

**IN THE
SUPREME COURT OF OHIO**

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

MERIT BRIEF
SUBMITTED ON BEHALF OF THE
APPELLEE OHIO POWER SITING BOARD

Jack A. Van Kley (0016961)
(Counsel of Record)
Van Kley & Walker, LLC
132 Northwoods Blvd., Suite C-1
Columbus, OH 43235
Tel: (614) 431-8900
Fax: (614) 431-8905
jvankley@vankleywalker.com

Attorney for Appellants Didion, et al.

David Yost (0056290)
Attorney General

John H. Jones (0051913)
Section Chief

Werner L. Margard III (0024858)
(Counsel of Record)
Jodi Bair (0062921)

Robert A. Eubanks (0073386)
Assistant Attorneys General
Public Utilities Section
30 East Broad Street, 26th Floor
Columbus, OH 43215
Tel: (614) 466-4397
Fax: (614) 644-8764
werner.margard@OhioAGO.gov
jodi.bair@OhioAGO.gov
robert.eubanks@OhioGO.gov

*Attorneys for Appellee, Ohio Power Siting
Board*

Michael J. Settineri (0073369)

(Counsel of Record)

Daniel E. Shuey (0085398)

Emily J. Taft (0098037)

Vorys, Sater, Seymour & Pease

52 East Gay Street, P.O. Box 1008

Columbus, OH 43216-1008

Telephone: 614.464.5462

Fax: 614.719-5146

mjsettineri@vorys.com

deshuey@vorys.com

etaft@vorys.com

*Counsel for Intervening Appellee Alamo
Solar I, LLC*

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INTRODUCTION

The Ohio General Assembly declared renewable energy development to be lawful and important to promote a diversified state energy portfolio. Many farming families welcome the economic and tax opportunities that a renewable energy development, such as Alamo Solar I Inc., (Project, Applicant, or Alamo) can bring to the local community. There are a limited number of sites in Ohio that can support a commercial-size solar farm. The Alamo Project will occupy up to 919 acres within a 1,002.5-acre Project boundary, and there will only be an estimated impact to forestland of 1.37 acres or less being cleared. This preserves the wooded corridors of the Project Area. The purpose of the Project is to produce and deliver clean, renewable electricity to the Ohio electric system and serve the needs of Ohio’s electric utility companies and their customers. Preble County is an ideal location for this solar farm.

The proposed Project is not one hundred percent impact free. Improvements and maintenance to local roads will be required and made. Landscape and lighting plans will be addressed and minimized. Though there is opposition to this Project, it is the Ohio Power Siting Board's (Board) statutory job to analyze and review the expected impacts and adopt measures that reasonably address and mitigate those impacts to the Project Area and environment. The conditions proposed by Board Staff to address and mitigate impacts and modified by the Amended and Restated Stipulation and Recommendation, are supported by a broad range of interested parties. *In the Matter of the Application of Alamo Solar I, LLC for a Certificate of Environmental Compatibility and Public Need*, Board Case No. 18-1578-EL-BGN (hereinafter *Alamo Solar*) (Opinion, Order & Certificate) (hereinafter Order) (June 24, 2021) at ¶¶ 17, 20, Appellants' App. at 004.¹

Appellants Concerned Citizens of Preble County, LLC, Eric And Kelly Altom, Mary Bullen, Camden Holdings, LLC, Joanna and John Clippinger, Joseph and Linda Deluca, Donn Kolb as the Trustee for the Donn E. Kolb Revocable Living Trust, Doris Jo Ann Kolb as the Trustee for the Doris Jo Ann Kolb Revocable Living Trust, Elaine Kolb, Carla and James Lay, Clint and Jill Sorrell, John and Linda Wambo, John Frederick Winter, and Michael and Patti Young (collectively, Appellants) make two basic arguments: (1) Alamo did not provide enough technical information to satisfy the requirements of the Ohio Administrative Code and (2) the Board granted a certificate containing conditions that are

¹ References to Appellants' Appendix are denoted "Appellants' App. At ___," and references to Appellee's Appendix attached hereto are denoted "App. at ___." References to Appellees Supplement are denoted "Appellee's Supp. At ___."

monitored by the Board Staff after the certificate is granted and are therefore not lawful. Both of these arguments fail because Appellant is mistaken. The Board can waive provisions of the Ohio Administrative Code; however, it must find that the statutory criteria are met before issuing a certificate. That is what the Board did in this case. The Board exercised its discretion when analyzing the technical information, finding that the statutory criteria, which are not waivable, were met. Furthermore, this Court has spoken clearly to this issue whether the Board can issue a certificate with conditions that occur after the Board Order when it held the following in *Buckeye Wind*:

R.C. 4906.10(A) allows a certificate to be issued *upon such conditions as the board considers appropriate*. The statutes authorize a dynamic process that does not end with the issuance of a construction certificate. The General Assembly vested the board with authority to allow its staff to monitor * * * compliance with conditions that the board has set.

In re Buckeye Wind, L.L.C., 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869 at ¶ 16. The Board's Order is lawful and reasonable. Accordingly, the Board respectfully requests that this Court affirm its decision.

STATEMENT OF THE FACTS AND CASE

On December 10, 2018, Alamo filed this application to construct and operate a commercial solar farm in Preble County, Ohio. Prior to filing the application, Applicant engaged in certain public outreach activities, including filing a Project descriptive pre-application letter on October 22, 2018 and holding a public informational meeting on November 13, 2018.

The application purposed to construct arrays of ground-mounted photovoltaic (PV) modules, commonly referred to as solar panels, in Gasper and Washington Townships in Preble County. The Project would also include associated support facilities, such as access roads, up to four meteorological stations, pyranometers, buried electrical collection lines, inverter pads, and a substation. The Project would occupy up to 919 acres within a 1,002.5-acre Project boundary, and is projected to generate 69.9 MW. The Board Staff completed its investigation and issued its Report of Investigation (Staff Report) on May 28, 2019.

A Joint Stipulation and Recommendation (Joint Stipulation) was filed by a number of parties on July 5, 2019. The signatory parties, in addition to the Applicant, included the Board Staff, The Preble County Commissioners, the Preble County Engineer, the Preble Soil & Water Conservation District, the Board of Trustees of Gasper Township, the Board of Trustees of Washington Township, and the Preble County Planning Commission. The Eaton Community and Preble Shawnee Local School Districts intervened in this case, but were not a signatory party to the Stipulation. Though not signatory parties, the school districts offered no testimony in opposition to the Stipulation. CCPC also intervened and actively participated in the case, but opposed the Project.

The initial adjudicatory hearing commenced on July 17, 2019 and concluded on July 19, 2019. Testimony was provided by eight Applicant witnesses, three intervenor witnesses, and nine Board Staff witnesses. All parties received a full and fair opportunity

to be heard. Post-hearing and reply briefs were filed by the parties on September 13, 2019, and September 27, 2019, respectively.

Following the adjudicative hearing and post-hearing briefing, the parties engaged in a series of discussions and negotiations regarding issues that were raised during the hearing and in the post-hearing briefing. That effort resulted in the Amended and Restated Joint Stipulation (Amended Stipulation), filed on July 30, 2020. The same day, Alamo, Board Staff, the Ohio Farm Bureau Federation, the Preble County Commissioners, the Preble County Engineer, the Preble Soil & Water Conservation District, the Trustees of Gasper and Washington Township Boards of Trustees, and the Preble County Planning filed a Joint Motion to Reopen the Hearing Record to allow for the consideration of the Amended Stipulation. When the Joint Motion to Reopen was filed, the case was still pending for a Board decision. The Amended Stipulation includes both revised and new conditions that are more protective and detailed than the conditions in the original Joint Stipulation.

Pursuant to Ohio Adm. Code Ohio 4906-2-31, App. at 3, the Administrative Law Judge reopened this proceeding. *Alamo Solar* (Entry) (September 14, 2020), App. at 2. The Amended Stipulation was filed on July 29, 2020. Supporting testimony was filed by six Applicant witnesses, and one Board Staff witness. An adjudicatory hearing was held on the Amended Stipulation on October 26, 2020.

