) In sum, the Project is expected to generate new economic output of approximately **$161.7 million during the construction phase and $1.5 million annually from operation.** (*Id.* at p. 32.)

B. The Board determined the application was complete and proceeded to the fact-finding stage. Board Staff issued an investigation report, Angelina, Staff and others agreed to a joint stipulation, and the Board held four days of hearings.

On January 17, 2019, the Administrative Law Judge granted Angelina's motion for waivers related to various aspects of Ohio Admin. Code 4906-4. (ICN 20, Jan. 17 2019 Entry.) By letter filed and dated February 1, 2019, Angelina's application was deemed to comply with Chapters 4906-01, et seq., of the Ohio Administrative Code and that Board Staff had sufficient information to begin reviewing and investigating the application. (ICN 21, Feb. 1, 2019 Correspondence.) **No objection was filed to this finding.** On February 14, 2019, following proper service of the

application, the Administrative Law Judge found that Angelina's "accepted, complete application" was deemed filed as of February 15, 2019. (ICN 24, Feb. 14, 2019 Entry.) **No objections were filed to these findings.**

Staff proceeded to review and investigate the application, issuing a "Staff Report of Investigation" on April 15, 2019. (ICN 36, Staff Report.) Staff's findings and recommendations were the result of coordination with multiple state and federal agencies.[1] (*Id.* at p. ii.) The Board's investigation and subsequent report were performed "pursuant to the criteria set forth in R.C. 4906.10(A)." (*Id.* at p. 3.) Staff recommended that the Board find the application met the statutory requirements and grant the Certificate subject to certain conditions. (*Id.* at pp. 11–37).

Following the Staff Report, Angelina entered into a Joint Stipulation with Board Staff, the Preble County Commissioners, Preble County Engineer, Preble Soil & Water Conservation District, Board of Trustees of Israel Township, Board of Trustees of Dixon Township, the Preble County Planning Commission, and the Ohio Farm Bureau Federation (the "Joint Stipulation"). (ICN 88, Joint Stipulation pp. 18–19). The Joint Stipulation included a number of conditions regulating the construction and operation of the Project, which supersede the conditions recommended in the Staff Report. (*Id.*)

Four days of hearings were held on July 31, August 1, August 12, and September 10, 2019, where nineteen witnesses presented live testimony. Angelina's witnesses included many experienced professionals including:

[1] These agencies included the Ohio Environmental Protection Agency, the Ohio Department of Health, the Ohio Development Services Agency, the Ohio Department of Natural Resources, the Ohio Department of Agriculture, the Ohio Department of Transportation, the Ohio Historic Preservation Office, the U.S. Fish and Wildlife Service, the U.S. Army Corps of Engineers, and the U.S. Coast Guard.

- **Application and Project Details:** Douglas Herling, the Vice President of Development at Angelina and the Project Manager, testified regarding Angelina's amended application and exhibits.

- **Noise**: David Hessler, a professional engineer specializing in acoustics with significant experience on power station projects across Ohio and the world, conducted a noise assessment study and testified as to the minimal operational noise that would result from the Project.

- **Visual Impact**: Matthew Robinson, a Visualization Project Manager at Environmental Design & Research, Landscape Architecture, Engineering & Environmental Services, D.P.C ("EDR") with a masters in landscape architecture, created a visual resource assessment for the Project and testified as to the minimal visual impacts of the Project.

- **Ecological**: Ryan Rupprecht, the Senior Project Manager for the Renewable Energy Group with over fifteen years of professional environmental experience, conducted ecological assessment studies, testified as to the minimal potential environmental impacts of the Project.

- **Drainage and Runoff**: Noah Waterhouse, a professional engineer specializing in solar civil engineering with extensive experience evaluating drainage and runoff issues for over fifty solar projects, conducted a drain tile assessment and testified as to the minimal impacts of the Project on drain tile, drainage, and runoff in the Project Area.

- **Traffic**: Mark Bonifas, a professional engineer with over ten years of experience with renewable energy projects, conducted studies on the traffic implications of the Project and testified that the Project would likely not have a negative impact on traffic or road conditions.

- **Stormwater**: Matt Marquis, a professional engineer with a masters in civil engineering, testified that the Project will adequately mitigate and manage stormwater flows post-construction.

(*See* ICN 140, June 24, 2021 Opinion, Order and Certificate ¶¶ 98–104; ICN 134, Angelina's Initial Post-Hearing Br. pp. 10–14.) The Board admitted **forty exhibits** at the hearing, including the application, which was **admitted without any objection** by CCPC or any other party. (TR at 136.)

C. The Board re-opens the record to allow the parties to the original stipulation to submit an even more protective amended stipulation and present testimony in support.

After the hearing and post-hearing briefing, the parties to the original stipulation filed a joint motion to reopen the hearing record and to schedule a pretrial conference. (ICN 118, Joint Motion.) The movants explained that after the hearing and briefing, the parties continued to discuss and negotiate over the Project related to issues raised in the hearing. (*Id.* at p. 5.) As a result, the parties had agreed to an amended stipulation that incorporated a new condition and revised ten other conditions to reflect, in part, additional commitments being made by Angelina (including a Project setback commitment). (*Id.*) Importantly, **these revised and new conditions were "more protective" than the original conditions**. (*Id.* at p. 3.) The proposed amended stipulation was filed contemporaneously with the motion (the "Amended Joint Stipulation"). (ICN 117, Amended Joint Stipulation.)

On September 14, 2020, the ALJ granted the motion to reopen the record (ICN 121, Sept. 14, 2020 Entry), and held an additional one-day hearing on October 29, 2020. Seven witnesses presented live testimony at this hearing, and an additional eleven exhibits, including the Amended Joint Stipulation, were admitted. Notably, **CCPC did not object to the reopening of the record, the testimony of the witnesses, or the admission of any of the additional exhibits**. (*See* TR at 546, 581, 607, 623, 635, 639.)

D. The Board issued an order adopting the Amended Joint Stipulation and granting the certificate to Angelina.

On June 24, 2021, the Board issued an order approving and adopting the Amended Joint Stipulation and granted a certificate to Angelina for "the construction, operation, and maintenance of a solar-powered electric generation facility in Preble County, Ohio." (ICN 140, June 24, 2021 Opinion, Order and Certificate ¶ 365.) In its 157-page Order, the Board walked through the

voluminous record and the various arguments presented by the parties before concluding that the Project satisfied the requirements of R.C. 4906.10(A). (*Id.* at ¶¶ 37–115, 120–314.)

On July 23, 2021, CCPC filed an application for rehearing. (ICN 142, Application for Rehearing.) On November 18, 2021, the Board denied that application. (ICN 145, Nov. 18, 2021 Order on Rehearing.) The Board found the application to be "a verbatim recitation of arguments raised" previously, but still conducted a "painstaking review" of the evidence supporting its decision. (*Id.* at ¶¶ 21, 24.) The Board declined to "reweigh the evidence, which is, essentially what CCPC requests in its application for rehearing." (*Id.* at ¶ 25.)

CCPC has now filed this appeal to make these same arguments for a third time. (ICN 147, Notice of Supreme Court Appeal.)

III. ARGUMENT

Under R.C. 4906.10(A), the Board is required to render its decision on a certificate application "upon the record." R.C. 4906.10(A). The "record" in this case consists of days of testimony and exhibits that were admitted into the record without objection (including the application itself). *See id.* at 4906.12 (providing that Sections 4903.02 to 4903.16 apply to Board proceedings); *id.* at 4903.09 (stating that the "complete record" includes "a transcript of all testimony and of all exhibits).

In order to issue a certificate for the construction, operation, and maintenance of a major utility facility, R.C. 4906.10(A) requires the Board to find and determine eight things. CCPC's appeal challenges just two of the Board's required determinations: (1) "[t]he nature of the probable environmental impact" pursuant to R.C. 4906.10(A)(2); and/or (2) 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" pursuant to R.C. 4906.10(A)(3). Each of CCPC's propositions of law attack these two determinations based

on a variety of subcategories: (1) noise; (2) visual impacts; (3) impact of wildlife and plants; (4) drainage; (5) pollution; and (6) setbacks.

The Board, however, went through each of these elements in great detail in its Order, and then conducted a "painstaking review" on rehearing to confirm its findings for each. (*See* ICN 145, Nov. 18, 2021 Order on Rehearing ¶ 24.) Specifically, the Board detailed how and where in its initial Order it considered the evidence and addressed each topic in its original opinion:

- "operational noise (¶¶ 207–224, 228)"
- "visual and lighting impacts (¶¶ 131–147, 152, 232–234, 293–242)"
- "plants and wildlife, including those impacts on wildlife that could result in crop and livestock damage on nearby farms (¶¶ 169–179, 187–188)"
- "vegetation, including noxious weeds (¶¶ 181–185, 189)"
- "drainage and flooding, i.e., the quantity of surface water drainage (¶¶ 155–163, 165–168, 186)"
- "groundwater contamination (¶¶ 252–262, 263)"
- "water quality (¶¶ 163–164, 186)"
- "the Project's setbacks (¶¶ 213, 232–238, 239–242)"

(*Id.* at ¶ 24.) For each subcategory identified by CCPC in this appeal, there is simply no basis to argue that the Board failed to make the required findings under R.C. 4906.10(A) or lacked sufficient evidence to make the findings that it did.

CCPC's arguments to the contrary do not merit reversal here. First, from an overarching perspective, CCPC's arguments are based on two flawed premises. CCPC argues: (1) that the Board's rules regarding the completeness of applications are synonymous with the required findings in R.C. 4906.10(A); and (2) that the Board may not permit its staff to continue to collect information and monitor progress as the Project is constructed. **Both are incorrect**. The only relevant analysis here is whether the Board was unreasonable in determining the R.C. 4906.10(A)

factors when it considered the complete record. In conducting that analysis, the only possible conclusion is that **the record evidence more than supports the Board's determination** and that the Board's Orders must be affirmed.

A. Standard of Review

An order of the Power Siting Board "shall be reversed, vacated, or modified by this court only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable." *In re Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, ¶ 26.[2] **An appellant has the burden of demonstrating** that a challenged "finding and order are manifestly against the weight of the evidence, and are so clearly unsupported by it as to show misapprehension or mistake, or wilful disregard of duty." *Elyria Foundry Co. v. PUC*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 13; *Delphos v. Pub. Util. Com.*, 137 Ohio St. 422, 424, 30 N.E.2d 688 (1940).

This Court has made clear that its role is not "to reweigh the evidence and substitute our judgment for that of the commission." *Elyria Foundry Co*, 2007-Ohio-4164, ¶ 39 (citing *Payphone Assn.*, 109 Ohio St.3d 453, 2006 Ohio 2988, 849 N.E.2d 4, ¶ 16). Thus, even a finding that there is conflicting evidence on an issue is not sufficient to find an order is unreasonable or unlawful. *New York C. R. Co. v. Pub. Util. Com.*, 160 Ohio St. 220, 221, 115 N.E.2d 163 (1953).

