IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Alamo 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

REPLY BRIEF OF 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

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INTRODUCTION

The issue in this case is not whether solar energy facilities will be constructed in Ohio, or whether converting 841 acres of prime farmland into an industrial facility is good public policy, although the loss of food production is a serious concern. The issue here is whether the Ohio Power Siting Board ("OPSB" or "board") can bypass OPSB rules designed to inform and involve the board and the public in figuring out how to minimize the harm from this solar project ("Project").

For some time, OPSB has been misreading a three justice opinion in the *Buckeye Wind* case as an unrestricted license to make uninformed factual judgments and to defer important decisions on addressing a facility's impacts to its Staff's discretion after the public's participation in the adjudication has ended. OPSB, encouraged by Alamo and other utilities, has been issuing certificates without requiring the applicants to provide the information mandated by OPSB's rules. To compensate for these data gaps, OPSB adds conditions to its certificates directing applicants to submit post-certification plans and studies to the Staff to study and mitigate facility impacts. This deprives the communities bearing the brunt of these impacts of the opportunity to influence these decisions and deprives the board's members of the data necessary for sound certification decisions.

Although Alamo emphasizes the length of OPSB's opinion and the proceedings below, the public is ill-served by an expensive adjudicatory process that merely goes through the motions. The Court should not mistake quantity for quality. Most of OPSB's opinion just paraphrases the parties' post-hearing briefs, with little analysis to explain OPSB's conclusions. For example, OPSB disposed of the critical topics of visual impacts and vegetative screening with 11 lines of analysis. This is the inevitable result of a record that is short of relevant facts.

Alamo also states that this appeal is the Citizens' "third bite at the apple," as if that proves the extensiveness of the proceeding below. However, the second bite was just the Citizens'

application for reconsideration required by law to preserve their issues for appeal to this Court. OPSB's short denial of that filing added no new reasoning to the board's decision.

One of Alamo's tactics for diverting attention from the lack of data in the record is to accuse the Citizens' counsel of lying about the record's contents. Where the evidence in favor of the Citizens' positions is uncontroverted, both Appellees attempt to give the false appearance of factual disputes by discussing unrelated but superficially similar facts. For example, in the proposition of law about the failings of the four visual simulations, OPSB discusses (at 14) other topics (e.g., glare and land use) in the 100-page visual impact analysis to draw attention from the simulations' flaws. For the same purpose, Alamo refers to photographs in the visual impact analysis that contain no simulations on them. In contrast, the Citizens' briefs provide detailed record citations for their positions, and only on facts that are relevant, as further discussed below.

ARGUMENT

Appellants' Propositions Of Law Are Based On The Lack Of Rule-Required Information In The Entire Record, Not Just The Application, So Appellants Had No Obligation To Object To The Application's Admission Into Evidence.

Alamo correctly argues that this appeal focuses on whether the entire evidentiary record, and not just the Application, supports OPSB's decision. Although all applications must contain the information mandated by rule, the Citizens do not rely on that position on appeal. Thus, Alamo's contention that Appellants should have argued below that the Application was incomplete is a red herring. Appellants did raise this issue below, but they are not pursuing it on appeal. Alamo took the unusual step of requesting a second hearing after the first hearing exposed the lack of evidence for the Certificate, but Alamo still failed to supply the required information. Thus, the Citizens' focus is on the lack of evidence in the entire record.

Alamo asserts that the Staff found the Application to be complete but the Citizens did not

object to its admission or object to reopening the record at the second hearing. But the problem was not that the offered information was inadmissible; the problem was that more evidence was needed to comply with the rules. Alamo failed to add the required information during the second hearing, even though the Citizens had already briefed the record's shortcomings. (ICN 110, 112)

Another flaw in Alamo's red herring is that OPSB actually did not find the Application to be complete. Although the letter in question stated that the Application "has been found to comply with Chapters 4906-01, et seq.," the letter hedged on this conclusion as follows:

> This means the Board's Staff has received sufficient information to begin its review of this application. During the course of its investigation, the Staff may request additional information to ensure a full and fair assessment of this project.

(ICN 24, Letter of Feb. 8, 2019) The Staff did not actually determine that the Application was complete, since they had only just started reviewing it.

The Court Has The Authority To Vacate OPSB Factual Determinations That Are Manifestly Against The Weight Of Evidence Or Lack Record Support.

Alamo asks the Court to ignore all factual issues to avoid weighing conflicting evidence. OPSB's brief states that the Court disclaimed any role in reviewing factual decisions in *In re Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 30. In the instant case, OPSB's decisions are reversible, because they are manifestly against the weight of evidence or lack supporting evidence. And, while Alamo boasts about its expert witnesses, their testimony supports the Citizens' positions, admitting that Alamo had not provided rule-required information.