The Amended Stipulation incorporated two new conditions. Stipulated Condition 29 related to the management of potential post-construction stormwater flows; Stipulated Condition 30 related to certificate authority that had been recently incorporated by the

Board into other certificates. The Amended Stipulation also revised ten previously proposed conditions, addressing Project setbacks, cultural resources, visual screening and lighting, complaint resolution, drainage and drain tile, road maintenance, and decommissioning. Stipulated Conditions 1, 3, 10, 14, 15, 16, 18, 20, 25 and 28.

On June 24, 2021, the Board issued a certificate to Alamo, approving the Amended Stipulation. *Alamo Solar*, (Opinion, Order, and Certificate) (hereinafter Order) (June 24, 2021), Appellants' App. at 1. Appellants were the only party to file an Application for Rehearing. Appellants' App. at 159. The Board rejected CCPC's Application for Rehearing on November 18, 2021 and approved the Amended Stipulation. *Alamo Solar* (Order on Rehearing) (November 18, 2021), Appellants' App. at 283.

STANDARD OF REVIEW

Pursuant to R.C. 4906.12, App. at 15, the Court applies the same standard of review to determinations of the Ohio Power Siting Board that it applies to orders of the Public Utilities Commission. *In re Application of Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 966 N.E.2d 869, at ¶ 26. An order of the Board shall be reversed, vacated, or modified by the Court only when, upon consideration of the record, the Court finds the order to be unlawful or unreasonable. *Id.*

The Court will not reverse or modify a decision of the [Board] as to questions of fact if the record contains sufficient probative evidence to show that its decision was not manifestly against the weight of the evidence and was not clearly unsupported by the

record as to show misapprehension, mistake, or willful disregard of duty. *In re Complaint of Reynoldsburg*, 134 Ohio St.3d 29, 2012-Ohio-5270, 979 N.E.2d 1229, ¶ 18 citing *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 29. The Court will not reweigh evidence or substitute its judgment for that of the [Board] on factual questions when there is sufficient probative evidence in the record to support the [Board's] decision. *Luntz Corp. v. Pub. Util. Comm.*, 79 Ohio St.3d 509, 684 N.E.2d 43 (1997). The [Board's] factual determinations are entitled to deference. *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 163, 666 N.E.2d 1372 (1996).

The Court has “complete and independent power of review as to all questions of law” in appeals from the PUCO [or Board, in this case], *In re Fuel Adjustment Clauses for Columbus S. Power Co. & Ohio Power Co.*, 2014-Ohio-3764, 140 Ohio St.3d 352 at ¶ 23 citing *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 469, 678 N.E.2d 922 (1977). The Court has customarily relied on the expertise of a state agency in interpreting a law where “highly specialized issues” are involved and “where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly.” *Id.* at ¶ 23, citing *Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 110, 388 N.E.2d 1370 (1979).

ARGUMENT

Proposition of Law No. I

The Board reasonably determined that the applicant had complied with the requirements of Ohio Adm.Code 4906-4-08(A).

The record establishes that the Project's operational noise will have minimal impact. Alamo's witness David Hessler, who has nearly 30 years of acoustics experience, testified that the Project is not expected to cause any noticeable change in audible noise to adjoining property owners. Application Exhibit E at 4,5, Supp. at 5-6; Tr. Vol. II at 238, 239, Supp. at 37-38.

There were no legal errors relating to modeling string inverter noise, as Appellants claim. String inverters are a piece of generation equipment that take power generated by solar panels (which is in direct current) and converts it to alternating current which is fit for grid transmission. Tr. Vol. II at 249-50, Supp. At39-40. Unlike "central" inverters, which convert current for hundreds or thousands of panels, "string" inverters sit at the end of a single row of solar panels. Appellants erroneously claim that "[t]he board acted unreasonably and unlawfully by approving the Project without requiring Alamo . . . to provide any noise modeling data for string inverters at neighboring property lines." Appellants' Brief at 22. Ohio Adm.Code 4906-4-08(A)(3)(b) states in relevant part:

(3) Noise. The applicant shall provide information on noise from the construction and operation of the facility.

* * *

(b) Describe the operational noise levels expected at the nearest property boundary. The description shall address:

(i) Operational noise from generation equipment. In addition, for a wind facility farm, cumulative operational noise levels at the property boundary for each non-participating property adjacent to or within the project area, under both day and nighttime operations. The applicant shall use generally accepted computer modeling software (developed for wind turbine noise measurement) or similar wind turbine noise methodology, including consideration of broadband, tonal, and low-frequency noise levels.

Ohio Adm.Code 4906-4-08(A)(3)(b), App. at 7. But a plain reading of that rule shows that no such violation occurred. The rule does not, as Appellants claim, require an applicant to “include modeling for *string inverters*.” Appellants’ Brief at 22.

In a solar case, an applicant is only obligated to “[d]escribe the operational noise levels expected at the nearest property boundary” and ensure through project planning that those impacts are minimal. Ohio Adm.Code 4906-4-08(A)(3)(b)(i), App. at 4. The remainder of that rule, referring to modelling, applies only to wind farms, not solar facilities. It does not, for example, as Appellants suggest, require an applicant to use comprehensive modeling (or *any* modelling, for that matter) for each individual piece of equipment, such as string inverters. String inverters are, for all intents and purposes, inaudible from a mere 150 feet away. Tr. Vol. II at 251, Supp. at 41. Alamo witness David Hessler testified that a typical “sound pressure level [one] meter away was less than 65 dBA which is less than the level of a conversation, a normal conversation. They’re very, very quiet.” Tr. Vol. IV at 625, Supp. at 47. Such generation equipment is not subject to the same scrutiny as wind turbines, which are subject to the much more

comprehensive generation modeling requirements set forth in Ohio Adm.Code 4906-4-08(A)(3)(b)(i), *supra*.

Moreover, here, the Board determined that noise levels from operation of generation equipment, including string inverters, were minimal. *Alamo Solar Order* at ¶¶ 236-237, Appellant's App. at 086. Applicant's study provided the evidentiary basis for that approval. In this case, Mr. Hessler compared projected noise emissions from inverters with the daytime L90 sound level (near minimum, that is, the level that is exceeded 90% of the time) in the area, which he determined via field survey to be 34 dBA. Application Exhibit E at 2, Supp. at 4. As Mr. Hessler testified, sound from inverters "is only perceptible at short distances and it is highly unlikely to be significant or problematic at any residences, which would all generally be hundreds of feet from any given inverter." *Id.* at 4. 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." Supplemental Testimony of David Hessler at 2, Supp. at 31. Mr. Hessler also reviewed the preliminary layout noise levels at the closest non-participating property line and found that the sound would be 40 dBA. Tr. Vol. IV at 639, Supp. at 48.

Crucially, 35 dBA is "considered inconsequential even in rural environments where the background sound level is essentially negligible." Hessler Supplemental Testimony at 3, Supp. at 32. This expert testimony alone supports a factual finding that

noise levels were minimal, and there is, as such, ample record evidence to support the Board's finding that the Project noise impact would be minimal.

Here, the Board's determination that Mr. Hessler's Technical Report was reliable is entitled to broad deference. In *In re Champaign Wind*, this Court upheld a wind project that had 44 dBA based on evidence from the applicant and the Board Staff, and the Board finding that applicant's expert's noise assessment was reliable. The Court reasoned that "[a]s the board is the agency with the expertise and statutory mandate to issue certificates siting major utility facilities, its decision here is entitled to deference." *In re Champaign Wind*, L.L.C., 2016-Ohio-1513, ¶ 36 (citing *Constellation NewEnergy*, 2004-Ohio-6767, at ¶ 51, and *Migden-Ostrander v. Pub. Util. Comm.*, 2004-Ohio-3924); see also *In re Columbus S. Power Co.*, 2012-Ohio-5690, ¶ 36 ("we will defer to the commission's interpretation of a statute 'where there exists disparate competence between the respective tribunals in dealing with highly specialized issues'") quoting *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 110 (1979).