Finally, this Court relies on the expertise of a state agency in interpreting a law when "highly specialized issues" are involved and "where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly." *Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 110, 12 O.O.3d 115, 388 N.E.2d 1370 (1979).

[2] This Court reviews orders of the Power Siting Board under the same standard that it reviews orders of the Public Utilities Commission of Ohio. *See* R.C. 4906.12 (providing that Sections 4903.02 to 4903.16, which includes R.C. 4906.13, apply to Power Siting Board proceedings).

B. CCPC's arguments generally focus on irrelevant or well-settled issues.

1. CCPC's focus on non-mandatory rules that govern when an application is deemed complete is misplaced.

The Board answered the appropriate question in its Order: Whether, based on a review of the entire record (which consists of more than just the application), Angelina's application met the requirements of R.C. 4906.10(A). The Board correctly determined that it did when issuing the Certificate to Angelina.

CCPC attempts to shift this Court's focus to whether Angelina's application contained certain pieces of information in the manner that CCPC believes is required in Ohio Adm. Code 4906-4-06, -07, and -08. While CCPC's interpretation of the rules and the application is flawed,[3] the argument is ultimately a red herring. The identified rules are simply in place to help the Board determine if the application is complete and whether the Board has enough information to proceed to the fact-gathering and investigation phase of the process. *See* Ohio Adm. Code 4906-3-06(A) (requiring review, within 60 days of receipt, of an application "to determine compliance with Chapters 4906-1 to 4906-7" and then either "accept the [application] as complete" or "reject the [application] as incomplete.").

- **CCPC waived its right to object to the completeness of the Application.**

The time for CCPC to raise challenges to any alleged technical non-compliances with the application completeness rules **has long passed**. Angelina's application was determined to be complete on February 1, 2019, **without objection from Appellants or any other party**. (ICN 21, Feb. 1, 2019 Correspondence.) The ALJ reaffirmed that finding and determined that Angelina's "accepted, complete application" was deemed filed as of February 15, 2019, **without**

[3] For example, CCPC completely ignores the fact that the Board's rules are not mandatory and may be waived by the Board. *See* Ohio Adm. Code 4906-4-01(B).

objection from Appellants or any other party. (ICN 24, Feb. 14, 2019 Entry.) The application was then admitted into the record as evidence, **without objection from Appellants or any other party**. (TR at 136.) Any argument by Appellants regarding the application's technical completeness has been waived.

The Board correctly **considered and rejected this misdirection** in its Order, focusing on the entirety of the record and the statutory factors. (*See, e.g.,* ICN 140, June 24, 2021 Opinion, Order and Certificate ¶ 362 ("[T]he Board notes that the determination of completeness was issued on February 1, 2019, and, until now, has not been directly challenged.") This Court should do the same and find that the Board was not unreasonable in reviewing the record—including the Staff Report, the stipulation, the hearing transcripts and evidence—and determining that the Project met the statutory requirements.

2. CCPC's focus on Angelina's post-certificate submissions to Board Staff is likewise misplaced.

CCPC's assignments of error are also infused with the concept that the Board may not find that an application complies with the statute when the Board sets conditions requiring a certificate holder to make post-certificate submissions or where every single aspect of the project is not set in stone. This premise is flawed and contrary to this Court's precedent.

a. The Board is permitted to set conditions requiring Angelina to make post-certificate submissions to Board Staff for compliance review purposes.

As Board Staff noted below, post-Certificate submittals are regularly required with similar projects and are consistent with case law. (*Id.* at ¶ 358–364.) Here, contrary to CCPC's assertion that the post-Certificate submissions from Angelina were additional studies to fill alleged gaps in the evidence, the submissions are **merely the plans that relate to the construction and operation of the Project**. These plans are, and will continue to be, submitted to Board Staff, who then

confirm that the plans comply with the imposed Certificate conditions. The Board considered CCPC's argument and determined that the post-certification submissions and the Board Staff's ongoing role is appropriate. (*Id.* at ¶ 364–366, 368.) The Board explained in its Order that it was requiring "ongoing monitoring" "in the form of pre-construction conferences, the submission of final plans, and permitting requirements" to ensure that Angelina complies with the Certificate conditions. (*Id.* at ¶ 361.)

The Board correctly recognized that the Supreme Court of Ohio affirmed this practice in *Buckeye Wind*. (*Id.* at ¶¶ 359–360, 364 (citing *Buckeye Wind* for holding that "the Board is statutorily authorized to allow Staff to monitor compliance with the conditions enumerated in this decision . . . Staff's ongoing duties are a necessary component in a dynamic process."). In *Buckeye Wind*, facing a similar challenge, the Supreme Court held that "the board did not improperly delegate its responsibility to grant or deny a provisional certificate when it allowed for further fleshing out of certain conditions of the certificate." *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St. 3d 449, 2012-Ohio-878, ¶ 18.

This process has already been approved by this Court. The post-Certificate plans here are both similar to, and less extensive, than those this Court approved in *Buckeye Wind*. *See Buckeye Wind*, 2012-Ohio-878 at ¶ 28 (citing conditions 8, 33, 40, 45, 46, and 49). The below table shows how the submittals by Angelina following the issuance of the Certificate are very similar to those upheld in *Buckeye Wind* (and in other similar applications), and **much less** than what Buckeye Wind's certificate required.

Buckeye Wind Certificate	Angelina Solar I, LLC Certificate
Final equipment delivery route and transportation routing plan (Condition 8)	Transportation management plan (Condition 26)
Final engineering drawings (Condition 8) and final electric collection line plan (Condition 8)	Final engineering drawings (Condition 3)
Tree clearing plan (Condition 8)	Vegetation management plan (Condition 18)
Final access plan (Condition 8)	Construction access plan (Condition 22)
Complaint resolution process (Condition 31)	Final complaint resolution process (Condition 13)
Submit decommissioning methods including surface water drainage control and backfilling, soil stabilization plan (Condition 65)	Submit decommissioning plan (Condition 29)
	Landscape and lighting plan (Condition 11)
	Public information program (Condition 12)
Stream crossing plan (Condition 8)	
Frac-out contingency plan (Condition 8)	
Geotechnical report and final foundation design (Condition 8)	
Fire protection and emergency plan (Condition 8)	
Construction SWPPP and SPCC procedures (Condition 9c)	
Post-construction avian and bat mortality survey plan (Condition 15)	
Prepare Phase I cultural resource survey program (Condition 20)	
Conduct Architectural survey of project area (Condition 21)	
Submit blade shear maximum distance potential and formula (Condition 33)	
Conduct Fresnel-Zone analysis for turbine (Condition 40)	

Considering the above table and this Court's decision in *Buckeye Wind*, it is entirely proper for the Board's Staff to review those plans to ensure the Project is in compliance with the conditions in the Certificate. The Board **properly followed precedent** in this proceeding.

b. The post-certificate submission of final engineering drawings was not improper because the Board had sufficient information about the project's layout upon which to base its decision.

To the extent that CCPC also implies that the exact models and exact engineered layout were not finalized at the time of the Board's Order, such complaints are also misplaced. The preliminary site plan that Angelina submitted was based on "preliminary engineering using representative models of components" and "depicts the 'maximum extent' of the Project relative to the public and the environment." (ICN 125, Herling Second Supplemental Testimony p. 4.) Angelina's project manager, Mr. Herling, testified that the plan "details the layout of the Project, including the anticipated location of the panels, roads, entrances, inverters and setbacks." (*Id.*) He noted that the preliminary site plan "establishes the final design envelope for the Project across all dimensions and describes all of the major types of components to be constructed within that envelope, including the fence." (*Id.* at pp. 4–5.) That information "clearly defined the maximum impacts of the Project" (*id.* at p. 6), and the Board appropriately relied upon that information.

The Board also appropriately conditioned the Project on submitting the final layout post-certificate issuance (Condition 3). (ICN 140, June 24, 2021 Opinion, Order and Certificate ¶ 336.) Mr. Herling testified, "[t]he technology of [] key components [for solar projects], especially the solar panels (along with pricing), however, is **continually evolving** with new models being issued or improved upon frequently." (ICN 125, Herling Second Supplemental Testimony p. 5.) Because the panels, racking, and inverters—which are rapidly evolving—drive the final engineering and layout of a solar project, "it is not practical to incur the significant cost and time to prepare final engineering and construction plans prior to or during the Board's review process for a proposed project." (*Id.*)

In Mr. Herling's experience with solar projects in Ohio, given the millions of dollars that a project, like Angelina's, will cost for final designs and corresponding deposits, the investment

required for such projects occurs only once certain key authorizations for a facility has already been obtained"—i.e., the certificate is issued by the Board. (*Id.* at pp. 5–6.) If a solar project was required to submit final plans at the onset of the application process, it would be **caught in a never-ending cycle of redesigning and seeking amendments**. (*Id.* at p. 6.) As new technology emerged, an applicant would be required to submit an amendment to the Board, which in turn would open the project up to constant challenges and appeals before it could ever get to construction and operation. By the time that an amendment was granted and any appeal resolved, new technology would inevitably require additional amendments. A solar project would never be able to catch up with or afford the current state of solar technology, causing endless delay, increasing costs, and, most importantly, driving renewable energy investment away from the State. (*Id.*)

To be sure, this does not mean that there are no constraints on the final layout. Indeed, the Board has set conditions and clear parameters for where the panels, inverters, and other equipment cannot go—namely, they cannot be placed too close to the property line or residences of neighboring owners based on required setback requirements. To ensure compliance, after final engineering, Angelina is required to provide final plans reflecting the setbacks to Board Staff, who will review, monitor and ensure compliance with all conditions. (ICN 117, Amended Joint Stipulation p. 6.) And if Angelina seeks to materially alter the Certificate—e.g., request less setbacks—it must seek an amendment to the Certificate from the Board. *See, e.g.*, *In re Application of Black Fork Wind Energy, L.L.C.*, 156 Ohio St. 3d 181, 2018-Ohio-5206, 124 N.E.3d 787, ¶ 20 (". . . controlling statutes require the filing of an *application* to amend a certificate . . ." (emphasis in original)).

In sum, the Board had sufficient information about the facility layout to issue the Certificate and requiring the submission of subsequent plans to ensure compliance with the conditions of the Certificate as the construction of the facility proceeds is common, appropriate, and complies with this Court's precedent.

C. Pursuant to R.C. 4906.10(A), the Board reasonably and lawfully determined the nature of the Project's probable environmental impact and that the facility represents the minimum adverse environmental impact based on the entirety of the record.