Alamo's Argument That Final Design Plans Are Impractical Prior To Certification Is No Excuse For Bypassing The Board's Rules Or The Criteria In R.C. 4906.10(A).

Alamo argues that final design plans are impractical, because solar equipment designs evolve. However, none of the deficiencies at issue in this appeal requires a final Project design to

fix. For example, the preliminary nature of the current design does not preclude Alamo from submitting a final vegetation plan for approval during the adjudicatory process, because the vegetation will be planted next to the Project Area's outside boundaries that are set in stone.

OPSB Has No Authority To Bypass Public Participation By Allowing Its Staff To Obtain Data And To Approve Plans After Certification That Were Required By Rule To Be Included In The Evidentiary Record For Public Review.

Appellees cite the lead opinion in *In re Application of Buckeye Wind, L.L.C.* as justification for allowing the Staff to make critical decisions after certification that will determine and dictate the Project's impacts on the public. 131 Ohio St.3d 449, 456–57, 2012-Ohio-878, 966 N.E.2d 869, ¶¶ 28-30. That opinion stated that it may not be practical to hold a hearing on every infinite detail of construction, such as "whether white or gray screws are used in the control room." *Id*. at ¶ 30. This opinion stated that, "[i]n this case, we conclude that the board reasonably drew the line regarding the issuance of the certificate and the imposition of its conditions." *Id*. (Emphasis added.)

Three justices joined in that lead opinion and three justices dissented. A fourth justice concurred only in the judgment. Such a lead opinion is not binding precedent. *State ex rel. Mobley v. Ohio Dep't of Rehab. & Correction*, __ Ohio St.3d __, 2022-Ohio-1765, __ N.E.3d __, ¶ 16. The dissent disagreed with the lead opinion on several grounds that are pertinent herein.

First, the dissent observed that the post-certificate conditions unlawfully denied the appealing citizens of their only opportunity to be heard:

> The law requires otherwise. The legislature has required the board to settle issues like this up front on a public record, and it specifically guarantees affected citizens the right to participate in the review process and to have their voices heard. *See* R.C. 4906.07 (requiring that the board hold public hearings), 4906.08(A)(3) (neighboring citizens are entitled both to party status and to call and examine witnesses), 4906.09 (requiring the board to keep a record of its proceedings), 4906.10(A) (requiring the board to make all substantive determinations before authorizing construction), and 4906.11 (requiring the board to issue a written opinion stating the reasons for its decisions). Issues are not to be settled *after* construction is approved, much less by unaccountable staff members without

> public scrutiny or judicial review. Yet that is precisely what the board, and now the lead opinion, has allowed.

Buckeye Wind at ¶ 53. (Emphasis in original.)

Second, the dissent found that the lead opinion deprived the citizens of their right to a public hearing, because the Staff's post-certificate decisions are made without public input or review by OPSB or this Court. *Id*. at ¶¶ 55-63. R.C. 4906.10(A) prohibits OPSB from issuing a certificate unless the board, not the Staff, makes the required determinations. *Id*. at ¶¶ 64-65.

Third, the dissent noted that the lead decision rendered ineffectual the laws designed to protect the interests of citizens living near proposed utility projects:

> The outcome of this decision is unfortunate for anyone living near the site of a proposed high-voltage transmission line, electric substation, high-pressure gas pipeline, or generation plant. If the board runs into an issue that for whatever reason it does not want to deal with—or if it simply prefers to resolve an issue without the discomfort of public participation and judicial review—it now has a broad off-ramp. Approve the project now; work out the details with the company later. The public retains a formal right to participate, but it is up to the board whether that right amounts to anything more than a formality.
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> [I]n my view, the public's business should not be left to the unreviewable discretion of appointed staff members who are not accountable to the public. The board's decisions should have to see and bear the light of day.

Id. at ¶¶ 66-67. Alamo's Certificate tries to fill the record's information gaps with 12 post-certificate submittals to Staff. The table on Page 15 of Alamo's brief misleading lists only eight of them. Alamo's table is further misleading, because only six of Buckeye Wind's 16 post-certificate submittals were actually brought to the Court's attention in that case.