Furthermore, the Board approved Conditions to mitigate noise. *Alamo Solar* Order at ¶ 236, Appellant's App. at 086. Alamo entered into an Amended Stipulation in which it committed to expansive setbacks regarding central inverters—a minimum of 500 feet between any central inverter and any residence on a non-participating parcel—and prepared a preliminary layout of the Project based on this restrictive setback. Amended Stipulation at 6, Supp. at 19. As Mr. Hessler stated at hearing "[w]ith an inverter setback of 500 feet or more from any non-participating residences their exact location is

immaterial from a noise impact perspective.” Hessler Supplemental Testimony at 4, Supp. at 33.

Similarly, in their Brief, Appellants state that “[d]espite ... significant projected increases in noise, Alamo has not proposed to equip the inverters with noise controls, such as cabinet damping or ventilation silencers, even though these devices are effective and available.” Appellants’ Brief at 20. But Alamo has consistently stated that mitigation would be implemented if somehow an operational noise issue develops. Stipulated Condition 3 of the Amended Stipulation expressly commits Alamo to “promptly retrofit any inverter as necessary to effectively mitigate any off-site noise issue identified during operation of the facility.” Amended Stipulation at 6, Supp. at 19. Mr. Hessler, in his Noise Report 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.” Application Exhibit E at 13, Supp. at 13. Mr. Hessler also testified that noise from inverters can be easily mitigated by retrofitting them “with acoustical hoods, louvers or silencers, in the unlikely event mitigation is necessary.” Hessler Supplemental Testimony at 4, Supp. at 33. For these reasons, Appellants’ Proposition of Law relating to noise is without merit and should fail.

Proposition of Law No. II

The Board lawfully and reasonably determined that Alamo’s Application, supporting studies, testimony, and Amended Stipulation provided adequate information and commitments regarding the

Project's visual impacts and mitigation as required by Ohio Adm.Code 4906-4-08(D)(4) and R.C. 4906.10(A)(2) and (3).

The Board lawfully and reasonably determined that Alamo's Application, supporting studies, testimony, and Amended Stipulation provided adequate information and commitments regarding the Project's visual impacts and mitigation as required by Ohio Adm.Code 4906-4-08(D)(4). The Board determined the nature of the Project's environmental impact under R.C. 4906.10(A)(2) and also that the Project represented the minimum environmental adverse impacts, considering the available technology and the nature and economics of the alternatives according to R.C. 4906.10(A)(3).

A. There is sufficient evidence in the record of the photographic simulations of the proposed facility and describing the visual impacts and screening; thereby satisfying the requirements of R.C. 4906.10(A)(2) and (3).

Alamo's Application accurately provides photographic simulations or artist's pictorial sketches of the proposed facility from public vantage points." Ohio Adm.Code 4906-4-08(D)(4)(e), App. at 12. Appellants ask this Court to find that the Project does not meet the Board's visual impact study filing rules. Appellants' initial argument regarding visual impact is that the "simulations depict eight-foot panels even though Alamo can select panels up to 14 feet high." Appellants' Brief at 25. Alamo witness Matthew Robinson, the applicant's visual impact expert, testified that his ultimate conclusions would not change if the visual simulations depicted a panel height of 14 feet. Tr. Vol. II at 388, Supp. at 45. During cross examination, Mr. Robinson stated that eight-foot panels

were used in the Visual Resource Assessment (VRA) because it was the most likely height of the panels to be used. Tr. Vol. II at 387, Supp. at 44.

The Application provided simulations that are not exact pictures of the final panel design. The description in the Application provides more details of the panels that may be used in the Project and complies with the requirements of Ohio Adm.Code 4906-4-08(D)(4).

Appellants' argue that Alamo must cover the entire range of viewer groups. Appellants' Brief at 26. However, Appellants produced no witness or other evidence to support their contention that the entire range must be covered nor any evidence that a complete screening of the Project is required. The word "entire" is nowhere in the rule or the law regarding visual impact simulations. The rule requires the following:

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

Ohio Adm.Code 4906-4-08(D)(4)(e), App. at 12. The rule does not dictate distance nor specify that range means entirety of ranges. Nor would that be practical. Alamo provided a VRA that complies with this rule. The visual impact study is 100 pages long and contains numerous pictures and simulations, along with extensive analyses and explanations. Topics analyzed in the Applicant's' VRA include Visual Study Areas, Land Use Setting, Visual Assessment, View Groups, Visual Sensitivity, Viewshed Analysis, File Verification, Visual Simulations, Reflectivity and Glare. This is just a sample of the

33 study areas contained in the VRA. The study was extremely comprehensive, and meets the requirements of Ohio Adm.Code 4906-8(D)(4)(e).

Additionally, the Applicant filed Supplemental Testimony of Mr. Robinson who explained that the Amended Stipulation increased the setbacks from non-participating homeowners from 100 to 150 feet. Robinson Supplemental Testimony at 2, Supp. at 35. Mr. Robinson also explained how increasing the setback allowed the Applicant to increase its goals for the landscape mitigation plan. *Id.*

The Board determined that Alamo's Application, supporting studies, testimony, and Amended Stipulation provided adequate information and commitments regarding the Project's visual impacts as required by Ohio Adm.Code 4906-4-08(D)(4). And the Board also determined that there was more than sufficient information to allow it to determine the nature of the Project's environmental impact under R.C. 4906.10(A)(2) and also that the Project represented the minimum environmental adverse impacts, considering the available technology and the nature and economics of the alternatives according to R.C. 4906.10(A)(3).

B. The record before the Board contains evidence demonstrating that Alamo is required to minimize the Project's possible adverse visual impacts.

The evidentiary record contains many measures and commitments to minimize the Project's visual impacts. Stipulated Condition 15 requires that the landscape and lighting plan be developed in consultation with a landscape architect licensed by the Ohio Landscape Architects Board. *Alamo Solar* Order at ¶ 124 (15), Appellants' App. at 034.

Appellants' argument that "neighbors are completely at the mercy of Alamo to design and the Board Staff to approve the landscaping plan as they wish" completely ignores Alamo's commitment. Unless alternative mitigation is agreed upon with the owner of an adjacent non-participating parcel, the plan provides for the planting of vegetative screening and requires Alamo to ensure that 90 percent of the planting have survived after five years, as well as committing Alamo to maintain the vegetative screening for the entire life of the facility. Appellants' Brief at 29; *Alamo Solar* Order at ¶ 124 (15), Appellants' App. at 034.

In addition, the Amended Stipulation increased the Project's setbacks and visual screening and lighting. It requires that Alamo provide screening for all non-participating parcels containing a direct line of sight to the Project for the lifetime of the Project. Amended Stipulation at 8, ¶ 15, Supp. at 20. The Amended Stipulation requires that Alamo prepare a landscape and lighting plan in consultation with a licensed landscape architect. *Id.* For non-participating parcels with a direct line of sight, the plan shall provide for the planting of vegetative screening designed to enhance the view from the residence and be in harmony with the existing vegetation and viewshed area. *Id.* This vegetative screening shall be maintained for the life of the facility and any failed planting shall be replaced. After five years at least 90 percent of the vegetation must survive or be replaced. *Id.* These requirements demonstrate Alamo's compliance with Ohio Adm.Code 4906-4-06(D)(4). This record evidence also demonstrates compliance with R.C. 4906.10(A)(3) which requires that the facility represent the minimum adverse environmental impact, considering the state of available technology and the nature and

economics of the various alternatives. Alamo committed to a landscape plan that satisfies the Board's rules that that the Project's visual impact be minimized.

Ohio Adm.Code 4906-4-08(D)(4), App. at 12, requires that an evaluation of the visual impact of the facility be conducted or reviewed by a licensed architect or other professional with experience in in developing a visual impact assessment. This was clearly met by the VRA, and the testimony of Alamo's visual impact expert Mr. Robinson discussed above.

Other requirements are that the study describe measures taken to minimize any adverse impacts created by the facility. An example of this mitigation is Stipulated Condition 15 that any lights are to be motion-activated and designed to narrowly focus light inward toward the facility. These measures will soften and mitigate the Project's visual impact. Stipulated Condition 15 also requires that a plan be submitted to require fence repair and maintenance of perimeter fencing. This commitment will minimize negative impact of any damaged fencing. *Alamo Solar* Order at ¶ 146, Appellants' App. at 048-049.

