

**IN THE SUPREME COURT OF OHIO**

In the Matter of the Application of	)	Case No. 2022-0055
Firelands Wind, LLC for a Certificate of	)	
Environmental Compatibility and Public	)	On Appeal from the Ohio Power Siting
Need to Construct a Wind-Powered	)	Board, Case No. 18-1607-EL-BGN
Electric Generation Facility in Huron and	)	
Erie Counties, Ohio.	)	

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**BRIEF OF INTERVENOR-APPELLEE FIRELANDS WIND, LLC**

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June 6, 2022

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## I. INTRODUCTION

In this case, Patricia Didion, Jane Fox, Marvin Hay, Theresa Hay, Patricia Olsen, Sheila Poffenbaugh, Walt Poffenbaugh, Christina Popa, John Popa, Lori Riedy, Charles Rogers, Kenn Rospert, Dennis Schreiner, Sharon Schreiner, Donna Seaman, William Seaman, Deborah Weisenauer, Kenneth Weisenauer, Gerard Wensink, and Black Swamp Bird Observatory (“Appellants”) seek to overturn the decision by the Ohio Power Siting Board (“Board” or “OPSB”) to issue a certificate of environmental compatibility and public need to Firelands Wind, LLC (“Firelands” or “Applicant”) to construct a wind-powered electric generation facility on leased land in Groton and Oxford Townships, Erie County, and Lyme, Norwich, Richmond, Ridgefield, and Sherman Townships, Huron County, Ohio (“Project”) with a generating capacity of up to 297.66 megawatts (“MW”).<sup>1</sup> The Board’s decision approving the Firelands’ Project was the result of a two and a half-year process in which the Board considered an evidentiary record of more than five thousand pages and a Joint Stipulation and Recommendation filed on September 11, 2020 (“Stipulation”) that includes forty-four separate, rigorous conditions designed to ensure the Project’s consistency with the applicable criteria in Ohio Revised Code (“R.C.”) 4906.10.<sup>2</sup>

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<sup>1</sup> ICN 4, Firelands Application (“Application”) (Jan. 31, 2019) at 2. Throughout this brief: “ICN” refers to the administrative record docket numbers assigned by the Board; “Tr.” refers to the transcript of the Board’s administrative hearing, which was filed with the Board in nine volumes, which are sequentially numbered, on October 19 through October 29, 2020 (The volumes of the transcripts were not assigned ICN numbers by the Board.); testimony presented during the administrative hearing is cited herein by the volume, date, name of witness, and page number of the transcript; testimony that was pre-filed with the Board is cited by the witness name, the date it was filed with the Board, the ICN number assigned by the Board, and the party’s exhibit number for the pre-filed testimony; “Appellants Appx.” denotes a citation to the Appendix to the Appellants Merit Brief; and “BSBO/LR” denotes a reference to Appellants’ post-hearing brief or exhibit filed with the Board and a reference to the applicable ICN number. All other portions of the administrative record are denoted using the applicable ICN number assigned by the Board and/or the applicable hearing exhibit number.

<sup>2</sup> ICN 124, Stipulation (Sept. 11, 2020) at 2-9. The Stipulation was signed by Firelands, the City of Willard, the Board of Commissioners of Huron County, the Board of Trustees of Richmond

When the General Assembly created the Board almost 50 years ago, it charged the Board with finding the appropriate balance between the growth and advancement in energy development, and the preservation and protection of ecological and sociological interests. To assist the Board with its determinations in this regard, the General Assembly created a set of eight criteria to measure the impact from a proposed energy facility. Those criteria are found in R.C. 4906.10(A)(1) through (8). A review of the brief submitted by Appellants reflects that there is no dispute regarding the following five criteria found in R.C. 4906.10(A):

- (1) R.C. 4906.10(A)(1): There is no dispute in this proceeding that the basis of need for this facility, is not applicable in this proceeding.<sup>3</sup>
- (2) R.C. 4906.10(A)(4): There is no dispute that the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the facility will serve the interests of electric system economy and reliability.
- (3) R.C. 4906.10(A)(5): There is no dispute that the facility complies with the air and water pollution control, withdrawal of waters of the state, solid and hazardous wastes, and air navigation requirements.
- (4) R.C. 4906.10(A)(7): There is no dispute that the Board can determine the impact of the facility on agricultural land.
- (5) R.C. 4906.10(A)(8): There is no dispute that the facility incorporates the maximum feasible water conservation practices.