The post-certificate submittals in Alamo's Certificate go well beyond merely identifying the color of the screws in the control room, but instead are central to the Project's construction and operation. These submittals are being substituted for the mitigation measures that OPSB's rules specifically required Alamo to provide during the adjudicatory process. Without first identifying

these measures, OPSB cannot tell whether the Project will represent the minimum environmental impact under R.C. 4906.10(A)(3), because it does not know what can be or will be done to address the Project's impacts. These submittals can be and should be provided before certification.

OPSB Must Comply With Its Rules That Implement R.C. 4906.10(A).

Alamo argues that its compliance with OPSB's rules in Ohio Adm.Code Chapter 4906-4 is not mandatory. However, R.C. 4906.03 provides that "[t]he power siting board shall … (C) [a]dopt rules establishing criteria for evaluating the effects on environmental values of proposed and alternative sites…." This requires OPSB to issue rules to obtain the information necessary to comply with R.C. 4906.10(A). To fulfill this mandate, Ohio Adm.Code 4906-2-04(B) advises applicants that "[t]he information contained within the certificate application shall conform to the requirements of Chapters 4906-4 to 4906-6 of the Administrative Code, whichever is applicable." (Emphasis added.) Thus, compliance with Ohio Adm.Code 4906-4 is not optional. Without receiving that information, OPSB violates R.C. 4906.03(C) and R.C. 4906.10(A).

Appellees claim that OPSB waived compliance with some rule requirements at issue in this appeal. Ohio Adm.Code 4906-4-01(B) provides that "[t]he board may, upon an application or motion filed by a party, waive any requirement of this chapter other than a requirement mandated by statute." Thus, a party can file a request for a waiver, which allows other parties to weigh in on the waiver's merits. In fact, Alamo obtained waivers for numerous rule requirements not at issue herein. (ICN 3, Entry of Dec. 10, 2018) However, Alamo waived its opportunity to obtain any other waivers by failing to follow this procedure. OPSB cannot ignore its own rule-required procedure for granting waivers, nor did it grant any such waivers of the requirements at issue.

The rule requirements at issue in this appeal require Alamo to provide scientific data and other objective information so that OPSB and the public can make informed judgments about the

Project's impacts. Often, Alamo and OPSB relied on experts to opine that the Project will not cause a problem without producing the information required by rule to test the accuracy of the experts' opinions. Thus, while OPSB is supposed to decide whether a Project meets the statutory criteria, it has abdicated this duty to witnesses beholden to Alamo.

This Court has repeatedly ruled that administrative agencies are required to comply with their own rules. See Citizens' Merit Brief at 15. "Failing to be consistent in the execution of administrative rules affects the citizens of our state and does a disservice to our system of government." *In re Application of Duke Energy Ohio, Inc.,* 2021-Ohio-3301, 166 Ohio St.3d 438, 459, 187 N.E.3d 472, 493, ¶ 87 (concurring opinion). Allowing OPSB to disregard its rules would do serious harm to the Citizens and other communities impacted by solar facilities.

PROPOSITION OF LAW NO. 1:

The Ohio Power Siting Board Acted Unlawfully and Unreasonably By Issuing A Certificate To A Solar Energy Utility Without Receiving The Operational Noise Data Required By Rule And R.C. 4906.10(A)(2) And Without Requiring Noise Reduction Controls Required By Rule And R.C. 4906.10(A)(3).

Alamo notes that the Citizens did not present expert testimony on noise. However, the Citizens had no obligation to do so. OPSB's rules place the burden on Alamo to prove the Project's noise levels will not be harmful. The general public, unlike solar companies, lacks the resources to pay experts or perform technical studies. Indeed, that is an important reason for requiring applicants to comply with rule requirements for producing information about project impacts. The Court should reject Appellees' request to switch this burden to the public.

While Alamo argues that the Court should defer to the only noise expert who testified, David Hessler's and the Staff's admissions establish that Alamo failed to demonstrate that the Project will not be a noise nuisance. These admissions include the following:

First, the community's existing sound level is 34 dBA, and a five dBA increase harms the

community. (ICN 23, Hessler's Report, p. 2; ICN 41, Staff Report, p. 20) The Certificate allows Alamo to site central inverters as close as 500 feet to neighboring houses, but Mr. Hessler modeled their noise at a distance of 600 feet as provided by a tentative preliminary layout. (Hessler, Tr. IV 635:3-10) This trickery is how he came up with a modeled prediction of a "quiet" 35 dBA at neighboring houses. (ICN 100, Hessler Suppl. Testimony, p. 2, line 23 to p.3, line 2) At 500 feet, the central inverters will produce 38 dBA, a level that exceeds the five dBA benchmark for harming the community. (ICN 100, Hessler Suppl. Testimony, p. 2, lines 11-20)