Furthermore, Appellants indicate that there are no commitments to actually mitigate any adverse visual impact and the Application only states that Alamo "may," "can," or "will" minimize the visual impacts. Appellants' Brief at 28. Appellants go on to state that the vegetative plan is to be submitted post-certificate and is "altogether at Alamo's whim." Appellants' Brief at 29. Appellants' basic argument is that post-certificate mitigation plans are not a legal obligation. Specifically, Appellants state that these mitigation commitments are not enforceable. Appellants' Brief at 31. But

Appellants are wrong. The Board issued a certificate with conditions incorporating and requiring additional plans. In *Buckeye Wind*, this Court affirmatively concluded that “[t]he board [does] not improperly delegate its responsibility to grant or deny a provisional certificate when it allow[s] for further fleshing out of certain conditions of the certificate.” Order at 149, citing *In re Buckeye Wind, L.L.C.*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869 at ¶ 18.

In fact, the Court noted that:

R.C. 4906.10(A) allows a certificate to be issued *upon such conditions as the board considers appropriate*. The statutes authorize a dynamic process that does not end with the issuance of a construction certificate. The General Assembly vested the board with authority to allow its staff to monitor * * * compliance with conditions neighbors already had the chance to be heard.

Buckeye Wind at ¶ 16 (emphasis in original). Appellants’ argument that the Board cannot make a determination of minimum adverse impact based on promises that Alamo and the Board Staff will later address has been rejected by this Court. As stated in the *Buckeye Wind* decision and in R.C.4906.10(A), a certificate can be issued upon such conditions as the Board considers appropriate. This Court has previously decided this issue and, therefore, Appellants’ argument is without merit and should fail.

Proposition of Law No. III

The Board reasonably determined that Alamo had complied with the surveys required by Ohio Adm.Code 4906-4-08(B), and that the probable environmental impact on wildlife and vegetation had been adequately determined in accordance with R.C. 4906.10(A)(2).

Alamo conducted and provided the results of its literature and field surveys, which the Board accepted as adequate demonstrations of the probable environmental impact for purposes of R.C. 4906.10(A)(2). The Board further found that the Project would, as conditioned, have a minimum adverse impact on wildlife as required by R.C. 4906.10(A)(3). *Alamo Solar* Order at ¶ 200, Appellants' App. at 1. It based that decision on the evidence of record, and its expertise in evaluating such applications.

The Board's rules require that an applicant "[p]rovide the results of a literature survey of the plant and animal life within at least one-fourth mile of the project area boundary." Ohio Adm.Code 4906-4-08(B)(1)(c), App. at 7. While Appellants complain that Alamo performed only a partial literature search, it does not deny that such a survey was performed, and that the results of that survey were provided. They argue that Alamo should have done more than the rule requires; that it should have provided a literature survey for *all* plant and animal life in and near the Project Area. But the Board's rules do not require such an exhaustive literature survey. Reading the requirement to require surveying each and every plant and animal species goes against logic and reason. Such a requirement would be overly burdensome and unnecessarily broad. Nor has the Board ever imposed such a requirement on an applicant. Alamo complied with the Board's rule, and the Board found the literature survey to be acceptable.

Based on the literature survey, Alamo witness Ryan Rupprecht testified that the Project Area was not expected to provide significant habitat for any listed or other rare, threatened or endangered species. Direct Testimony of Ryan Rupprecht at 6, Supp. at 24; Tr. Vol. II at 271, 272, Supp. at 42-43. He further testified that, due to a lack of adequate

habitat in the immediate Project Area, it is likely many birds and wildlife will opt for higher quality habitat nearby for roosting, foraging, and breeding. *Id.*

The Board's rules also require that an applicant "[c]onduct and provide the results of field surveys of the plant and animal species identified in the literature survey." Ohio Adm.Code 4906-4-08(B), App. at 7. Contrary to Appellants' assertion that Alamo conducted "no field surveys" (Appellants' Brief at 33), field surveys were conducted by Cardno in November 2017, April 2018, and October 2018. *Alamo Solar Order* at ¶ 197, Appellants' App. at 069.

Appellants ask this Court to read more into the Board's rules than the Board requires. Ohio Adm.Code 4906-4-08(B)(1)(c), App. at 7, does not, as Appellants argue, generally require "formal presence/absence surveys for specific species." Appellants' Brief at 35. Rather, it requires surveys of species identified in the literature survey. The field surveys specifically found that no rare, threatened or endangered species – the species identified in the literature survey – were identified during field observations. Rupprecht Testimony at 4, Supp. at 23. Furthermore, Cardno concluded that, other than the agricultural crops and livestock in the area, no commercially valuable species are anticipated to be present in the Project Area. Application Ex. G at 4-5, Supp. at ____.

Moreover, despite Appellants' claims to the contrary, the Cardno Ecological Assessment included 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. Other than the agricultural crops and

livestock in the area, no commercially valuable species are anticipated to be present in the Project Area.

Id. (footnote omitted). Cardo noted that its “[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 6-2, Supp, at 23.

The Board found that the literature and field surveys provided by Alamo satisfied its requirements, and that it had made an “adequate demonstration of the nature of the probable environmental impact relative to threatened and endangered species.” *Alamo Solar Order* at ¶ 195-196, Appellants’ App. at 068. The Board specifically stated that it was persuaded by Alamo witness Rupprecht, who testified that the Project would have minimal, if *any*, impact on rare, threatened or endangered wildlife in the Project Area. Application Ex. G at 7-5, 7-6, Supp. at 4, 6, 7; Rupprecht Testimony at 2, 7, Supp. at 2, 25; *Alamo Solar Order* at ¶ 194, Appellants’ App. at 067-068. It also found Cardno’s conclusion persuasive that the proposed Project would not significantly impact wildlife or wildlife habitat. Rupprecht Testimony at 6, Supp. at 24; *Alamo Solar Order* at ¶ 197, Appellants’ App. at 068-069.

The Board found that the nature of probable environmental impact on wildlife had been adequately determined in accordance with R.C. 4906.10(A)(2), subject to the conditions recommended by its Staff. *Alamo Solar Order* at ¶ 200, Appellants’ App. at 070. The Amended Stipulation recommended, and the Board adopted, a number of conditions to protect wildlife and plants. Stipulated Condition 18 requires a vegetation

management plan to minimize clearing, protect trees and shrubs from damage, implement and manage ground cover, and prevent the growth of noxious weeds. Stipulated Condition 21 includes measures to avoid impacts on the Indiana bat, and state and federal listed species of plants and animals, including having an environmental specialist on site during construction activities that may affect sensitive areas. *Alamo Solar* Order at ¶ 124 at (19) – (21), Appellants’ App. at 036-037. Similarly, based on the small amount of expected tree clearing, as well as the commitments regarding ground cover and the control of noxious weeds, the Board had adequate evidence to find that the Project would also have a minimal impact on vegetation.

This Court has repeatedly affirmed that it will not reverse or modify a board decision as to questions of fact where the record contains sufficient probative evidence to show that the Board’s decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 29. The Court consistently shows deference to the Board’s specialized expertise. *Id.* Appellants bear the burden of demonstrating that the Board’s decision is against the manifest weight of the evidence or is clearly unsupported by the record. *Id.* Here, the Board found that the uncontroverted evidence adequately demonstrated that the probable environmental impact of the Project on wildlife and vegetation would be minimal.

Nor have Appellants demonstrated any harm from the Board’s decision, claiming only that the surveys performed left the Board “with little information about” the Project

Area. Appellants' Brief at 36. Appellants failed to allege that they suffered any harm from what they characterize as inadequate surveys. This Court has long recognized that an "[a]ppeal lies only on behalf of a party aggrieved by the final order appealed from. Appeals are not allowed for the purpose of settling abstract questions, but only to correct errors *injuriously affecting the appellant.*" *Ohio Domestic Violence Network v. Pub. Util. Comm.*, 65 Ohio St.3d 438, 439, 605 N.E.2d 13 (1992) (emphasis added).