The Board concluded that the "record evidence in this matter provides sufficient factual data to enable the Board to make an informed decision" and that, based on the record, Angelina's application should be approved and a certificate should be issued, pursuant to R.C. Chapter 4906. (ICN 140, June 24, 2021 Opinion, Order and Certificate ¶ 389.) It spent pages going through the evidence to determine the Project's probably environmental impact. (*Id.* at ¶¶ 123–242.) It also reasonably and lawfully concluded "that **the Facility represents the minimum adverse environmental impact**, considering the state of available technology and the nature and economic of the various alternatives, and other pertinent considerations in compliance with R.C. 4906.10(A)(3)." (*Id.* at ¶ 242 (emphasis added).)

Each of CCPC's propositions of law **seek to relitigate evidentiary and factual questions** that fall within the province of the Board's decision-making authority. Indeed, CCPC has already raised these same evidentiary disputes with the Board, and each was "painstakingly" considered and properly rejected twice. CCPC now seeks to use this appeal to have a **third bite at the apple**. However, reweighing evidentiary matters is not the role of this Court on appeal. The Board, in its discretion and utilizing its expertise, weighed the evidence, made credibility determinations, and issued a decision that was based entirely on the record evidence. This decision, and the weight and credibility of the evidence supporting it, should be afforded deference.

Moreover, even if the Court deemed it necessary to dig into the evidentiary record, the Board came to the correct decision. The record supports the Board's determinations as to the nature of the Project's probable environmental impact and that the facility represents the minimum adverse environmental impact. Contrary to CCPC's cursory assertions, the record contained sufficient evidence as to operational noise, visual impact, impact on wildlife and plants, drainage, pollution, and adequate setbacks for the Project.

1. Response to Proposition of Law I: The Power Siting Board acted lawfully and reasonably when it considered the entirety of the record evidence and determined that "there will be no significant change in what is audible at the houses and that the operational sound emissions from the Project should not have any negative impact in the surrounding community, day or night."

In addressing operational noise from the Project, the Board found "that there will **be no significant change** in what is audible at nearby residences and that the operational sound emissions from the Facility **should not have any negative impact** in the surrounding community." (*Id.* at ¶ 227 (emphasis added).) In making this determination, the Board relied on Angelina's expert, Mr. Hessler, the only acoustical expert proffered in this case, who testified that, based on his expertise and analysis, it was not expected that "the operational sound emissions from the Project in general to have any negative impact on the surrounding community." (ICN 50, Hessler Direct Testimony p. 5.)

CCPC did not present any testimony regarding operational noise. Instead, CCPC argues that Angelina did not present sufficient evidence as to the operational noise of the inverters that will be used for the Project. In so arguing, CCPC **mischaracterizes the record and cherry picks** without context certain statements made by Mr. Hessler. A review of Mr. Hessler's actual testimony, however, provides more than sufficient evidence to support the Board's determination that there will be no negative impact from operational noise from the inverters. Moreover,

Angelina agreed in the Amended Joint Stipulation to establish larger setbacks between central inverters and those residence, which further addresses any unsubstantiated noise concerns. (ICN 117, Amended Joint Stipulation pp. 6–7.)

a. The Board properly relied on the testimony of David Hessler, the only expert who presented evidence on the subject of noise.

The Board found that the "expert testimony from Mr. Hessler was persuasive." (ICN 140, June 24, 2021 Opinion, Order and Certificate ¶ 227.) Mr. Hessler testified that in his thirty years of experience with renewable energy, he has never heard of any complaints concerning sound from solar projects. (TR at 265.) Indeed, he stated that any noise from the substation or the inverters is perceptible only at short distances—far less than what the Project's setbacks are. (ICN 50, Hessler Direct Testimony p. 4.) As such, he opined that, at the nearest non-participating residence to the substation or the central inverters, any noise is unlikely to be problematic. (*Id.*)

Mr. Hessler's conclusion was based on modeling that **utilized a very conservative** measure for the existing sound baseline. Mr. Hessler compared projected noise emissions from the transformer with the daytime L90 (near minimum) sound level in the area, which he determined via field survey to be 31 dBA. (ICN 8, Noise Impact Assessment pp. 2, 6.) The L90 baseline of 31 dBA was determined by averaging "the quietest (not necessarily consecutive) 1 minute of each 10 minute interval making it a conservative measure of the near-minimum background sound level." (*Id.* at p. 4.) Thus, the L90 level is necessarily lower than the overall average background sound level in the area—a measure known as the Leq level. (*Id.* at p. 5.) Considering both these measures, Mr. Hessler explained that the L90 measure "constitutes a very conservative, or 'worst case' design basis, and the Leq, or average level . . . represents a more 'typical' or more commonly observed level." (ICN 106, Hessler Rebuttal Testimony p. 5.)

Using this average as a baseline, Mr. Hessler measured the sound from inverters at various locations throughout the Project Area, using the preliminary Project layout that complies with the 500-foot setback requirement in the Amended Joint Stipulation. He then modeled the sound contours of the solar panel inverters using this layout, coupled with a recently obtained noise data report provided by the manufacturer of a common inverter model, the SMA SC4600-UP. (*Id.* at p. 2.) Mr. Hessler's model established that "the sound contours from the Project during normal operation on a sunny day projected out to an extremely quiet sound level of 35 dBA," and that "all non-participating residences are either close to or, in the vast majority of cases, outside the 35 dBA contour."[4] (*Id.* at p. 3.) He testified that this level of 35 dBA "**is so low in absolute terms that it is generally considered inconsequential even in rural environments** where the background sound level is essentially negligible." (*Id.* (emphasis added).) Based on Mr. Hessler and Mr. Herling's testimony, the Board properly concluded that "the operational sound emissions from the Project **should not have any negative impact in the surrounding community**." (ICN 140, June 24, 2021 Opinion, Order and Certificate ¶ 237.)

b. CCPC's attempts to undermine Mr. Hessler's testimony are unpersuasive.

Having refused to provide any actual evidence or their own expert on the issue of operational noise, CCPC unsuccessfully attempts to discredit Mr. Hessler's testimony.

i. Mr. Hessler's testimony consistently supported his conclusions.

[4] Notably, this decibel range is well below noise levels previously found to be acceptable by the Board for other power generation projects. *See, e.g.*, *In re Champaign Wind*, Case No. 12-0160-EL-BGN, Opinion, Order and Certificate, May 28, 2013 at p. 88 (allowing a sound level of 5 dBA over Leq of 44 dBA); *In re Blue Creek*, Case No. 11-3644-EL-BGA, Order on Certificate Amendment, November 28, 2011 at p. 5 (allowing a sound level of 5 dBA over Leq of 43.6 dBA).

First, CCPC argues that Mr. Hessler's testimony at the supplemental hearing was at odds with his prior testimony in this matter. However, Mr. Hessler's testimony, both at the initial hearing and at the supplemental hearing, **has been entirely consistent** with the conclusion in his written report that "inverter sound is rarely audible at the perimeter fence of typical solar fields so an adverse noise impact at the nearest residences beyond the project boundary appears to be highly unlikely", that "options exist to mitigate inverter sound emissions should any problem arise" and that "[i]n general, the potential noise impacts from all aspects of the project are expected to [be] minimal." (ICN 8, Noise Impact Assessment p. 15–16.)

Indeed, Mr. Hessler's testimony at the supplemental hearing confirmed these conclusions. In his supplemental testimony, Mr. Hessler utilized a noise data report from the manufacturer of a common inverter model used in solar fields similar to the Project. (ICN 129, Hessler Supplemental Testimony p. 2.) With this noise data, Mr. Hessler found that "the sound contours from the Project during normal operation on a sunny day projected out to an extremely quiet sound level of 35 dBA," and that the noise level at all non-participating residences was either close to or, in the vast majority of cases, below that level. (*Id.* at pp. 2–3.) And the sound levels at the property lines of the non-participating residences is equally quiet. Based on Mr. Hessler's model, the highest sound level at non-participating residence property line was 40 dBA—"the minimum absolute threshold any project would ever need to be designed to because that sound level is so low that complaints are extremely rare even when there is no significant background masking noise present in the environment." (ICN 106, Hessler Rebuttal Testimony pp. 5–6 (emphasis added).)

Moreover, Mr. Hessler's testimony is supported by his earlier testimony regarding the study completed by the Massachusetts Clean Energy Center ("Massachusetts Study"). The Massachusetts Study presents noise measurements at 150 feet distance from various inverters. (*Id.*

at p. 13.). Those measurements found that even at that distance noise from any kind of inverter is not significant anymore. (*Id.*; TR at 245–56.) This conclusion was further supported by Mr. Hessler's measurements of another solar facility in New York State "where people lived across the street from the fence [of the project] and I'm not aware of any problems there." (TR at 270.) And as Mr. Hessler testified, Condition 3 of the Amended Joint Stipulation requires Angelina to "promptly retrofit any inverter as necessary to effectively mitigate any off-site noise issue identified during the operation of the facility", mitigation that he testified could be could be done in a practical manner. (ICN 129, Hessler Supplemental Testimony p. 4.)

CCPC declined to provide any actual evidence to refute Mr. Hessler's findings or to support its unsubstantiated claims that the operational noise from the Project would be an issue. Instead, the record is replete with evidence to support the Board's determination that operational noise should not have any negative effect in the surrounding community. The Board properly relied upon Mr. Hessler's testimony which consistently throughout the proceeding supported his overall conclusion that "[i]n general, the potential noise impacts from all aspects of the project are expected to be minimal." (ICN 8, Noise Impact Assessment pp. 15–16.)

ii. Because Angelina must comply with the 500-foot setback requirement, the final layout is immaterial to the noise analysis.

CCPC next argues that because the final layout may not be identical to the preliminary layout used in Mr. Hessler's modeling, the noise report is not dispositive. However, the record makes clear that wherever the inverters are ultimately placed within the Project Area, they must be positioned to comply with the increased setbacks agreed to in the Amended Joint Stipulation. As such, the **inverters cannot be placed within 500 feet from any non-participating residence**. (ICN 117, Amended Joint Stipulation p. 6.) Indeed, although this model is based on the preliminary layout, Mr. Hessler made clear that "[**w]ith an inverter setback of 500 feet . . . their**

exact location is immaterial from a noise impact perspective." (ICN 129, Hessler Supplemental Testimony p. 5 (emphasis added).) Accordingly, the Board correctly determined that "[t]he evidence in the record demonstrates that operational noise will disturb the surrounding community little, if at all, particularly with the increased setbacks provided for in Amended Stipulation Condition 3." (ICN 140, June 24, 2021 Opinion, Order and Certificate ¶ 227.)