Alamo attempts to undercut its own modeling data of 38 dBA at 500 feet by stating that a Massachusetts study found inverter noise not to be "significant" at 150 feet. However, that study did not measure the inverters' sound at 150 feet, because they could not be heard above other loud noises that averaged from 41.6 dBA to 50 dBA. (Hessler, Tr. II 256:16 to 257:17) Mr. Hessler admitted that the report "tells you nothing about inverter noise really." (Hessler, Tr. II 261:9-13) Even after taking a 20-minute intermission in the hearing to discuss the report with Alamo's counsel, Mr. Hessler was unable to identify any such data in the report as revealed by the lack of redirect examination on the issue. (Tr. 263:11-18, 264:4 to 267:17) Thus, this study does not show whether Alamo's inverters will be heard in an area that normally is at 34 dBA. Similarly, Mr. Hessler's failure to hear much inverter noise at one solar project in New York is hardly evidence that other solar projects do not cause problems.

Second, while Alamo states that the highest sound level modeled at the property lines was 40 dBA, the noise at this level will be six dBA above the existing sound level at the property lines. Since a five dBA increase is harmful, OPSB's decision to allow this noise level is unreasonable.

Third, Appellees do not dispute that the setback between inverters and property lines is 25 feet and that no modeling was done for that distance. The 40 dBA results were for inverters at a

substantially longer distance. This violates the mandate in Ohio Adm.Code 4906-4-08(A)(3)(b) to "[d]escribe the operational noise levels expected at the nearest property boundary."

Fourth, the 500-foot setback for central inverters does not apply to string inverters, which may be as close as 25 feet to the property line and which were not modeled at that distance as required by Ohio Adm.Code 4906-4-08(A)(3)(b). Appellees argue they do not need this data, because string inverters are quiet, just as they inaccurately argued in the first hearing that central inverters are quiet only to be proven wrong by modeling data provided in the second hearing. However, while a single string inverter may produce less noise than one central inverter, installing a string inverter on every string of solar panels would add up to numerous string inverters.

Simply relying on Mr. Hessler to say the Project will not cause a noise problem, given his admissions that the record lacks the supporting noise level data required by OPSB's rules, does not sustain Alamo's burden to demonstrate that its Project complies with R.C. 4906.10(A)(2) and (3). The Court should vacate the Certificate and remand the board's decision with instructions to obtain the required data and to bar any noise increases over five dBA at the property lines.

PROPOSITION OF LAW NO. 2:

The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Issuing A Certificate To A Solar Energy Utility Without Receiving The Information Required By Rule And R.C. 4906.10(A)(2) About The Project's Visual Impacts And Without Receiving The Information Required By Rule And R.C. 4906.10(A)(3) For Minimizing The Project's Adverse Visual Impacts.

A. The Evidentiary Record Does Not Adequately And Accurately Describe The Project's Visual Impacts.

Ohio Adm.Code 4906-4-08(D)(4)(a) requires a "viewshed analysis" with a map showing Project visibility in surrounding areas. Alamo accuses the Citizens of representing that the "viewshed analysis" utilized a solar panel height of eight feet instead of 14 feet. To the contrary, the Citizens' Merit Brief does not contest the panel height used in the viewshed analysis.

Where Alamo fails is its misleading photographic simulations under Ohio Adm.Code 4906-4-08(D)(4)(e), which are supposed to provide accurate visual depictions of the Project's appearance. Appellees admit that the simulations depict eight-foot tall panels, which are little more than half the height of the 14-foot panels that the Certificate authorizes Alamo to use. Alamo states that this is okay, because Matthew Robinson said Alamo would most likely use eight-foot panels. If so, then Alamo should have requested approval only for eight-foot panels.

Appellees also note that Mr. Robinson said 14-foot simulations would not change his conclusions. No one has explained what that means. More importantly, however, no one can credibly contend that 14-foot panels are no more intrusive than eight-foot panels. That is why Alamo's brief (at 26) refers to eight-foot panels as "less visually impactful" than 14-foot panels.

As explained in the Citizens' Merit Brief (at 25-26), Alamo included no simulations depicting how the solar panels will appear to the most impacted stakeholders – the people whose residences will be next to them. OPSB states that the visual impact study is more than 100 pages long, but only five simulations were provided for the all-important purpose of pictorially showing everyone how the panels will affect their views. Contrary to rule, the Application provides simulations only for one viewer group in one landscape -- motorists seeing the views from public roads -- rather than a range of view groups and a range of landscapes. (ICN 21, Applic. Exh. I, pp. 29-33) Not a single view was simulated from adjacent landowners' houses or yards, where the most severe views will be suffered. Alamo's brief represents that photographs were taken from 34 viewpoints, but a photograph of land without solar panels simulated on it does not portray the solar arrays' appearance. Nor were any views simulated from distances anywhere close to the short setbacks between the solar arrays and neighbors' yards and homes.