It is well settled that the Court will not reverse an order of the Board unless the party seeking reversal shows that it has been or will be harmed or prejudiced by the order. *Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 86 N.E.2d 10 (1949), paragraph six of the syllabus. A generalized harm is insufficient because, as the parties seeking reversal, Appellants must show harm *to themselves*. See *Ohio Edison Co. v. Pub. Util. Comm.*, 173 Ohio St. 478, 184 N.E.2d 70 (1962), paragraph ten of the syllabus; *Ohio Contract Carriers Assn., Inc. v. Pub. Util. Comm.*, 140 Ohio St. 160, 42 N.E.2d 758 (1942), syllabus; *Indus. Energy Consumers v. Pub. Util. Comm.*, 63 Ohio St.3d 551, 553, 589 N.E.2d 1289 (1992). The harm must be real and concomitant and not future in nature. *Cincinnati v. Pub. Util. Comm'n*, 63 Ohio St. 3d 366, 588 N.E.2d 1175 (1992). Allegations regarding future harm are too speculative to meet this requirement. *Industrial Energy Consumers v. Pub. Util. Comm'n*, 63 Ohio St. 3d 551, 553, 589 N.E.2d 1289, 1291 (1992). Appellants bear the "burden of demonstrating * * * that it has or will be prejudiced by the error." *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 88, 2002-Ohio-1735, 765 N.E.2d 862. This Court "will not reverse an order of the [Board] absent a showing of prejudice by the party seeking reversal." *Myers v. Pub. Util. Comm.*, 64

Ohio St.3d 299, 302, 595 N.E.2d 873 (1992); *see also Holladay Corp. v. Pub. Util. Comm'n*, 61 Ohio St. 2d 335, 402 N.E.2d 1175 syllabus (1980). Appellants did not allege, let alone identify, any harm they suffered due to the Board's decision to accept Alamo's literature and field surveys.

The Board's determination should be affirmed.

Proposition of Law No. IV

The Board lawfully determined that Alamo met the requirements of R.C. 4906.10(A)(2) and (3) regarding compliance with information associated with the Project's drainage and prevention of flooding.

As quoted by the Appellants, the Ohio Administrative Code requires the Board to obtain data about a project's potential for surface water runoff prior to approving a project. Ohio Adm.Code 4906-4-07, Appellants' Brief at 37. Appellants claim that the Board unreasonably granted the Applicant's certificate because this requirement was not met. Quite the contrary is true, however, as evidenced in the record. Alamo provided evidence in its Application that the soil in the Project Area is suitable for drainage for the Project, and there are no soil problems that need to be remedied for construction of the facility. Application at 63, Supp. at 2. Also important to the Board's finding that the Applicant met the requirements of Ohio Adm.Code 4906-4-07 was the testimony of Alamo witness Noah Waterhouse. Mr. Waterhouse is a licensed professional engineer with extensive experience evaluating drainage, runoff, and drain tile issues at solar projects. Direct Testimony of Noah Waterhouse at 1-2, Supp. at 28. Mr. Waterhouse testified that he expects the facility will not have any impact on drainage nor result in

increased runoff. *Id.* at 5. Interestingly, witness Waterhouse testified that he expects the facility to have superior drainage and runoff characteristics compared to a fallow field, due to the year-round vegetation maintained in and around the Project Area. *Id.*

Another Applicant witness, Mr. Marquis, a professional engineer with experience in hydrology and hydraulics, agreed with Mr. Waterhouse's conclusion that the proposed land use changes brought about by the facility would not result in an increase in runoff. Witness Marquis also stated that "the vegetation beneath the panels is more than adequate for the management of stormwater." Tr. Vol. IV at 670, Supp. at 49.

Appellants point to specific areas of Ohio Adm.Code 4906-4-7(C)(2)(b) that require the Applicant to "provide an estimate of the quality and quantity of aquatic discharges from construction." Appellants' Brief at 37. But the Board clearly noted Alamo will satisfy a "General Permit Authorization for Storm Water Discharges Construction Associated with Construction Activities (Construction General Permit) issued by the Ohio EPA." *Alamo Solar* Order at ¶ 170, Appellants' App. at 059. Alamo also reaffirmed its commitment to perform pre- and post-construction construction stormwater calculations to determine if post-construction best management practices are required per the Construction General Permit." *Alamo Solar* Order at ¶ 57, Appellants' App. at 015. According to the Amended Stipulation, if action is necessary, Alamo must incorporate guidance from the Ohio EPA titled "Guidance on Post-Construction Storm Water Controls for Solar Panel Arrays." *Alamo Solar* Order at ¶ 124 (29), Appellants' App. at 040-041. As the Applicant's experts testified, no is runoff expected, which provides the estimate of runoff to have been quantified. Furthermore, Alamo must

mitigate any such impacts pursuant to the terms of the Construction General Permit and guidance from the Ohio EPA. *Id.*

Appellants state that the Board's decision violates Ohio Adm.Code 4906-4-07(C)(2)(c) because of lack of statistical information and lack of any plans to mitigate runoff from construction activities. Appellants' Brief at 41. As discussed above, two expert witnesses determined that there will be no increase in runoff and in fact, there is likely to be less runoff. In addressing Appellants' argument that there are no plans to mitigate runoff from construction, the Applicant will obtain a Storm Water Discharge permit associated with Construction Activity and issues by the EPA. The Applicant will perform pre- and post-construction stormwater calculations to ensure best management practices are in keeping with its Construction General Permit. Going even further, Alamo will mitigate any impacts pursuant to the terms of the Construction General Permit and guidance from the EPA. *Alamo Solar* Order at ¶ 124 (29), Appellants' App. at 040-041.

Proposition of Law No. V

The Board lawfully and reasonably issued a certificate to Alamo after finding through record evidence that the Project's pollution impacts and mitigation measures met the standards required by Ohio law, R.C. 4906.10(a)(2) and (3).

Appellants claim that the record does not contain the information required to find compliance with Ohio Adm.Code 4906-4-07(C)(2)(b) and (d). Appellants incorrectly maintain that the information in these rules are absolutely mandatory. After asserting that the administrative rule has not been complied with, Appellants make the assertion that the

Applicant did not meet the rule, and by extension, that the Applicant has not satisfied R.C. 4906.10(A)(2) and (3). This is not the standard.

Chapter 4906-4 of the Administrative Code states what the Board would like to see in an Application. These rules may be waived in power siting cases. On February 8, 2019, the Board's Executive Director filed a letter stating that Alamo's Application had "been found to comply with Chapters 4906-01, et seq., of the Ohio Administrative Code," and deeming the Application complete. Letter of compliance (February 8, 2019), Supp. at 14. Furthermore, Appellants did not object to the admission of Alamo's application during the evidentiary hearing.

The arguments in this proposition of the Appellants' brief are similar to those raised in the Appellants' proposition regarding drainage and flooding, namely, that an applicant must comply with every single element of the Board's rules. Appellants complain that (1) the record contains no sampling and analysis of water quality receiving runoff from the Project Area; (2) the Applicant did not provide an estimate of the quality of aquatic discharges from the site clearing and construction operations; and (3) the Applicant, instead of identifying plans to mitigate equipment to control erosion discharges into streams, merely promises to do so after the Board issues a certificate. Appellants' Brief at 45. The evidence in the record demonstrates that the Applicant met all of these rule requirements.

As discussed earlier in this brief, Alamo's expert witnesses Waterhouse and Marquis testified that the runoff created by the Project was likely to be less due to the grass and other flora planted as part of the construction of the Project, satisfying

Appellants' first two complaints. Appellants presented no evidence whatsoever at the hearings held in this matter that the Applicant had not complied with these rules.

Applicants admit that there have been mitigation measures provided, but asserts that any post-certificate commitment is illegal. Alamo provided specific evidence of mitigation plans to deal with any possibility that there will be erosion discharges into streams. It is obligated by its storm water certificate and enforced by the EPA to take care of runoff. Furthermore, Alamo will perform and pre- and post-construction studies and reaffirmed its commitment to perform pre- and post-construction construction stormwater calculations to determine if post-construction best management practices are required per the Construction General Permit.” *Alamo Solar* Order at ¶ 124 (29), Appellants’ App. at 040-041. If action is necessary, Alamo must incorporate guidance from the Ohio EPA titled “Guidance on Post-Construction Storm Water Controls for Solar Panel Arrays.” *Id.* This Court has held that post-certificate conditions are legal and an important part of the siting process when it held:

R.C. 4906.10(A) allows a certificate to be issued upon such conditions as the board considers appropriate. The statutes authorize a dynamic process that does not end with the issuance of a construction certificate. The General Assembly vested the board with authority to allow its staff to monitor *
* * compliance with conditions neighbors already had the chance to be heard.