Moreover, Condition 3 requires Angelina, following submission of the detailed engineering drawings of its final project design, to "promptly retrofit any inverter as necessary to effectively mitigate any off-site noise issue identified during operation of the facility." (ICN 95, Amended Joint Stipulation p. 6.) This Condition ensures that Angelina must take prompt action to mitigate intrusive operational noise (in the unlikely event that there is any).

iii. Angelina has agreed to, and the Board has required, to mitigation if any unexpected inverter noise issues are later identified.

CCPC further argues that Angelina has failed to propose mitigation measures in the unlikely event that operational noise became an issue. But this again ignores the full record in this case. As the Board correctly stated, "in the event that **unforeseen noise issues** should arise, Angelina has listed **measures such as acoustical hoods and damping sheets that can promptly be used to retrofit any inverter and mitigate sound emissions**." (*Id.* (emphasis added).) Indeed, Mr. Hessler noted that "if [an inverter] were to unexpectedly generate complaints, options, such as cabinet damping and ventilation silencers, would be available to retroactively mitigate noise from these devices and resolve any issue." (ICN 8, Noise Impact Assessment p. 13.) And **this suggestion is now a condition** agreed to in the Amended Joint Stipulation and adopted by the Board. (ICN 117, Amended Joint Stipulation p. 4.)

c. String inverters do not generate significant noise.

Finally, CCPC attempts to draw a material distinction between central inverters with string inverters for operation sound. In reality, this is merely a **red herring**. As Mr. Hessler testified, string inverters are **much smaller than central inverters**, are attached to solar panel racking (i.e. do not have their own footprint), and handle an "order of magnitude" less current than central inverters. (TR at 592–93, 569, 509–610.) It is undisputed that **string inverters are far more quiet than central inverters**. (*Id.* at 592; *id.* at 254 (testifying that string inverters have "no noticeable sound" at a distance of approximately 50 feet).) Put simply, string inverters are even quieter than the already nearly inaudible central inverters.

None of CCPC's arguments are new. Instead, CCPC has already raised these issues with the Board both in its briefing and in its application for rehearing. In both instances, the Board weighed the evidence, assessed the credibility of the witnesses, and rejected each assertion. This Court should likewise reject CCPC's arguments and decline its invitation to reassess the Board's weighing of the evidence. The Court should reject CCPC's first proposition of law.

2. Response to Proposition of Law II: The Power Siting Board acted lawfully and reasonably when it considered the entirety of the record evidence and determined that there are sufficient parameters and conditions in place to mitigate and minimize any potential visual impact.

CCPC claims that Angelina distorted its simulations of the Project and that Angelina failed to include measures that would minimize the Project's visual impact. **Neither assertion is accurate**. Here, the Board properly relied upon Angelina's visual resources assessment ("VRA") and the expert testimony of Mr. Robinson to conclude that **the visual impact of the Project will be minimal** and will be further limited by Condition 15 of the Amended Joint Stipulation. (ICN 140, June 24, 2021 Opinion, Order and Certificate ¶ 167.)

a. The record contains sufficient evidence that adequately and accurately describes the Project's visual impact.

As a part of its evaluation of the Project, Angelina commissioned Mr. Robinson, a landscape architect, and his firm EDR to perform a VRA. (ICN 14, VRA pp. 1–2.) That assessment showed that "**the proposed Project does not have an undue adverse effect on aesthetic resources or a significant number of viewers within the study area**." (*Id.* at p. 36 (emphasis added).) Contrary to CCPC's assertion, the viewshed analysis measurement of potential visibility was based on a panel height of fourteen feet. (*Id.* at p. 21 (noting an "assumed maximum solar panel height of 14 feet"); TR at 182.) This limited visibility—before any mitigation has even been put into place—does not constitute a "visual blight" as CCPC asserts.

CCPC did not commission any viewpoint studies. Instead, CCPC argues that the studies submitted did not use the correct heights or include required vantage points. Both arguments are wrong and without legal support.

i. The VRA accurately simulated the panel heights for the Project.

Completely ignoring the testimony of Mr. Robinson, CCPC attempts to undermine the validity of Angelina's expert analysis by conflating the precise percentages of potential visibility in the viewshed analysis (based on a fifteen-foot panel height), with the visual simulation results (which depict eight-foot tall solar panels). Yet, Mr. Robinson testified that if the visual simulations depicted a panel height of fifteen feet, his conclusions in the VRA would not change, nor would it change the outcome of the simulations. (TR at 205.) Indeed, Mr. Robinson further testified that the smaller and less visually impactful eight-foot panel height is the probable height for a project like Angelina's given current solar panel technology. (*Id.* at 182.) And Angelina's application clearly states that the high end of the panels, regardless of the racking technology used, will be "8

to 14 feet above ground surface." (ICN 3, Application pp. 7–8.) As such, the visual simulations in the VRA accurately portray the Project as described in the application.

ii. The VRA accurately simulated various vantage points.

CCPC further argues that Angelina concealed how the Project will appear to the closest neighbors based on a faulty understanding of Ohio Admin. Code 4906-4-08(D)(4)(e). Even assuming that this regulation is still relevant after the application has been deemed complete, which it is not, **the regulation simply requires the simulation to have "vantage points that cover the range of landscapes, viewer groups, and types of scenic resources found within the study area**," along with an explanation of the applicant's "selection of vantage points." This is exactly what Angelina's application provides. (*See* ICN 14, VRA p. 21 ("An analysis of the visibility of the Project was undertaken to identify those locations within the visual study area where there is potential for the major Project components to be seen from ground-level vantage points.")

Indeed, the VRA explains in detail that the visual resource professional "drove public roads and visited public vantage points within the study area to document points from which the Project would be visible, partially screened or fully screened. . . . **Photographs were taken from 34 representative viewpoints** within the study area as shown on Figure 8. . . . Viewpoints photographed during field review generally represented the most open, unobstructed available views toward the Project Area." (*Id.* at p. 25.) Accordingly, the visual simulations in the VRA are accurate and portray the requisite vantage points.

b. The record includes sufficient measures to minimize the Project's visual impact.

CCPC, focusing only on the application and **ignoring all other evidence in the record**, argues that Angelina has failed to describe the measures it will take to minimize the visual impact of the Project. Contrary to this argument, Angelina has in fact **committed to provide screening**

for all non-participating parcels containing a residence with a direct line of sight to the project area for the entire lifetime of the Project; it has provided clear and effective options that will be used to accomplish this visual mitigation; it has provided for the possibility of good neighbor agreements with non-participating participants to develop alternative arrangements; and it is **obligated to provide a final vegetation management plan to Staff** for confirmation that will need to satisfy these commitments. (ICN 117, Amended Joint Stipulation pp. 8–9.)

Angelina's application provided a detailed initial landscaping plan. This plan showed the potential mitigation areas and designs, including the potential grasses, wildflowers, shrubs, and trees that may be selected. (ICN 14, VRA pp. 40–41.) Each selection is to be based on **aesthetic and environmental suitability** for the area. (*Id.*) The application further specified certain landscaping features that would not be considered due to their inapplicability to the current rural agricultural character and topography, such as evergreen hedges, earthworks, and berms. (*Id.*) Condition 15 of the Amended Joint Stipulation furthered that commitment requiring Angelina to:

> prepare a landscape and lighting plan that addresses the aesthetic and lighting impacts of the facility where an adjacent non-participating parcel contains a residence with a direct line of sight to the project area and also include a plan describing the methods to be used for fence repair. **The plan *shall* include measures such as fencing, vegetative screening or good neighbor agreements.** Unless alternative mitigation is agreed upon with the owner of any such adjacent, non-participating parcel containing a residence with a direct line of sight to the fence of the facility, the plan shall provide for the planting of vegetative screening designed by the landscape architect to enhance the view from the residence and be in harmony with the existing vegetation and viewshed in the area. **The Application *shall* maintain vegetative screening for the life of the facility and the Applicant *shall* replace any failed plantings so that, after five years, at least 90 percent of the vegetation has survived.**

(ICN 117, Amended Joint Stipulation p. 8 (emphasis added).)

CCPC takes issue with the flexibility of this approach, seemingly arguing that Angelina must commit to a single mitigation method at the outset of the application process. Yet, it provides

no authority that the Board's approach, as approved in other cases, is not adequate. Instead, as the Board properly determined, the mitigation measures outlined in the Amended Joint Stipulation and the Order are sufficient. Angelina is obligated to screen the non-participating parcels for the entire life of the project, has provided numerous, effective options for doing so, and is required to provide a final mitigation plan that must be approved by Staff as satisfying its screening obligations. (*Id.*)

CCPC argues for extreme measures that are not appropriate for this Project. Additionally, CCPC argues that the visual mitigation measures are inadequate because they fail to completely screen neighboring properties from the solar panels and fences. Again, **CCPC provides no authority that such extreme measures are legally required**. And CCPC **declined to provide a single witness or any other evidence** to support its contention that 100% screening is desirable. To the contrary, the only evidence in the record establishes that **100% screening is not desirable**. Indeed, Mr. Robinson's expert testimony provided that the use of an opaque "green wall" is "not what we would suggest in any way; it does not fit the character of the landscape nor what we would feel would fit in with what the locals would agree with and want." (TR at 199–200).

Based on the results of the VRA and Mr. Robinson's testimony, as well as the mitigation measures required under the application, the Amended Joint Stipulation, and the Board's Order, the Board reasonably determined that the Project will have a minimal visual impact. The Court therefore should reject CCPC's second proposition of law.

3. Response to Proposition of Law III: The Power Siting Board acted lawfully and reasonably when it considered the entirety of the record evidence and determined that the Project would not significantly impact plants, wildlife, or wildlife habitat.

The Board concluded "that Angelina has made an adequate demonstration of the nature of the probable environmental impact relative to threatened and endangered species" in accordance

with R.C. 4906.10(A)(2). (ICN 140, June 24, 2021 Opinion, Order and Certificate ¶ 187.) In making this determination, the Board relied heavily on the Ecological Assessment and field studies conducted by Cardno, as well as the expert testimony of Mr. Rupprecht and the Staff recommendations. (*Id.* at ¶¶ 187–88.)