The simulations are not designed to portray the Project's appearance; they are designed to disguise it.

B. The Evidentiary Record Does Not Include Measures That Would Minimize The Project's Adverse Visual Impacts.

Appellees do not dispute the Citizens' point that the Application only suggests, and does not commit to, measures to mitigate the Project's visual harm. Instead, they argue that Certificate Condition 15 makes those commitments. However, Condition 15 states only that Alamo will submit a landscape plan to the Staff after certification. (ICN 95, Amended Stipulation, pp. 8-9) The condition's only standards for the plan are that it "enhance the view from the residence and be in harmony with the existing vegetation and viewshed in the area." This is so general as to be meaningless. Alamo may argue after certification that planting just a bush or flower here and there harmoniously enhances the view, but that would do little to obstruct the solar panels' view. The neighbors will have no say on what plants will be planted, the height of the selected plant species, the gaps between plants through which panels will be seen, or any other aspect of the landscaping. Condition 15 deprives the public of any role in deciding what views will be imposed on them for 40 years. This scheme does not satisfy Alamo's pre-certification duty to provide the visual mitigation measures that "will be taken" under Ohio Adm.Code 4906-4-08(D)(4)(f).

As explained in the Citizens' Merit Brief (at 29), Alamo could have provided a final landscape plan to be tested during the hearings. However, Condition 15 does not require Alamo to include any of its preliminary plan in the final, post-certificate plan. Instead, OPSB opted to cut the neighbors entirely out of the decision-making process for mitigating the Project's adverse visual impacts. The Court should vacate the Certificate and remand with instructions to incorporate a final, completed landscape plan into the Certificate with Citizen input.

PROPOSITION OF LAW NO. 3:

The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Issuing A Certificate To A Solar Energy Utility Without Receiving The Information Required By Rule And R.C. 4906.10(A)(2) & (3) Concerning The Project's Potential Impacts On Wildlife And Plants.

In arguing that Alamo complied with Ohio Adm.Code 4906-4-08(B)(1)(c) & (d), Appellees rely on statements made by Alamo wildlife expert Ryan Rupprecht of Cardno. Noticeably missing from their briefs are references to the admissions of Mr. Rupprecht and Application Exhibit G that no field surveys of animal species were conducted, as quoted on Page 35 of the Citizens' Merit Brief. These admissions are conclusive proof the field surveys were not done.

Nevertheless, Appellees still insist that the results of animal surveys were provided. However, they assert support from only one sentence from the Application:

> Wildlife observations during the field surveys were limited to common species in agricultural areas, including white-tailed deer (*Odocoileus virginianus*) and gray squirrels (*Sciurus carolinensis*).

(ICN 13, Exh. G, § 6.1.2, Page 6-2) This obviously is not a checklist of animal species found in and near the Project Area. Surely this area has other, readily seen animal species such as rabbits or robins. In fact, the Application notes that "common woodland and grassland songbirds" were found during the wetland delineations, but it does not identify those species. (*Id*., § 7.2.4, p. 7-6)

Although Appellees note that Application Exhibit G refers to a "survey," the referenced "survey" was for examining wetlands and habitat, not wildlife. (Rupprecht, Tr. II 278:19 – 279:3) While Cardno may have incidentally seen some wildlife during those visits, it was not searching for animals and it did not report any, except deer and squirrels. This is not information upon which OPSB can rely in deciding what mitigation actions are necessary for wildlife.

Appellees also point out that the Application states that "[c]ommon game species in southeastern Ohio include cottontail rabbit" and other species. (ICN 13, Applic. Exh. G, p. 4-5, §

4.4) (Emphasis added.) But this does not identify the animals in and near the Project Area. Nor is the survey required by rule limited to game species.

OPSB argues that the field survey need only look for and list the rare, threatened, endangered, and commercially valuable species, but Mr. Rupprecht admitted that no field surveys were done. If any surveys had been done, even on just these species, the Application would have listed more than just deer and squirrels. For example, rabbits are commercially valuable and omnipresent, yet the Application does not note their presence in the Project Area.