In re Buckeye Wind, L.L.C., 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869 at ¶ 16.

The Board correctly conducted its proceedings that allowed the Applicant to present its witnesses and other evidence. Appellants and other parties had the right

to cross-examine all witnesses and present their own witnesses and evidence. The Amended Stipulation was filed on July 30, 2020. Alamo filed six additional pieces of testimony supporting and further explaining the additional expanded commitments of the Amended Stipulation on October 9, 2020. The Board Staff also filed additional Supplemental testimony on October 9, 2020. Appellants filed no testimony after the Amended Stipulation was filed. The Applicant's additional testimony provided more detail regarding such things as clarifying the benchmark conditions of the affected drainage systems, which includes measuring both surface and subsurface drainage. Waterhouse Supplemental Testimony at 1-2, Supp. at 26-27. Finally, the Amended Stipulation "*requires* the Applicant to investigate the location of various waterways, not only by survey, but also by contacting the adjacent landowners and requesting pertinent information." *Id.* (emphasis added).

The Board correctly found that the Applicant satisfied the criteria for information required by R.C. 4906.10(A)(2) and (3) related to the Projects possible pollution impacts and mitigation measures.

Proposition of Law No. VI

The setbacks adopted by the Board are reasonable, lawful, and supported by the record. *In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St.3d 333, 2010-Ohio-1841, ¶ 17 (2010)

The Board found, as a matter of fact and based on the evidence of record, that the setbacks required by the Application and Amended Stipulation were sufficient and

reasonable to minimize any adverse impact. The Court should not disturb the Board's finding.

The Board has the responsibility to minimize the Project's adverse environmental impact. Alamo has committed to design its facility with setbacks from the fence to public roads, from the above-ground equipment to public roads, from its fence and adjacent property lines, from the above-ground equipment to property lines and from above-ground equipment and habitable residences. There will be setbacks from the solar equipment to non-participating property lines and homes of 25 feet and 150 feet respectively. *Alamo Solar* Order at ¶ 225, Appellants' App. at 081. The Board found that these setbacks were sufficient to protect the public:

The Ohio Supreme Court, in considering such cases, has stated that “[w]hether the setbacks were sufficient to protect the public . . . [is] an evidentiary issue, and we have ‘consistently refused to substitute [our] judgment for that of the commission on evidentiary matters.’” *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513 at ¶30. We are persuaded by Company witness Herling's testimony on cross examination: “[t]he [county] engineer was comfortable that those distances would allow for adequate room to avoid drifting of snow or inadequate room to store snow in the winter, those are some of the primary concerns, and to allow for sight lines at any intersections.” Tr. I at 133-4. The evidence of record in this application indicates that the setbacks required by the application and Amended Stipulation are sufficient and reasonable.

Alamo Solar Order at ¶ 245, Appellants' App. at 088-089.

In addition to the setbacks, there are strong vegetative screening requirements. “Unless alternative mitigation is agreed upon with the owner of an adjacent non-

participating parcel containing a residence within 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.” *Alamo Solar* Order at ¶ 124 (15), Appellants’ App. at 034. The certificate further requires Alamo to ensure that 90 percent of the planting have survived after five years, as well as committing Alamo to maintain the vegetative screening for the entire life of the facility. *Id.*

The Board reasonably and lawfully found that the setbacks required by the Application and Amended Stipulation, in conjunction with the requirements for establishing and maintaining vegetative screening, were sufficient and reasonable to minimize any adverse impact. The Court should not disturb the Board’s finding. Consistent with its holding in *Champaign Wind*, the Court should not substitute its judgment for the Board’s.

CONCLUSION

Although Appellants oppose this Project, many local organizations representing the residents in the Project Area signed the Stipulation. It is the Board's statutory job to analyze and review the expected impacts and adopt measures that reasonably address and mitigate those impacts to the Project Area and environment. The conditions adopted and approved by the Board to address and mitigate impacts as provided by the Amended Stipulation, and supported both by substantial evidence and by a broad range of interested parties, are reasonable and satisfy the criteria of R.C. 4906.10(A) (1-8) for this Project.

For the foregoing reasons, the Board's Orders are lawful and reasonable. Accordingly, the Board respectfully requests that this Court affirm its decision.

Respectfully submitted,

David Yost (0056290)
Attorney General

John H. Jones (0051913)
Section Chief

/s/Werner L. Margard III

Werner L. Margard III (0024858)
(Counsel of Record)

Jodi Bair (0062921)

Robert A. Eubanks (0073386)
Assistant Attorneys General

Public Utilities Section
30 East Broad Street, 26th Floor
Columbus, OH 43215

Tel: (614) 466-4397

Fax: (614) 644-8764

werner.margard@OhioAGO.gov

jodi.bair@OhioAGO.gov

robert.eubanks@OhioAGO.gov

*Attorneys for Appellee, Ohio Power Siting
Board*

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **MERIT BRIEF**, submitted on behalf of Appellee Ohio Power Siting Board, was served by electronic mail upon the following parties of record this 3rd day of June, 2022.

/s/ Werner L. Margard III

Werner L. Margard III (0024858)
Assistant Attorney General

Parties of Record:

Jack A. Van Kley (0016961)
(Counsel of Record)
Van Kley & Walker, LLC
132 Northwoods Blvd., Suite C-1
Columbus, OH 43235
Tel: (614) 431-8900
Fax: (614) 431-8905
jvankley@vankleywalker.com

Attorney for Appellants Didion, et al.

Michael J. Settineri (0073369)
(Counsel of Record)
Daniel E. Shuey (0085398)
Emily J. Taft (0098037)
Vorys, Sater, Seymour & Pease
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
Telephone: 614.464.5462
Fax: 614.719-5146
mjsettineri@vorys.com
deshuey@vorys.com
etaft@vorys.com

*Counsel for Intervening Appellee Alamo
Solar I, LLC*

APPENDIX

Rules

Ohio Adm. Code Ohio 4906-2-3135 3

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Rule 4906-2-31 | Reopening of proceedings.

(A) The board or the administrative law judge may, upon their own motion or upon motion of any person for good cause shown, reopen a proceeding at any time prior to the issuance of a final order.

(B) A motion to reopen a proceeding shall specifically set forth the nature and purpose. If the purpose is to permit the presentation of additional evidence, the motion shall specifically describe the nature and purpose of the requested reopening of such evidence and shall set forth facts showing why such evidence could not with reasonable diligence have been presented earlier in the proceeding.

Rule 4906-4-08 | Health and safety, land use and ecological information.

(A) The applicant shall provide information on health and safety.

(1) Equipment safety. The applicant shall provide information on the safety and reliability of all equipment.

(a) Describe all proposed major public safety equipment.

(b) Describe the reliability of the equipment.

(c) Provide the generation equipment manufacturer's safety standards. Include a complete copy of the manufacturer's safety manual or similar document and any recommended setbacks from the manufacturer.

(d) Describe the measures that will be taken to restrict public access to the facility.

(e) Describe the fire protection, safety, and medical emergency plan(s) to be used during construction and operation of the facility, and how such plan(s) will be developed in consultation with local emergency responders.

(2) Air pollution control. Except for wind farms, the applicant shall describe in conceptual terms the probable impact to the population due to failures of air pollution control equipment.

(3) Noise. The applicant shall provide information on noise from the construction and operation of the facility.

(a) Describe the construction noise levels expected at the nearest property boundary. The description shall address:

- (i) Blasting activities.
- (ii) Operation of earth moving equipment.
- (iii) Driving of piles, rock breaking or hammering, and horizontal directional drilling.
- (iv) Erection of structures.
- (v) Truck traffic.
- (vi) Installation of equipment.