Angelina submitted detailed field studies. Angelina The Ecological Assessment conducted by Cardno, and properly relied on by the Board, includes information regarding rare, threatened, and endangered species, as well as a discussion of other species: "Common game species in southwestern Ohio include cottontail rabbit, northern bobwhite (quail), Canadian geese, gray and fox squirrels, mallard and other ducks, mourning doves, ringnecked pheasants, ruffed grouse, white-tailed deer, and wild turkey." (ICN 10, Ecological Assessment p. 4-5.) Cardno found that, other than the agricultural crops and livestock in the area, **no commercially valuable species are anticipated** to be present in the Project Area. (*Id.*)

The field studies conducted by Cardno included "[h]abitat observations and sensitive species assessment." (*Id.* at p. 1-1.) The Ecological Assessment specifically notes that "[w]ildlife observations during the field surveys were limited to common species in agricultural areas, including white tailed deer (Odocoileus virginianus) and gray squirrels (Sciurus carolinensis)." (*Id.* at p. 6-2.) The report goes on to state that: "**Visual reconnaissance surveys** . . . **did not observe any [rare, threatened, or endangered, or "RTE"] species**. The modification of the majority of available habitat has likely degraded the quality and limited potential RTE habitat. . . . During the field surveys, Cardno staff observed minimal wildlife use in the Project Area and observed no RTE species due to the Project Area being relatively low quality and highly disturbed." (*Id.* (emphasis added).) Despite the lack of RTE species observations, Mr. Rupprecht testified that "**Angelina Solar has prioritized avoidance measures for sensitive habitats** [and]

significant impacts to these habitats are not anticipated." (ICN 55, Rupprecht Direct Testimony p. 4 (emphasis added).)

Moreover, Mr. Rupprecht testified that there is abundant availability of similar agricultural fields within the Project Area that could be used as similar habitat. (*Id.* at pp. 2, 7; ICN 10, Ecological Assessment pp. 7-5, 7-6.) He further stated that the Project Area and a quarter-mile buffer around it **are not known to provide significant habitat for sensitive bird species**, and that given this fact, it is likely many birds and wildlife will opt for higher quality habitats in other areas for roosting, foraging, and breeding. (ICN 55, Rupprecht Direct Testimony p. 6.)

Further, Mr. Rupprecht testified that according to the Habitat Utilization Factors, **the deer population in the surrounding area would not fluctuate** by more than five percent (0.01 deer per acre) as a result of the Project. (*Id.* at pp. 2, 7.) And although the deer population was used as the basis for the estimate, the same percent would likely be seen with other wildlife populations in the Project Area. (*Id.*)

CCPC distorts the record evidence and legal requirements, but submitted no experts on this issue. Despite the extensive evidence in the record to the contrary, CCPC argues that the Board erred in its determination because, as it claims, Angelina failed to appropriately conduct literature and field surveys of plant and wildlife species in the Project Area to support its application. This is incorrect. As an initial matter, CCPC's arguments **mischaracterize the non-mandatory rules** governing the completeness of an application (Ohio Admin. Code 4906-4-08(B)) and conflate them with the statutory requirements for the issuance of a certificate (R.C. 4906.10). As set forth above, CCPC **declined to timely object to the completeness** of Angelina's application, so it has **waived** the opportunity to do so now.

Additionally, CCPC continues to **ignore and misstate the record evidence**. Contrary to CCPC's assertion, Angelina conducted both a literature and field surveys of animal species in the Project Area in accordance with the Board's rules. As outlined above, Angelina engaged Cardno to conduct an **Ecological Assessment**, as well as **multiple field surveys of plant and animal species in the Project Area**. (ICN 10, Ecological Assessment pp. 4-5 to 4-6.) Prior to this engagement, Angelina consulted with the Ohio EPA, Ohio Department of Health, the Ohio Development Services Agency, ODNR, and the Ohio Department of Agriculture in preparing its wildlife plans submitted in support of its application, and Board Staff likewise coordinated with ODOT, OHPO, and USFWS on this subject—which the Board found particularly convincing. (ICN 140, June 24, 2021 Opinion, Order and Certificate ¶ 187.) Indeed, Board Staff, in their vast expertise, agreed with Angelina and **opined that Angelina reasonably conducted the survey of species in the Project Area**, specifically those designated as endangered or threatened.

Further, as the Board noted, the **mitigation measures** in the Amended Joint Stipulation **adequately address any actual concerns from the CCPC**. Specifically, pursuant to Condition 19, to avoid any adverse impact to the Indiana Bat and Northern Long-Eared Bats, Angelina must adhere to seasonal cutting dates unless coordination with the ODNR and USFWS allows a different course of action. (ICN 117, Amended Joint Stipulation p. 10.) Condition 21 also provides certain safeguards to protect RTE plant and animal species that may be encountered during construction. (*Id.*).

The Board expressly deemed Mr. Rupprecht's "qualified, expert testimony" and the Cardno Ecological Assessment credible and persuasive. (ICN 140, June 24, 2021 Opinion, Order and Certificate ¶ 188.) Based on the testimony of Mr. Rupprecht, the Cardno Ecological Assessment, and the Staff Report, as well as the conditions within the Amended Joint Stipulation,

the Board properly determined that the Project's impact on RTE species and other wildlife will be minimal. (*Id.*) The Court therefore should reject CCPC's third proposition of law.

4. Response to Proposition of Law IV: The Power Siting Board acted lawfully and reasonably when it considered the entirety of the record evidence and determined that the conditions in the Amended Joint Stipulation ensure that drainage impact will be mitigated.

CCPC next argues that Angelina failed to provide certain quantitative data related to runoff and drainage with its application. While CCPC's argument again misconstrues the rules regarding the application's completeness, an argument waived when CCPC failed to object to the determination that the application was complete, the Board also disagreed with the substance of CCPC's argument. In sum, the Board, relying on the testimony of Mr. Waterhouse and the Staff report, concluded that the Project should not have an impact on drainage or cause an increase in runoff. (ICN 140, June 24, 2021 Opinion, Order and Certificate ¶ 186.) The Board further found that any concerns related to drainage were properly addressed by the conditions set forth in the Amended Joint Stipulation. (*Id.*) The record supports this determination.

Mr. Waterhouse—a licensed professional engineer with extensive experience evaluating drainage, runoff, and drain tile issues at more than fifty solar projects—concluded that: "The Project **should not have an impact on drainage, nor should it result in an increase in runoff.**" (ICN 54, Waterhouse Direct Testimony p. 5 (emphasis added).) Indeed, far from having a negative impact, Mr. Waterhouse's expert opinion is that "when compared to a fallow field, I would expect the Project to have **superior drainage and runoff characteristics**, due to the year-round vegetation maintained in and around the Project Area" and "that a typical project of this nature will ultimately **see a reduction of runoff, not an increase**, based on that change in land use." (*Id.* at p. 4 (emphasis added).) Mr. Marquis likewise testified that the proposed changes to land use for the Project "would not result in an increase in runoff." (TR at 525.) Mr. Marquis further

testified that runoff from the solar panels can be managed through management of the ground surfaces beneath the panels, which is typically how it is handled on large-scale utility projects. (*Id.* at 634).

Board Staff agreed, finding that **the Project will not adversely impact public or private water supplies** and that there are no geological features that would restrict construction of the facility. (ICN 36, Staff Report pp. 16–17.) Staff determined that solar facilities are generally constructed and generate electricity without impacts to surface or groundwater and that such construction would not generate much wastewater discharges, if at all, at the Project Area. (*Id.* at p. 16.)

In the face of this extensive record, CCPC attempts to poke holes in the evidence where there are none. In essence, CCPC's arguments boil down to second guessing the Board's weighing of the evidence and its credibility determinations as to Angelina's witness, Mr. Waterhouse. Unhappy with the Board's determination, **CCPC is merely asking this Court to reweigh the evidence** and substitute its own judgment for that of the Board's—an ask that is beyond the role of this Court. *See Elyria Foundry*, 2007-Ohio-4164, at ¶ 39.

CCPC first argues that ground compaction during the construction of the Project may increase runoff and cause drainage issues. However, CCPC has failed to provide any evidence of these alleged concerns. Instead, as set forth above, the record is replete with evidence that the Project, including construction operations, will not negatively impact drainage and will reduce runoff.

CCPC further argues that Angelina was required by Ohio Administrative Code 4906-4-07(C) to perform a hydrology study as part of its application. Even if this regulation involving what an application requires to be deemed complete were relevant—which it is not—CCPC's

assertion **broadly overstates what is required under the regulation**. Rather, the regulation merely requires that information regarding "compliance with water quality regulations" be provided—which Angelina has provided. *See* O.A.C. 4906-4-07(C)(2) and (3). This section of the regulations is specifically concerned with water quality regulations, not the quantification of water that will flow from a project area. *See id.*

CCPC ignores the Certificate's conditions. CCPC argues that Angelina failed to describe its plans to mitigate drainage and runoff issues. This is again an inaccurate statement of the record. As the Board indicated, "[i]ntegral to the Board's decision is the requirement that Angelina comply with Amended [Joint] Stipulation Conditions 16 and 30." (ICN 140, June 24, 2021 Opinion, Order and Certificate ¶ 186.) Condition 16 **requires that the Project follow established Ohio EPA regulatory programs** for the management of stormwater and that **Angelina implement a SWPPP** as part of its Ohio EPA construction stormwater permit. (ICN 117, Amended Joint Stipulation p. 9.) Condition 30 **requires that Angelina obtain a Construction General Permit from the Ohio EPA** and determine if whether post-construction stormwater best practices are required if an acre or more of ground is disturbed, that Angelina submit documentation of its supporting calculations to the Preble County Office of Land Use Management and to Preble Soil and Water, and that **Angelina provide confirmation that it has incorporated guidance** from Ohio EPA's "Guidance on Post-Construction Storm Water Controls" to those two local agencies. (*Id.*) Both Conditions detail the mitigation measures that are in place and must be followed once the certification is issued. (*Id.*)

Because the record evidence in its entirety supports the Board's determination as to the Project's impact on drainage and runoff, the Court should reject CCPC's fourth proposition of law and affirm the Board's Orders.

5. Response to Proposition of Law V: The Power Siting Board acted lawfully and reasonably when it considered the entirety of the record evidence and determined that the Project will comply with Ohio law regarding water pollution control.

In a similar vein to its fourth proposition of law, CCPC argues that Angelina failed to provide certain water quality data or to delineate mitigation measures in its application. This argument relies entirely on Ohio Admin. Code 4906-4-07(C), which as outlined above, is irrelevant to whether the Project complies with the statutory requirements. CCPC is again conflating the non-mandatory rules governing the completeness of an application—an issue that CCPC has waived—with the statutory requirements for the issuance of a certificate—the actual issue before this Court.

Even still, looking to the entire record, there is no evidence that the Project actually poses any danger to stormwater, groundwater, or soil erosion. To the contrary, there is significant evidence to support the Board's determination that the Project's impacts on water quality will be minimal, if any, and that Angelina has sufficient mitigation measures in place. Indeed, the Board found that "the Project will comply with Ohio law regarding water pollution control." (ICN 140, June 24, 2021 Opinion, Order and Certificate ¶ 263.) In coming to this conclusion, the Board primarily relied on Mr. Rupprecht's testimony and the Staff report. (*Id.* at ¶¶ 252–63.)