Alamo also argues that little wildlife is expected in the Project Area's habitats. But the Application states that "[w]ildlife within the Project Area could potentially utilize it for foraging, migratory stopover, breeding and/or shelter." (ICN 13, Applic. Exh. G, p. 4-5, § 4.4) The Project will destroy 802 acres of cropland used by wildlife to forage for food, and 39 acres of grassland and pasture where birds and other wildlife nest and feed. (ICN 6, Fig. 20) The Project Area contains wildlife habitat in 43 acres of forest, 13 wetlands, and 25,521 linear feet of 28 streams and ditches. (ICN 13, Table 4-1, p. 4-2; § 6.2.2.3, p. 6-7; Table 6-1, p. 6-5; Table 6-4, p. 6-8)

Nevertheless, Appellees contend that they can skip the rule-required surveys, because they do not expect to find many species. However, rather than presuming the absence of wildlife without checking, the rule requires surveys to find out what species are present. Moreover, if Alamo believed that the Project Area is devoid of plants and wildlife, Alamo should have obtained a waiver from the survey requirements under Ohio Adm.Code 4906-4-01(B). Then that premise could have been properly vetted by Staff and the public.

Alamo also contends that the Project will not harm wildlife, implying that wildlife surveys are unnecessary to protect wildlife. Even the Application disagrees:

> Wildlife resources such as, birds, bats, terrestrial, and aquatic organisms have the potential of being impacted <u>with any utility-scale energy project</u>. Project

> construction activities such as earthmoving, vehicular movements, and construction equipment are likely to displace wildlife using the habitat for foraging, breeding, and nesting.

(ICN 13, Exh. G, p. 4-6, § 4.4.2) (Emphasis added) Even though solar panels will not be constructed in most forests, wetlands, and streams inside the Project Area, the Project's impacts still may drive away or otherwise harm the wildlife in these areas. For example, bulldozers, pile drivers, and other construction machinery will produce more than 80 decibels of earsplitting noise during 11 months of Project construction, in contrast to the normal 34-decibel level present there during daytime. (ICN 11, Application, Exh. E, pp. 14-15; ICN 5, Fig. 3) Yet Alamo did no surveys to find out what species are present and need protection in these areas.

OPSB argues that Ohio Adm.Code 4906-4-08(B)(1)(c) does not require literature surveys for all species of plants and animals, but only for rare, threatened, endangered, and commercially valuable species. Not only would this position default on OPSB's duty to protect all species, but it also ignores that surveys of the more numerous species are necessary for figuring out whether the Project may cause those species to harm neighboring properties. For example, it is important to find out whether the Project will displace common birds and mammals from the Project Area into adjoining land where they will overpopulate, spread disease to other wildlife, poultry, and livestock, increase predator attacks on livestock, or overgraze habitat and crops. Without knowing what species are present, OPSB cannot protect the Citizens' adjoining properties.

OPSB also alleges, without record support, that surveying all species would be burdensome. But copying checklists from the internet to do a complete literature survey is not onerous. And a complete field survey simply requires a biologist to mark the name of each observed species on a checklist while inspecting the Project Area and surrounding land.

OPSB argues that any violations of Ohio Adm.Code 4906-4-08(B)(1)(c) and (d) do not

aggrieve the Citizens. Ohio Adm.Code 4906-4-08(B)(1)(c) rebuts that position by requiring literature surveys of plant and animal species "within at least one-fourth mile of the project area boundary," and Ohio Adm.Code 4906-4-08(B)(1)(d) requires the field surveys to look for those species. The Citizens own and live on property within this quarter-mile radius, as their properties adjoin the Project Area. (ICN 80, Clippinger Testimony, p. 3, line 9 to p. 4, line 8, & Exh. A) The wildlife on the Citizens' properties must be surveyed, since the Project may impact that wildlife (e.g., with construction noise or by reducing their food sources). In addition, the Citizens have a stake in minimizing impacts on wildlife in the Project Area to protect species of birds and other wildlife that travel back and forth between the Project Area and the Citizens' land, where their presence is valued for aesthetic purposes, and to prevent damage from wildlife fleeing from the Project Area to the Citizens' yards and fields. For example, the testimony of Joanna Clippinger expressed concerns about displaced deer, coyotes, and other animals eating the crops on the Citizens' fields, spreading diseases to their livestock, eating their livestock, and colliding with the Citizens' vehicles on public roads. (*Id*., p. 5, lines 13-14, p. 9, lines 1-20)

Appellees also contend that the Certificate provides mitigation for impacts on plants and wildlife, implying that surveys are unnecessary. While the Certificate provides limited mitigation measures, they are based on blind guesses as to what species might be present. Ohio Adm.Code 4906-4-08(B)(1)(c) and (d) requires surveys, because they are necessary to identify mitigation.