(b) Describe the operational noise levels expected at the nearest property boundary. The description shall address:

- (i) Operational noise from generation equipment. In addition, for a wind farm, cumulative operational noise levels at the property boundary for each property adjacent to or within the project area, under both day and nighttime operations. The applicant shall use generally accepted computer modeling software (developed for wind turbine noise measurement) or similar wind turbine noise methodology, including consideration of broadband, tonal, and low-frequency noise levels.
- (ii) Processing equipment.
- (iii) Associated road traffic

(c) Indicate the location of any noise-sensitive areas within one mile of the facility, and the operational noise level at each habitable residence, school, church, and other noise-sensitive receptors, under both day and nighttime operations. Sensitive receptor, for the purposes of this rule, refers to any occupied building.

(d) Describe equipment and procedures to mitigate the effects of noise emissions from the proposed facility during construction and operation, including limits on the time of day at which construction activities may occur.

(e) Submit a preconstruction background noise study of the project area that includes measurements taken under both day and nighttime conditions.

(4) Water impacts. The applicant shall provide information regarding water impacts

(a) Provide an evaluation of the impact to public and private water supplies due to construction and operation of the proposed facility.

(b) Provide an evaluation of the impact to public and private water supplies due to pollution control equipment failures.

(c) Provide existing maps of aquifers, water wells, and drinking water source protection areas that may be directly affected by the proposed facility.

(d) Describe how construction and operation of the facility will comply with any drinking water source protection plans near the project area.

(e) Provide an analysis of the prospects of floods for the area, including the probability of occurrences and likely consequences of various flood stages, and describe plans to mitigate any likely adverse consequences.

(5) Geological features. The applicant shall provide a map of suitable scale showing the proposed facility, geological features of the proposed facility site, topographic contours, existing gas and oil wells, and injection wells. The applicant shall also:

(a) Describe the suitability of the site geology and plans to remedy any inadequacies.

(b) Describe the suitability of soil for grading, compaction, and drainage, and describe plans to remedy any inadequacies and restore the soils during post-construction reclamation.

(c) Describe plans for the test borings, including closure plans for such borings. Plans for the test borings shall contain a timeline for providing the test boring logs and the following information to the board:

(i) Subsurface soil properties.

(ii) Static water level.

(iii) Rock quality description.

(iv) Per cent recovery.

(v) Depth and description of bedrock contact.

(6) Wind velocity. The applicant shall provide an analysis of high wind velocities for the area, including the probability of occurrences and likely consequences of various wind velocities, and describe plans to mitigate any likely adverse consequences.

(7) Blade shear. For a wind farm, the applicant shall evaluate and describe the potential impact from blade shear at the nearest property boundary and public road.

(8) Ice throw. For a wind farm, the applicant shall evaluate and describe, by providing a site-specific ice throw risk analysis and assessment study, the potential impact from ice throw at the nearest property boundary and public road.

(9) Shadow flicker. For a wind farm, the applicant shall evaluate and describe the potential cumulative impact from shadow flicker at the property boundary and sensitive receptors within a distance of ten rotor diameters or at least one-half mile, whichever is greater, of a turbine, including its plans to minimize potential impacts.

(10) Radio and TV reception. The applicant shall evaluate and describe the potential for the facility to interfere with radio and TV reception and describe measures that will be taken to minimize interference.

(11) Radar interference. The applicant shall evaluate and describe the potential for the facility to interfere with military and civilian radar systems and describe measures that will be taken to minimize interference.

(12) Navigable airspace interference. The applicant shall evaluate and describe the potential for the facility to interfere with navigable airspace and describe measures that will be taken to minimize interference. The applicant shall coordinate such efforts with appropriate state and federal agencies.

(13) Communication interference. The applicant shall evaluate and describe the potential for the facility to interfere with microwave communication paths and systems and describe measures that will be taken to minimize interference.

Include all licensed systems and those used by electric service providers and emergency personnel that operate in the project area.

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

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

(a) Provide a map of at least 1:24,000 scale containing a one half-mile radius from the project area, showing the following:

(i) The proposed facility and project area boundary.

(ii) Undeveloped or abandoned land such as wood lots or vacant tracts of land subject to past or present surface mining activities, not used as a registered game preserve or in agricultural production.

(iii) Wildlife areas, nature preserves, and other conservation areas.

(iv) Surface bodies of water, including wetlands, ditches, streams, lakes, reservoirs, and ponds.

(v) Highly-erodible soils and slopes of twelve percent or greater.

(b) Provide the results of a field survey of the vegetation and surface waters within one-hundred feet of the potential construction impact area of the facility. The survey should include a description of the vegetative communities, and delineations of wetlands and streams. Provide a map of at least 1:12,000 scale showing all delineated resources.

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

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

(e) Provide a summary of any additional studies which have been made by or for the applicant addressing the ecological impact of the proposed facility

(2) Ecological impacts. The applicant shall provide information regarding potential impacts to ecological resources during construction.

(a) Provide an evaluation of the impact of construction on the resources surveyed in response to paragraph (B)(1) of this rule. Include the linear feet and acreage impacted, and the proposed crossing methodology of each stream and wetland that would be crossed by or within the footprint of any part of the facility or construction equipment. Specify the extent of vegetation clearing, and describe how such clearing work will be done so as to minimize removal of woody vegetation. Describe potential impacts to wildlife and their habitat.

(b) Describe the mitigation procedures to be utilized to minimize both the short-term and long-term impacts due to construction, including the following:

(i) Plans for post-construction site restoration and stabilization of disturbed soils, especially in riparian areas and near wetlands. Restoration plans should include details on the removal and disposal of materials used for temporary access roads and construction staging areas, including gravel.

(ii) A detailed frac out contingency plan for stream and wetland crossings that are expected to be completed via horizontal directional drilling.

(iii) Methods to demarcate surface waters and wetlands and to protect them from entry of construction equipment and material storage or disposal.

(iv) Procedures for inspection and repair of erosion control measures, especially after rainfall events.

(v) Methods to protect vegetation in proximity to any project facilities from damage, particularly mature trees, wetland vegetation, and woody vegetation in riparian areas.

(vi) Options for disposing of downed trees, brush, and other vegetation during initial clearing for the project, and clearing methods that minimize the movement of heavy equipment and other vehicles within the project area that would otherwise be required for removing all trees and other woody debris off site.

(vii) Avoidance measures for state of federally listed and protected species and their habitat, in accordance with paragraph (D) of rule [4906-4-09](#) of the Administrative Code.

(3) Operational ecological impacts. The applicant shall provide information regarding potential impacts to ecological resources during operation and maintenance of the facility.

(a) Provide an evaluation of the impact of operation and maintenance on the undeveloped areas shown in response to paragraph (B)(1) of this rule.

(b) Describe the procedures to be utilized to avoid, minimize, and mitigate both the short- and long-term impacts of operation and maintenance. Describe methods for protecting streams, wetlands, and vegetation, particularly mature trees, wetland vegetation, and woody vegetation in riparian areas. Include a description of any expected use of herbicides for maintenance.

(c) Describe any plans for post-construction monitoring of wildlife impacts.

(C) The applicant shall provide information on land use and community development.

(1) Existing land use. The applicant shall provide information regarding land use in the region and potential impacts of the facility through the following maps and related information.

(a) Provide a map of at least 1:24,000 scale showing the following within one-mile of the project area boundary:

(i) The proposed facility.

(ii) Land use, depicted as areas on the map. Land use, for the purposes of paragraph (C) of this rule, refers to the current economic use of each parcel. Categories should include residential, commercial, industrial, institutional, recreational, agricultural, and vacant, or as classified by the local land use authority.

(iii) Structures, depicted as points on the map. Identified structures should include residences, commercial centers or buildings, industrial buildings and installations, schools, hospitals, churches, civic buildings, and other occupied places.

(iv) Incorporated areas and population centers.

(b) Provide, for the types of structures identified on the map in paragraph (C)(1)(a) of this rule, a table showing the following:

(i) For all structures and property lines within one thousand five hundred feet of the generation equipment or wind turbine, the distance between both the structure or property line and the equipment or nearest wind turbine.

(ii) For all structures and property lines within two hundred fifty feet of a collection line, access road, or other associated facility, the distance between both the structure or property line and the associated facility.

(iii) For each structure and property in the table, whether the property is being leased by the applicant for the proposed facility.