The record supports this determination. **The Project requires only limited construction activities that will involve no discharge to water bodies and receiving streams**. (ICN 3, Application p. 46.) There will be no changes in flow patterns and erosion. (*Id.*) And the Project has near-zero water consumption requirements. (*Id.*) Mr. Rupprecht testified that the Project will have no impacts on the 1.19 acres of wetlands or the six other waterbodies located within the Project Area. (ICN 55, Rupprecht Direct Testimony pp. 5–6.) Indeed, Board Staff confirmed that the Project will not adversely impact public or private water supplies and will not affect wetlands,

ponds, or lakes. (ICN 36, Staff Report pp. 17, 31.) Staff highlighted that the Preble Soil & Water Conservation District, which is responsible for overseeing water quality and soil protection in the area and that it, along with the County Commissioners, Dixon Trustees, the Planning Commission, and the County Engineer were each heavily involved in the negotiations underlying, and indeed are signatories of, the Amended Joint Stipulation. (*Id.* at p. 11.)

Furthermore, as outlined above, **Mr. Waterhouse and Mr. Marquis provided expert testimony that the Project would not have an adverse impact on stormwater, drainage, or runoff**. To the contrary, the Project is expected to have superior drainage and runoff and will likely ***reduce*** runoff given the vegetation that Angelina commits to plant and maintain beneath the solar panels. (ICN 54, Waterhouse Direct Testimony p. 5.)

Moreover, there is **no risk of either soil or water contamination** from the panels to be used for the Project. The panels are composed primarily of **readily recyclable materials** such as glass, aluminum, and copper. Suppliers of solar panels that will be used for the Project have demonstrated that their products pass U.S. EPA's "Toxicity Characteristic Leaching Procedure." (ICN 3, Application p. 39; ICN 51, Herling Direct Testimony p. 17.) As Mr. Herling testified, these panels will be required to pass the test and testified that panels that are sold in the United States would be performing that test as a benchmark. (ICN 51, Herling Direct Testimony p. 16; TR at 100.) Furthermore, Mr. Herling explained that it is "exceedingly unlikely" that solar panels will "release any material to the environment necessitating soil or water remediation," even if damaged by breakage or fire. (ICN 51, Herling Direct Testimony p. 16.)

Finally, CCPC's suggestion that the Project does not include mitigation measures completely ignores Condition 30 of the Amended Joint Stipulation—to which intervening party and expert in relative water quality and soil protection, the Preble County Soil and Water

Conservation District, is a signatory. Under Condition 30, which the Board found was "[i]ntegral" to its decision, Angelina will perform pre- and post-construction stormwater calculations. (ICN 117, Amended Joint Stipulation p. 12.) And, if an acre or more of ground is disturbed, Angelina will obtain a Construction General Permit from the Ohio EPA and determine if whether post-construction stormwater best practices are required. (*Id.*) Additionally, Angelina has committed to other mitigation measures to address any potential effect that the Project may have on water quality including:

- **Obtaining all necessary permits for the construction and operation of the Project**, including Ohio National Pollutant Discharge Elimination System permits for general stormwater and construction discharge and a SWPPP for erosion control and the management of stormwater—a requirement of the Amended Joint Stipulation (ICN 36, Staff Report p. 26–27; ICN 3, Application pp. 45–48; ICN 117, Amended Joint Stipulation p. 9);

- **Obtaining the U.S. Army Corps of Engineers Section 404 or nationwide permit** for stream crossing and wetland impact (ICN 36, Staff Report p. 17); and

- **Plant vegetation** beneath the solar panels for the management of stormwater (ICN 54, Waterhouse Direct Testimony p. 5).

Based on the entirety of the record evidence, the Board properly found that the Project will comply with Ohio law regarding water pollution control. The Court therefore should reject CCPC's fifth proposition of law and affirm the Board's Orders.

6. Response to Proposition of Law VI: The Power Siting Board acted lawfully and reasonably when it considered the entirety of the record evidence and determined that the setbacks required by Angelina's application and Amended Joint Stipulation are sufficient and reasonable.

CCPC claims, without any evidence, that the setbacks provided between the Project fence and neighbors' property lines of 25 feet and 150 feet between solar equipment and non-participating residences are "egregious" and "unsettling." (CCPC Merit Br. pp. 46–47.) **This is the same argument that CCPC raised before the Board** both in its post-hearing brief and in its

application for rehearing. The Board properly weighed the evidence in the record and rejected this unsubstantiated contention.

As the Board correctly noted, although the Ohio Revised Code establishes certain mandatory minimum setbacks for wind facilities, **it does not do so for solar facilities**. In solar cases, "[w]hether the setbacks were sufficient to protect the public . . . [is] an evidentiary issue, and [this Court has] 'consistently refused to substitute [its] judgment for that of the [Board] on evidentiary matters." *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St. 3d 489, 2016-Ohio-1513 at ¶30.

In its thorough analysis of R.C. 4906.10(A)(3), **the Board explicitly considered and rejected CCPC's contentions that the provided-for setbacks do not represent the minimum adverse environmental impact.** (ICN 140, June 24, 2021 Opinion, Order and Certificate ¶¶ 239–42.) Weighing the entirety of the record evidence, the Board determined that "while CCPC argues the setbacks remain egregiously short, the evidence before us supports a finding that they will result in the minimum adverse impact on the community" and that "[i]t is evident that Angelina has invested effort into ensuring that the vegetative screening will be as effective as possible to make the impact of siting the facility in a rural area minimal." (*Id.* at ¶ 240). It is the Board's role to balance competing societal interests, including "not in my backyard" arguments from landowners seeking to kill the entire project. The Board performed that role here and the Court should not usurp the role of the Board.

Here, the record evidence supports this determination. Specifically, Mr. Robinson testified that the "[a]dditional setback distance allows more space install these modules and **gives the vegetation more room to grow** and become an established component of the landscape thereby improving screening." (ICN 95, Robinson Supplemental Direct Testimony p. 2 (emphasis added);

ICN 117, Amended Joint Stipulation p. 6.) Accordingly, the record supports the fact that the above-mentioned landscaping and vegetation, which will mitigate the visual impact of the Project, can easily grow and provide a barrier within the 25-foot or 150-foot distances.

Notably, the setbacks in the Amended Joint Stipulation are more expansive than proposed in Angelina's initial application to the Board. (*See* ICN 3, Application pp. 54–55; ICN 117, Amended Joint Stipulation p. 6.) Where the application provided for a 10-foot setback from the perimeter fence and non-participant's property line, **the Amended Joint Stipulation increased that to 25 feet**. (*Id.*) Where the application called for a 100-foot setback between above-ground equipment and a non-participating residence, **the Amended Joint Stipulation increased that distance to 150 feet**. (*Id.*) Mr. Robinson testified that these increases in the setbacks are in the public interest: "Condition 3 benefits the public interest by improving the Applicant's ability to effectively screen the Project and integrate it into the landscape, thereby lowering the visual impact, as well as improving motorist visibility." (ICN 95, Robinson Supplemental Direct Testimony p. 3.)

CCPC further argues that the 500-foot inverter setback, while "better than nothing," is also insufficient. (CCPC Merit Br. p. 45.) Again, CCPC cites nothing to support this assertion. Yet, this 500-foot inverter setback **is 350 feet more than what CCPC asked for in the initial hearing**. (*See* TR at 77–79 (CCPC's counsel pushing Mr. Herling to commit to a 150-foot setback for inverters).)

Finally, **CCPC attempts to shift the burden of proof on Angelina**. As the Board properly determined, Angelina has met its burden of proving compliance with R.C. 4906.10(A)(3). On appeal, **CCPC has the burden to prove that the Board's determination was unlawful or**

unreasonable. CCPC's conclusory and unsubstantiated claims fall far short of that burden. The Court therefore should reject CCPC's sixth proposition of law and affirm the Board's decisions.

IV. CONCLUSION

For the foregoing reasons, the Court should reject CCPC's attempt at a third bite of the apple. The Board, in its expertise, lawfully and reasonably considered the vast evidentiary record and determined that the Project meets all statutory requirements under R.C. 4906.10(A). The Court should affirm the Board's Order approving the Project, subject to the conditions set forth in the approved Amended Joint Stipulation, and issuing a certificate for the construction, operation, and maintenance of the solar electric generation facility.

Respectfully submitted on behalf of,

ANGELINA SOLAR I, LLC

/s/ Michael J. Settineri

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CERTIFICATE OF SERVICE

I hereby certify that, on June 6, 2022, a copy of the foregoing brief was served by U.S. Mail, postage prepaid, on the following:

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APPENDIX

THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF ANGELINA SOLAR I, LLC, FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED.	CASE NO. 18-1579-EL-BGN

ENTRY

Entered in the Journal on September 14, 2020

{¶ 1} Angelina Solar I, LLC (Angelina or Applicant) is a person as defined in R.C. 4906.01.

{¶ 2} R.C. 4906.04 provides that no person shall construct a major utility facility in the state without obtaining a certificate for the facility from the Ohio Power Siting Board (Board).

{¶ 3} On October 22, 2018, Angelina, a subsidiary of Open Road Renewables, LLC, filed a pre-application notification letter with the Board regarding a proposed solar electric generating facility in Israel and Dixon townships, Preble County, Ohio. Subsequently, on December 3, 2018, and having completed steps mandated by Ohio law, Angelina filed its application with the Board for a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility of up to 80 megawatts in Preble County, Ohio.

{¶ 4} By Entry dated January 17, 2019, the administrative law judge (ALJ) granted motions filed by Applicant to waive certain provisions of the Board's rule requirements and a motion for protective order to keep portions of its application confidential.

{¶ 5} By letter dated February 1, 2019, the Board notified Angelina that its application was compliant with pertinent statutory and administrative code requirements and provided sufficient information to permit Staff to commence its review and investigation. And, on February 7, 2019, Angelina filed a certificate of service of its accepted and complete application and proof that it submitted its application fee to the Treasurer of the State of Ohio as required by Ohio Adm.Code 4906-3-07.

{¶ 6} By Entry issued February 14, 2019, the ALJ issued a procedural schedule, which was altered by subsequent Entries such that the evidentiary hearing was called-and-continued on the original hearing date but eventually scheduled to reconvene on July 31, 2019.

{¶ 7} On June 14, 2019, a Joint Stipulation and Recommendation (Stipulation) executed by Angelina; the Ohio Farm Bureau Federation; the Preble County Commissioners; the Preble County Engineer; the Preble Soil & Water Conservation District; the Board of Trustees of Israel Township, the Board of Trustees of Dixon Township; the Preble County Planning Commission; and Board Staff (collectively, Signatory Parties). The Eaton Community School District did not join the Stipulation. The Concerned Citizens of Preble County, LLC, Robert Black, Marja Brandly, Michael Irwin, Campbell Brandly Farms, LLC, Kevin and Tina Jackson, Vonderhaar Family ARC, LLC, and Vonderhaar Farms, Inc. (collectively, CCPC) actively opposed the Stipulation.[1]

{¶ 8} On July 31, 2019, the hearing reconvened as scheduled, carried over to August 1, 2019, and convened again on August 12, 2019; the hearing reconvened on September 10, 2019, for the purpose of taking rebuttal testimony. On October 18, 2019, Angelina, Staff, and CCPC filed initial post-hearing briefs. Reply briefs were submitted by the same parties on November 1, 2019. To date, the Board has not issued a final order regarding Angelina's application.