OPSB cannot judge the impact of the Project under R.C. 4906.10(A)(2) and (3) without surveys identifying the wildlife that will be harmed by the Project. Because Alamo's expert admitted that no surveys were done, OPSB's decision to the contrary is unreasonable and unlawful.

PROPOSITION OF LAW NO. 4:

The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Issuing A Certificate To A Solar Energy Utility Without Receiving Information Required By Rule And R.C. 4906.10(A)(2) & (3) About The Project's Drainage Impacts And Associated Mitigation To Prevent Flooding.

Appellees do not dispute that, for construction, Ohio Adm.Code 4906-4-07(C)(2)(b) requires the Application to contain "an estimate of the … quantity of aquatic discharges from the site clearing and construction operations." (Emphasis added.) Appellees do not dispute that, for operation, Ohio Adm.Code 4906-4-07(C)(3)(d) requires the Application to contain "a quantitative flow diagram or description for water … through the proposed facility." (Emphasis added.) Nor do they dispute the fact that the record lacks this quantitative water quality data, since Alamo's expert admitted that fact at hearing. (Waterhouse, Tr. I 203:19-22, 204:14-20)

Appellees argue that, since Alamo's experts say that drainage problems are unlikely, they do not need any quantitative data. That is, as long as Alamo can find experts willing to say that flooding might not be a problem, then Alamo can simply ignore the rule's requirements to demonstrate quantitatively that the Project will not flood downstream landowners.

Ohio EPA's guidance on storm water controls for solar facilities refutes Appellees' assertions that vegetation in solar arrays reduces runoff:

> Although the area under and between ground-mounted solar panel arrays may be covered in vegetation (normally considered pervious), the elevated panels alter the volume, velocity and discharge pattern of storm water runoff and associated pollutants and therefore do require post-construction storm water management under OHC00005 (Part II.G.2.e, pp. 19-27).

(Marquis, Tr. IV 666:24 to 667:5, 667:25 to 668:12, 669:12-25)

OPSB's decision also violates the requirement in Ohio Adm.Code 4906-4-07(C)(2)(c) that the applicant describe any plans to mitigate stormwater flows. The Citizens are threatened by this violation, because the Project Area drains onto the Citizens' farm fields and yards, which could

result in flooding. (ICN 80, Clippinger Testimony, p. 6, lines 1-3; ICN 84, DeLuca Testimony, p. 2, line 21 to p. 3, line 2) But OPSB figuratively shrugged and stated that drainage concerns are "premature" and can be addressed later. (Opinion, pp. 62-63, ¶ 182 (Appx. 62-63)) Rather than complying with the rule, Appellees state that they will deal with flooding after certification pursuant to Ohio EPA's construction general permit. OPSB's deliberate violation of this rule bypasses the Citizens' participation in decisions affecting their ability to protect their properties.

PROPOSITION OF LAW NO. 5:

The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Issuing A Certificate To A Solar Energy Utility Without Receiving Information Required By Rule And R.C. 4906.10(A)(2) & (3) Concerning The Project's Pollution Impacts And Associated Mitigation.

Alamo's Application states unequivocally that Alamo did not provide the information required by Ohio Adm.Code 4906-4-07(C) concerning the water quality of the surface water runoff from the Project during construction and operation. For the requirement in Ohio Adm.Code 4906-4-07(C)(1)(d) to "[d]escribe the existing water quality of the receiving stream based on at least one year of monitoring data," the Application states that this requirement is "inapplicable to the Project." (Applic., p. 45) With regard to Ohio Adm.Code 4906-4-07(C)(2)(b), (c), (d), and (e), the Application states that "the above requirements do not apply to the Project." (*Id*., p. 46)

OPSB argues that it can waive these requirements, tacitly admitting that Alamo did not fulfill the rule's requirements. However, no party filed an application or motion for waiver.

Instead, OPSB states (at 27) that Alamo complied with the rule simply by hiring experts to say that runoff from the solar arrays is "likely to be less" due to vegetation in the solar arrays. This point is irrelevant to this proposition of law, which concerns the amount of pollution in the runoff, not the quantity of the runoff. Smaller flows with more pollutants can be more harmful to receiving streams than larger, less polluted flows. Moreover, mere statements about the amount of flow,

unaccompanied by data on the pollutants in that flow, do not provide "at least one year of monitoring data" of existing water quality or an "estimate of the quality … of aquatic discharges from the site clearing and construction operations" as required by the rule. Neither Appellee points to any such data in the record. This rule requires OPSB to make a decision about the Project's water quality impacts based water quality data, not self-serving statements by Alamo.