(c) Provide an evaluation of the impact of the proposed facility on the above land uses identified on the map in paragraph (C)(1)(a) of this rule. Include, for each land use type, the construction impact area and the permanent impact area in acres, in total and for each project component (e.g., turbines, collection lines, access roads), and the explanation of how such estimate was calculated.

(d) Identify structures that will be removed or relocated.

(2) Wind farm maps. For wind farms only, the applicant shall provide a map(s) of at least 1:24,000 scale showing the proposed facility, habitable residences, and parcel boundaries of all parcels within a half-mile of the project area. Indicate on the map, for each parcel, the parcel number and whether the parcel is being leased by the applicant for the proposed facility, as of no more than thirty days prior to the submission of the application. Include on the map the setbacks for wind turbine structures in relation to property lines, habitable residential structures, electric transmission lines, gas pipelines, gas distribution lines, hazardous liquid(s) pipelines, and state and federal highways, consistent with no less than the following minimum requirements:

(a) The distance from a wind turbine base to the property line of the wind farm property shall be at least one and one-tenth times the total height of the turbine structure as measured from its tower's base (excluding the subsurface foundation) to the tip of a blade at its highest point.

(b) The wind turbine shall be at least one thousand, one hundred, twenty-five feet in horizontal distance from the tip of the turbine's nearest blade at ninety

degrees to the property line of the nearest adjacent property, including a state or federal highway, at the time of the certification application.

(c) The distance from a wind turbine base to any electric transmission line, gas pipeline, gas distribution line, hazardous liquid(s) pipeline, or public road shall be at least one and one-tenth times the total height of the turbine structure as measured from its tower's base (excluding the subsurface foundation) to the tip of a blade at its highest point.

(d) Minimum setbacks from property lines and residences may be waived pursuant to the procedures set forth in paragraph (C)(3) of this rule.

(3) Setback waivers. The setback shall apply in all cases except those in which all owner(s) of property adjacent to the wind farm property waive application of the setback to that property. The waiver(s) must meet the following requirements:

(a) Content of waiver. The waiver shall:

(i) Be in writing;

(ii) Provide a brief description of the facility;

(iii) Notify the applicable property owner(s) of the statutory minimum setback requirements;

(iv) Describe the adjacent property subject to the waiver through a legal description;

(v) Describe how the adjacent property is subject to the statutory minimum setback requirements; and

(vi) Advise all subsequent purchasers of the adjacent property subject to the waiver that the waiver of the minimum setback requirements shall run with the land.

(b) Required signature. The waiver shall be signed by the applicant and the applicable property owner(s), indicating consent to construction activities without compliance with the minimum setback requirements.

(c) Recordation of waiver. The waiver shall be recorded in the county recorder's office where the property that is the subject of the waiver is located.

(4) Land use plans. The applicant shall provide information regarding land use plans.

(a) Describe formally adopted plans for future use of the project area and surrounding lands for anything other than the proposed facility.

(b) Describe the applicant's plans for concurrent or secondary uses of the site.

(c) Describe the impact of the proposed facility on regional development, including housing, commercial and industrial development, schools, transportation system development, and other public services and facilities.

(d) Assess the compatibility of the proposed facility and the anticipated resultant regional development with current regional plans.

(e) Provide current population counts or estimates, current population density, and ten-year population projections for counties and populated places within five miles of the project area.

(D) The applicant shall provide information on cultural and archaeological resources

(1) Landmark mapping. The applicant shall indicate, on a map of at least 1:24,000 scale, any formally adopted land and water recreation areas, recreational trails, scenic rivers, scenic routes or byways, and registered landmarks of historic, religious, archaeological, scenic, natural, or other cultural significance within ten miles of the project area. Landmarks to be considered for purposes of paragraph (D) of this rule are those districts, sites, buildings, structures, and objects that are recognized by, registered with, or identified as eligible for registration by the national registry of natural landmarks, the state historical preservation office, or the Ohio department of natural resources.

(2) Impacts on landmarks. The applicant shall provide an evaluation of the impact of the proposed facility on the preservation and continued meaningfulness of these landmarks and describe plans to avoid or mitigate any adverse impact.

(3) Recreation and scenic areas. The applicant shall describe the identified recreation and scenic areas within ten miles of the project area in terms of their proximity to population centers, uniqueness, topography, vegetation, hydrology, and wildlife. Provide an evaluation of the impact of the proposed facility on identified recreational and scenic areas within ten miles of the project area and describe plans to mitigate any adverse impact.

(4) Visual impact of facility. The applicant shall evaluate the visual impact of the proposed facility within at least a ten-mile radius from the project area. The evaluation shall be conducted or reviewed by a licensed landscape architect or other professional with experience in developing a visual impact assessment. The applicant shall:

(a) Describe the visibility of the project, including a viewshed analysis and area of visual effect, shown on a corresponding map of the study area. The viewshed analysis shall not incorporate deciduous vegetation, agricultural crops, or other seasonal land cover as viewing obstacles. If the viewshed analysis includes atmospheric conditions, it shall incorporate the atmospheric conditions under which the facility would be most visible.

(b) Describe the existing landscape and evaluate its scenic quality. This description shall include documentation of a review of existing plans, policies, and regulations of the communities within the study area, and list all references to identified visual resources or other indications of the visual preferences of the community.

(c) Describe the alterations to the landscape caused by the facility, including a description and illustration of the scale, form, and materials of all facility structures, and evaluate the impact of those alterations to the scenic quality of the landscape.

(d) Evaluate the visual impacts to the resources identified in paragraph (D) of this rule, and any such resources within ten miles of the project area that are valued specifically for their scenic quality.

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

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

(E) The applicant shall provide information regarding agricultural districts and potential impacts to agricultural land.

(1) Mapping of agricultural land. The applicant shall identify on a map of at least 1:24,000 scale the proposed facility, all agricultural land, and separately all agricultural district land existing at least sixty days prior to submission of the application located within the project area boundaries. Where available, distinguish between agricultural uses such as cultivated lands, permanent pasture land, managed woodlots, orchards, nurseries, livestock and poultry confinement areas, and agriculturally related structures.

(2) Agricultural information. The applicant shall provide, for all agricultural land, and separately for agricultural uses and agricultural districts identified under paragraph (E)(1) of this rule, the following:

(a) A quantification of the acreage impacted.

(b) An evaluation of the impact of the construction, operation, and maintenance of the proposed facility on the land and the following agricultural facilities and practices within the project area:

(i) Field operations such as plowing, planting, cultivating, spraying, aerial applications, harvesting.

(ii) Irrigation.

(iii) Field drainage systems.

(iv) Structures used for agricultural operations.

(v) The viability as agricultural district land of any land so identified.

(c) A description of mitigation procedures to be utilized by the applicant during construction, operation, and maintenance to reduce impacts to agricultural land, structures, and practices. The description shall illustrate how avoidance and mitigation procedures will achieve the following:

(i) Avoidance or minimization to the maximum extent practicable of any damage to field tile drainage systems and soils in agricultural areas.

(ii) Timely repair of damaged field tile systems to at least original conditions, at the applicant's expense.

(iii) Segregation of excavated topsoil, and decompaction and restoration of all topsoil to original conditions unless otherwise agreed to by the landowner.

Section 4906.10 | Basis for decision granting or denying certificate.

(A) The power siting board shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions, or modifications of the construction, operation, or maintenance of the major utility facility as the board considers appropriate. The certificate shall be subject to sections [4906.101](#), [4906.102](#), and [4906.103](#) of the Revised Code and conditioned upon the facility being in compliance with standards and rules adopted under section [4561.32](#) and Chapters 3704., 3734., and 6111. of the Revised Code. An applicant may withdraw an application if the board grants a certificate on terms, conditions, or modifications other than those proposed by the applicant in the application. The board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, unless it finds and determines all of the following:

- (1) The basis of the need for the facility if the facility is an electric transmission line or gas pipeline;
- (2) The nature of the probable environmental impact;
- (3) 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;

Section 4906.12 | Procedures of public utilities commission to be followed.

Sections [4903.02](#) to [4903.16](#) and [4903.20](#) to [4903.23](#) of the Revised Code shall apply to any proceeding or order of the power siting board under Chapter 4906. of the Revised Code, in the same manner as if the board were the public utilities commission under such sections.