{¶ 9} On March 9, 2020, the governor signed Executive Order 2020-01D (Executive Order), declaring a state of emergency in Ohio to protect the well-being of Ohioans from the dangerous effects of COVID-19. As described in the Executive Order, state agencies are required to implement procedures consistent with recommendations from the Department of Health to prevent or alleviate the public health threat associated with COVID-19. Additionally, all citizens are urged to heed the advice of the Department of Health regarding

1 The ALJ granted intervenor status to each of these named entities in an April 18, 2019 Entry.

this public health emergency in order to protect their health and safety. The Executive Order was effective immediately and will remain in effect until the COVID-19 emergency no longer exists. The Department of Health is making COVID-19 information, including information on preventative measures, available via the internet at coronavirus.ohio.gov/.

{¶ 10} On July 29, 2020, the Signatory Parties filed an Amended and Restated Joint Stipulation and Recommendation (Amended Stipulation). With the Amended Stipulation, these parties also filed a joint motion to reopen the hearing record and to schedule a prehearing conference.

{¶ 11} Ohio Adm.Code 4906-2-31 provides that the Board or ALJ may, upon motion of any person for good cause shown, reopen a proceeding at any time prior to the issuance of a final order. The rule also states that a motion to reopen a proceeding shall specifically set forth the nature and purpose; and, if that purpose is to permit the presentation of additional evidence, the motion must specifically describe the nature and purpose of the requested reopening of the evidence and show why the evidence could not, with reasonable diligence, have been presented earlier in the proceeding.

{¶ 12} Citing to Ohio Adm.Code 4906-2-31, the Signatory Parties represent that good cause exists to reopen the record in this matter for consideration of the Amended Stipulation and anticipated testimony in support of the Amended Stipulation. The Signatory Parties explain that the Amended Stipulation is the product of a series of discussions and negotiations that took place after both the adjudicatory hearing and the post-hearing briefing concluded and includes both new and revised conditions that the Signatory Parties wish to present to the Board for consideration. These new and revised conditions include adding project setbacks, cultural resources, visual screening and lighting, complaint resolution, drainage and drain tile, road maintenance, and decommissioning, which reflects the post-hearing negotiations of the parties, the ongoing development of the project, and additional commitments being made by Angelina. The Signatory Parties further explain that, if the motion is granted, Angelina will present the Amended Stipulation and testimony

of six witnesses in support of the revisions and new conditions contained in the Amended Stipulation, none of which could have been presented earlier in the proceeding as the negotiations that resulted in the Amended Stipulation commenced after briefing was completed. The Signatory Parties also note that the Board has allowed the presentation of an amended stipulation with supporting testimony in prior proceedings. Finally, a prehearing conference to discuss an appropriate procedural schedule is requested.

{¶ 13} Upon review, the ALJ concludes that the Signatory Parties have demonstrated good cause to reopen the record in this proceeding for the purpose of considering the Amended Stipulation and any testimony in support of, or in opposition to, the same. Additionally, the ALJ finds that all interested parties to the proceeding should participate in a prehearing conference in order to determine a mutually agreeable and efficient procedural schedule. Accordingly, the joint motion to reopen the hearing record and for a prehearing conference should be granted.

{¶ 14} To that end, a prehearing conference will be conducted on September 18, 2020, at 10:00 a.m. EST. In light of the Executive Order and present pandemic circumstances, the prehearing conference will be conducted via remote-access technology. Instructions for participation in the prehearing conference will be emailed to the parties.

{¶ 15} It is, therefore,

{¶ 16} ORDERED, That the joint motion to reopen the hearing record and to schedule a prehearing conference be granted as stated in Paragraph 13. It is, further,

{¶ 17} ORDERED, That the parties participate, via remote-access technology, in a prehearing conference on September 18, 2020, as stated in Paragraph 14. It is, further,

{¶ 18} ORDERED, That a copy of this Entry be served upon all parties and interested persons of record.

THE OHIO POWER SITING BOARD

/s/Patricia A. Schabo

By: Patricia A. Schabo
Administrative Law Judge

JRJ/hac

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in

Case No(s). 18-1579-EL-BGN

Summary: Administrative Law Judge Entry granting the joint motion to reopen the hearing record and to schedule a prehearing conference and scheduling a prehearing conference on September 18, 2020 electronically filed by Heather A Chilcote on behalf of Patricia A. Schabo, Administrative Law Judge, Power Siting Board

OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF ANGELINA SOLAR I, LLC, FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED.	CASE NO. 18-1579-EL-BGN

ENTRY

Entered in the Journal on February 14, 2019

{¶ 1} Angelina Solar I, LLC (Angelina or Applicant) is a person as defined in R.C. 4906.01.

{¶ 2} R.C. 4906.04 provides that no person shall construct a major utility facility in the state without obtaining a certificate for the facility from the Ohio Power Siting Board (Board).

{¶ 3} On October 22, 2018, Angelina, a subsidiary of Open Road Renewables, LLC, filed a pre-application notification letter with the Board regarding its proposed 100 megawatt (MW) solar electric generating facility in Israel and Dixon townships, Preble County, Ohio.

{¶ 4} On November 15, 2018, Applicant held a public information meeting to discuss the proposed project with interested persons and property owners. Previously, on November 5, 2018, Angelina filed an affidavit of publication demonstrating its compliance with the notice requirements of Ohio Adm.Code 4906-3-03.

{¶ 5} On December 3, 2018, Angelina filed its application with the Board for a certificate of environmental compatibility and public need to construct and operate a solar-powered electric generation facility of up to 80 MW in Preble County, Ohio.[1]

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1 Angelina explains that the application seeks approval for 80 MW, but studies panel locations which can accommodate a 100 MW project size in order to provide it with flexibility in locating panels after final engineering is complete.

{¶ 6} Also on December 3, 2018, Applicant filed a motion seeking waivers from certain provisions of the Board's rule requirements and a motion for protective order to keep portions of its application confidential. Staff did not file a response to either motion. By Entry dated January 17, 2019, the administrative law judge (ALJ) granted both motions.

{¶ 7} Pursuant to Ohio Adm.Code 4906-3-06, within 60 days of receipt of an application for a major utility facility, the Chairman of the Board must either accept the application as complete and compliant with the content requirements of R.C. 4906.06 and Ohio Adm.Code Chapters 4906-1 through 4906-7 or reject the application as incomplete. By letter dated February 1, 2019, the Board notified Angelina that its application was compliant and provided sufficient information to permit Staff to commence its review and investigation. Pursuant to Ohio Adm.Code 4906-3-06 and 4906-3-07, the Board's February 1, 2019 letter directed Angelina to serve appropriate government officials and public agencies with copies of the complete, certified application and to file proof of service with the Board. The letter further instructed Angelina to submit its application fee pursuant to R.C. 4906.06(F) and Ohio Adm.Code 4906-3-12.

{¶ 8} On February 7, 2019, Angelina filed a certificate of service of its accepted and complete application and proof that it submitted its application fee to the Treasurer of the State of Ohio as required by Ohio Adm.Code 4906-3-07.

{¶ 9} Ohio Adm.Code 4906-3-08(A) states that, once the applicant has complied with Ohio Adm.Code 4906-3-07, the Board or the ALJ shall file an entry indicating the date on which the accepted, complete application is deemed filed. Additionally, once the effective date is established, the ALJ must promptly fix the dates for public hearings. Under R.C. 4906.07(A), the public hearing must be held not less than 60 nor more than 90 days after the effective date.

{¶ 10} Therefore, the effective date of the application shall be February 15, 2019. The ALJ finds that a local public hearing in this matter shall be held on April 30, 2019, at 6:00 p.m., at Eaton Fire Division Station #2, 391 West Lexington Road, Eaton, Ohio 45320.

The evidentiary hearing shall commence on May 14, 2019, at 10:00 a.m., in Hearing Room 11-D at the offices of the Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio 43215-3793.

{¶ 11} Petitions to intervene in this proceeding will be accepted by the Board up to 30 days following the service of the notice required by Ohio Adm.Code 4906-3-09 or by March 29, 2019, whichever is later.

{¶ 12} In accordance with Ohio Adm.Code 4906-3-09, Angelina should issue public notices of the application and hearings. Pursuant to the same rule, in addition to other required information, that notice shall include a statement that the public hearing in this case shall consist of two parts:

(a) A local public hearing, pursuant to R.C. 4906.08(C), where the Board shall accept written or oral testimony from any person on April 30, 2019, at 6:00 p.m., Eaton Fire Division Station #2, 391 West Lexington Road, Eaton, Ohio 45320.

(b) An evidentiary hearing commencing on May 14, 2019, at 10:00 a.m., in Hearing Room 11-D at the offices of the Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio 43215-3793.

{¶ 13} Further, under R.C. 4906.06(C) and Ohio Adm.Code 4906-3-09, the initial notice shall include the following language:

> Petitions to intervene in the adjudicatory hearing will be accepted by the Board up to 30 days following service of the notice required by R.C. 4906.06(C) and Ohio Adm.Code 4606-3-09, or March 29, 2019, whichever is later. However, the Board strongly encourages interested persons who wish to intervene in the adjudicatory hearing to file their petitions as soon as possible. Petitions should be addressed to

Docketing Division, the Ohio Power Siting Board, 180 East Broad Street, Columbus, Ohio 43215-3793 and cite the above-listed case number.

{¶ 14} Ohio Adm.Code 4906-2-09 provides that the ALJ shall regulate the course of the hearing. In so doing, the ALJ may require expert or factual testimony to be offered at Board proceedings to be reduced to writing and filed with the Board. Accordingly, the ALJ establishes the following procedural schedule and process:

(a) Pursuant to Ohio Adm.Code 4906-3-06(C), Staff shall file its report of investigation (Staff Report) on or before April 15, 2019.

(b) On or before April 24, 2019, each party shall file a list of issue(s) citing specific concerns about which they may be interested in pursuing cross-examination of witnesses at the evidentiary hearing.

(c) All expert and factual testimony to be offered by Angelina shall be filed by May 3, 2019. All expert and factual testimony to be offered by the intervenors and Staff shall be filed by May 10, 2019.