Alamo goes so far as to state that the Project will not discharge. Ohio EPA's guidance on storm water controls for solar facilities leaves no question over whether they discharge runoff:

> Although the area under and between ground-mounted solar panel arrays may be covered in vegetation (normally considered pervious), the elevated panels alter the volume, velocity and discharge pattern of storm water runoff and associated pollutants and therefore do require post-construction storm water management….

(Marquis, Tr. IV 666:24 to 667:5, 667:25 to 668:12, 669:12-25) (Emphasis added.) Storm water from soil disturbed by construction carries eroded soil particles into streams. This Project will move dirt on 51 acres. (ICN 5, Applic., Fig. 17, pdf p. 29) The Application admits that soil erosion and sedimentation controls are needed for these areas. (ICN 13, Applic. Exh. G, pp. 1-4 to 1-5, § 1.1.1) Alamo agreed that Project construction necessitates an Ohio EPA stormwater permit that "requires development of a proposed storm-water pollution prevention plan ('SWPPP') for erosion control and storm-water management." (ICN 4, Applic., p. 45) Condition 29 requires Alamo to obtain a "General Permit Authorization for Storm Water Discharges … Associated with Construction Activities." (ICN 114, Opinion, p. 40) (Emphasis added.)

Alamo claims that the record contains no evidence that the Project threatens water quality. However, the purposes of the rule requirements on water quality are to determine whether the Project threatens water quality and, if so, identify suitable corrective measures. If evidence is lacking, it is because Alamo has refused to provide it.

Appellees argue that the record need not comply with the requirement in Ohio Adm.Code

4906-4-07(C)(2)(e) to "[d]escribe the equipment proposed for control of effluents discharged into bodies of water and receiving streams," because that equipment will be identified after certification by implementing Ohio EPA's stormwater construction permit and the instructions of the Preble Soil & Water Conservation District. This arrangement deprives the Citizens of their public participation rights and defaults on OPSB's obligations to implement its rule and determine the Project's compliance with R.C. 4906.10(A)(2) and (3).

PROPOSITION OF LAW NO. 6:

The Ohio Power Siting Board Acted Unlawfully And Unreasonably By Issuing A Certificate To A Solar Energy Utility Without The Setbacks Necessary To Minimize The Project's Adverse Environmental Impact Under R.C. 4906.10(A)(3).

Alamo observes that the law specifies setbacks for wind projects, but not solar projects. These authorities were established before utility-scale solar projects appeared in Ohio. The Alamo and Angelina projects were the first two to go through contested hearings. So some OPSB authorities need updating. In the meantime, establishing setbacks on a case-by-case basis is important to achieve the criteria in R.C. 4906.10(A) and OPSB's rules.

Effective setbacks are necessary, because industrial solar projects are not benign. Poorly designed solar projects make loud humming noises, make jarring pile driving noises during construction, damage drainage systems, cause flooding, disrupt wildlife populations, destroy prime farm land, damage public roads, propagate invasive weeds, and utterly destroy the area's aesthetic views. The Citizens below raised concerns about 19 categories of adverse impacts of this Project, most of which were not adequately addressed.

Alamo argues that the Citizens suggested a 150-foot setback for central inverters in the first hearing. This point simply illustrates the necessity for OPSB to insist that an applicant provide all rule-required data. During the first hearing, no one knew how far inverter noise will

travel, because Alamo had provided no modeling and relied solely on Mr. Hessler's opinion that inverters are almost silent. When Alamo finally presented some modeling data at the second hearing, it became evident that a 500-foot setback for inverters is not protective either.

Alamo argues that it had proposed a 10-foot setback, so 25 feet provides more room for plants. But not much vegetation can fit into an eight-yard sliver of land either. Whatever plan Alamo concocts without public involvement will do little to relieve the claustrophobic atmosphere created by solar facilities only eight yards away on two or three sides of Citizens' yards.

Alamo argues that the Court did not vacate the setbacks in *Champaign Wind*. However, the closest setback in that case was 541 feet. 2016-Ohio-1513, ¶ 28. Here we have humming solar arrays of up to 14 feet in height right next to people's yards. No reasonable person would find 40 years of life in such a setting to be tolerable.

CONCLUSION

Because OPSB's decision on the six contested issues are without evidentiary support and violate OPSB's rules, the decision is unreasonable and unlawful. The Citizens request that the Court vacate and remand Alamo's Certificate with instructions to comply with the OPSB rules designed to provide for meaningful public participation and informed board decision-making.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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