(d) The parties are strongly encouraged to arrange for electronic service of testimony and other pleadings amongst themselves. If electronic service is agreed to, the parties are also directed to provide an electronic copy to the assigned ALJ.

{¶ 15} It is, therefore,

{¶ 16} ORDERED, That the hearings in this matter be scheduled at the times and places designated in Paragraph 10. It is, further,

{¶ 17} ORDERED, That notices of the application and hearings be issued by Angelina in accordance with Paragraphs 12 and 13. It is, further,

{¶ 18} ORDERED, That Staff file its Staff Report pursuant to Paragraph 14. It is, further,

{¶ 19} ORDERED, That the parties file their issues lists and testimony in accordance with Paragraph 14. It is, further,

{¶ 20} ORDERED, That a copy of this Entry be served upon all parties and interested persons of record.

THE OHIO POWER SITING BOARD

/s/Patricia A. Schabo

By: Patricia A. Schabo
Administrative Law Judge

SJP/hac

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in

Case No(s). 18-1579-EL-BGN

Summary: Administrative Law Judge Entry scheduling hearings and setting procedural schedule and process electronically filed by Heather A Chilcote on behalf of Patricia A. Schabo, Administrative Law Judge, Power Siting Board

OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION OF ANGELINA SOLAR I, LLC, FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED.	CASE NO. 18-1579-EL-BGN

ENTRY

Entered in the Journal on January 17, 2019

{¶ 1} On October 22, 2018, Angelina Solar I, LLC (Angelina or Applicant), a subsidiary of Open Road Renewables, LLC, filed a pre-application notification letter with the Ohio Power Siting Board (Board) regarding its proposed 100 megawatt (MW) solar electric generating facility in Israel and Dixon townships, Preble County, Ohio (the Project).

{¶ 2} Thereafter, on December 3, 2018, Angelina filed an application with the Board for a Certificate of Environmental Compatibility and Public Need to construct the Project.

{¶ 3} In addition to filing its application, Angelina filed two motions: one seeking waivers from certain provisions of the Board's rule requirements and one seeking a protective order to keep portions of its application confidential and not part of the public record. Neither motion is opposed or otherwise received comment.

Motion for Waivers

{¶ 4} Angelina contends that good cause exists for granting a waiver, in whole or in part, from Ohio Adm.Code 4906-4-05(B)(2) (requiring submission of PJM interconnection system impact study), 4906-4-08(A)(1)(c) (manufacturers' safety manual documents and recommended setbacks), 4906-4-08(A)(5)(c) (description of its plan for test borings, including appropriate closure plans), and 4904-4-08(D)(2)-(4) (reduced study area regarding the impact on landmarks).

{¶ 5} Ohio Adm.Code 4906-4-05(B) requires an applicant to provide information on interconnection of the proposed facility to the regional electric power grid. Subpart (B)(2)

requires the applicant to provide system studies on the generation interconnection request, including the feasibility study and system impact study. Angelina reports that it has provided the feasibility study associated with PJM Queue Position AC2-111 with its application but the system impact study (SIS) for AC2-111 is still in progress. Angelina states that it anticipates receiving the SIS within 90 days of its motion and will submit the SIS to Board Staff as soon as it is available. Because Staff will have the opportunity to consider the SIS in its review of the application, Angelia submits that good cause exists to allow for the delayed submission of the SIS.

{¶ 6} Ohio Adm.Code 4906-4-08(A)(1)(c) requires an applicant to provide information regarding the safety and reliability of all equipment including the generation equipment manufacturer's safety standards, a copy of the manufacturer's safety manual or similar document, and any recommended setbacks from the manufacturer. Angelina explains that the nature of the Project and timing of panel model selection warrant a waiver because the final panel model will not be selected until after the final engineering of the Project is complete. Once selected, Angelina commits to providing Board Staff with the manufacturer's safety standards, including complete copies of its safety manuals or similar documents, as part of the final construction plans for the Project; Angelina will also identify any recommended setbacks.

{¶ 7} Ohio Adm.Code 4906-4-08(A)(5)(c) requires an applicant to provide and describe plans for test borings, including closure plans for such borings. Pursuant to the regulation, the plans shall contain a timeline for providing the test boring logs and information regarding subsurface conditions. The Applicant requests waiver of this rule because the panel layout will not be complete until final engineering drawings are developed and, given that the Project is a solar farm, it expects that equipment will impact the subsurface to a very limited degree. Additionally, Angelina expects to conduct only limited test borings in connection with the construction of the Project. If the waiver is approved, Angelina commits to provide its plan for borings, including appropriate closure

plans, to Board Staff no less than 30 days prior to the commencement of the field work and after the Project's layout has been finalized. Further, within 60 days following the receipt of all relevant data from the borings, Angelina will provide Board Staff with all of the information required by the plan, including subsurface soil properties, status water level, rock quality description, percent recovery, and the depth and description of bedrock contact.

{¶ 8} Angelina also seeks waivers from Ohio Adm.Code 4906-4-08(D)(2)-(4) regarding impacts on landmarks, recreation and scenic areas, and the visual impact of the facility. Ohio Adm.Code 4906-4-08(D)(2) requires an applicant to provide an evaluation of the impact of the proposed facility on the preservation and continued meaningfulness of mapped landmarks within a ten-mile radius and to describe plans to avoid or mitigate any adverse impact. Ohio Adm.Code 4906-4-08(D)(3) requires an applicant to describe and evaluate impacts to the identified recreation and scenic areas within ten miles of the project area. Ohio Adm.Code 4906-4-08(D)(4) requires an applicant to evaluate the visual impact of the proposed facility within a ten-mile radius from the project area. Angelina reports that it has evaluated the impact of the Project on the presentation and continued meaningfulness of the registered landmarks, scenic and recreation areas, and visibility and viewshed within a five-mile vicinity of the project area in the submitted Cultural Resources Report (Exhibit H) and Visual Impact Report (Exhibit I). Angelina further represents that, because of the Project's low profile and anticipated screening afforded by vegetation and existing structures, visibility of the planned components is expected to be limited to the immediate vicinity of the Project. Furthermore, the Cultural Resources Report indicates that no effects are anticipated on landmarks or scenic and recreation areas outside a two-mile radius. Thus, Angelina seeks waiver of Ohio Adm.Code 4906-4-08(D)(2)-(4) to allow for the focused five-mile study area and review of landmarks, as opposed to the required ten-mile radius.

{¶ 9} Ohio Adm.Code 4906-4-01(B) expressly provides that the Board may waive any requirement in Ohio Adm.Code Chapter 4906-4, other than one mandated by statute, upon motion.

{¶ 10} Upon consideration of Angelina's motion for waivers, the administrative law judge (ALJ) finds that good cause exists to grant waivers of Ohio Adm.Code 4906-4-05(B)(2), 4906-4-08(A)(1)(c), 4906-4-08(A)(5)(C), and 4906-4-08(D)(2)-(4). As committed to within its motion, Angelina is expected to provide its plan for test borings, including appropriate closure plans, to Board Staff no less than 30 days prior to the commencement of field work and after the Project's layout has been finalized in order to ensure that Staff has sufficient time to review the information prior to commencement of such work. Furthermore, should Staff determine that information regarding areas covered by the requested waivers is necessary for its investigation of the application, Angelina is expected to comply with any resulting requests for information from Staff.

Motion for Protective Order

{¶ 11} Along with the motion for waivers, Angelina filed a motion for protective order. Angelina moves the Board to keep portions of its application confidential and not part of the public record. The information Angelina seeks to protect includes estimated capital and intangible costs, operations and maintenance costs, rates of increases, rates of inflation and assumptions that go into the calculation of Net Present Value of operations and maintenance costs, and other sensitive financial data. Angelina also seeks to keep confidential the estimated annual payments to landowners. Angelina represents that its motion targets sensitive and confidential information that is generally not disclosed and—if revealed—would provide competitors and others with a competitive advantage.

{¶ 12} Pursuant to Ohio Adm.Code 4906-2-21(D) and upon motion, the Board "may issue any order that is necessary to protect the confidentiality of information contained in [a] document, to the extent that state or federal law prohibits release of the information,

including where it is determined that both * * * the information is deemed * * * to constitute a trade secret under Ohio law * * * and non-disclosure of the information is not inconsistent with the purpose of Title 49 of the Revised Code." To be designated a trade secret under R.C. 1333.61, financial information must both: (1) derive independent economic value from not being generally known to, or readily ascertainable by, other persons who can obtain economic value from its disclosure or use and (2) be subject to reasonable efforts under the circumstances to maintain its secrecy. R.C. 1333.61(D). Additionally, the Supreme Court of Ohio has established a six-part test to apply when analyzing a trade secret claim. *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

{¶ 13} In support of its request, Angelina asserts that the information it seeks to protect has independent economic value, is subject to reasonable efforts to maintain its secrecy, and otherwise meets the six-factor *Plain Dealer* test. Further, Angelina contends that non-disclosure of the information will not impair the purposes of Title 49, as the Board and its Staff have full access to the information. In the same vein, Angelina maintains that no purpose of Title 49 would be served by the public disclosure of the information.

{¶ 14} The ALJ has examined the information filed under seal, as well as the assertions set forth in the Applicant's memorandum in support of its motion for a protective order. Applying the requirements discussed above, the ALJ finds that the motion should be granted. As such, the financial and estimated cost information on pages 26 through 30 of the application and the estimated annual land lease payments made to landowners contained in pages 3, 17, and 21 of Exhibit C should be kept confidential and not subject to public disclosure.

{¶ 15} Ohio Adm.Code 4906-2-21(F) specifies that, unless otherwise ordered, a protective order issued under Ohio Adm.Code 4906-2-21(D) expires 24 months after the date of its issuance. Angelina does not seek a different time frame; thus, the information protected by this order shall remain under seal for a period ending 24 months from the date of this Entry. Should Angelina wish to extend that 24-month period, it shall file an

appropriate motion at least 45 days in advance of the expiration date. Ohio Adm.Code 4609-2-21(F). If no such motion is filed, the Docketing Division may release the information without prior notice to the Applicant.

{¶ 16} It is, therefore,

{¶ 17} ORDERED, That Angelina's motion for waivers be granted as stated in Paragraph 10. It is, further,

{¶ 18} ORDERED, That Angelina's motion for a protective order be granted as stated in Paragraph 14. It is, further,

{¶ 19} ORDERED, That a copy of this Entry be served upon all parties and interested persons of record.

THE OHIO POWER SITING BOARD

/s/ Patricia A. Schabo

By: Patricia A. Schabo
Administrative Law Judge

NJW/hac

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Case No(s). 18-1579-EL-BGN

Summary: Administrative Law Judge Entry granting motion for waivers and motion for protective order electronically filed by Heather A Chilcote on behalf of Patricia A. Schabo, Administrative Law Judge, Power Siting Board