Thus, Appellants are only disputing that the Board's determination satisfies the following three of the eight criteria in R.C. 4906.10(A), as follows:

- (1) R.C. 4906.10(A)(2): Appellants erroneously claim the record does not provide enough information for the Board to determine the probable environmental impact of the facility.

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Township of Huron County, the Board of Trustees of Norwich Township of Huron County, residents Tom Yingling and Kevin Erf, and the Board's Staff. While the Erie County Commissioners did not sign the Stipulation, they did not present evidence opposing the Stipulation at the hearing.

<sup>3</sup> This criterion only applies to electric transmission line and gas pipeline facilities.

- (2) R.C. 4906.10(A)(3): Appellants erroneously claim that the Board did not properly determine the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of various alternatives.
- (3) R.C. 4906.10(A)(6): Appellants erroneously claim that the Board did not properly determine the facility will serve the public interest, convenience, and necessity.<sup>4</sup>

As detailed below, the assertions by Appellants regarding the Board's determinations under R.C. 4906.10(A)(2), (3), and (6) are incorrect and not supported by the record in this case. The Board's reasoning was well-grounded in a thorough consideration of data and expert analysis demonstrating that construction and operation of the Project pursuant to the Stipulation will meet all applicable criteria under R.C. 4906.10. Appellants might have considered the evidence differently, but mere factual disagreement is not sufficient for this Court to overturn the Board's expert judgement. Therefore, the Court should uphold the Board's decision on appeal.

## **II. STATEMENT OF FACTS**

### **A. The Ohio Power Siting Board Review Process**

The Board has authority to issue a certificate of environmental compatibility and public need for the construction of a major utility facility such as Firelands pursuant to R.C. 4906.03 and 4906.04. To grant such a certificate, the Board must find and determine all of the following under R.C. 4906.10(A)(1)-(8):

- (1) The basis of the need for the facility if the facility is an electric transmission line or gas pipeline.<sup>5</sup>
- (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.

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<sup>4</sup> ICN 175, Firelands Reply Brief (Dec. 4, 2020) at 4.

<sup>5</sup> Since this Project is a proposed electric generating facility, this criterion is not applicable.

- (4) That the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the facility will serve the interests of electric system economy and reliability.
- (5) That the facility will comply with Chapters 3704., 3734., and 6111. of the Revised Code and all rules and standards adopted under those chapters and under sections 1501.33, 1501.34, and 4561.32 of the Revised Code. In determining whether the facility will comply with all rules and standards adopted under section 4561.32 of the Revised Code, the board shall consult with the office of aviation of the division of multi-modal planning and programs of the department of transportation under section 4561.341 of the Revised Code.
- (6) That the facility will serve the public interest, convenience, and necessity.
- (7) In addition to the provisions contained in divisions (A)(1) to (6) of this section and rules adopted under those divisions, what its impact will be on the viability as agricultural land of any land in an existing agricultural district established under Chapter 929. of the Revised Code that is located within the site and alternative site of the proposed major utility facility. Rules adopted to evaluate impact under division (A)(7) of this section shall not require the compilation, creation, submission, or production of any information, document, or other data pertaining to land not located within the site and alternative site.
- (8) That the facility incorporates maximum feasible water conservation practices as determined by the board, considering available technology and the nature and economics of the various alternatives.<sup>6</sup>

**B. The Firelands Project**

On January 31, 2019, as supplemented on March 18, April 11, July 10, October 4, 2019, and January 24, 2020, Firelands submitted its Application to the Board for a certificate of public convenience and necessity to construct a wind-powered facility on approximately 1,000 parcels or 32,000 acres of leased land located in Groton and Oxford Townships in Erie County and Lyme,

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<sup>6</sup> Appellants Appx. 267.



Norwich, Richmond, Ridgefield, and Sherman Townships in Huron County, Ohio.<sup>7</sup> The permanent operating footprint of the facility will be approximately 84.5 acres of built facilities, or approximately 0.3% of the total leased land.<sup>8</sup>

The Project was proposed to consist of up to 87 wind turbines and was approved to consist of up to 73 turbines, each with a nameplate electric generating capacity of 3.0 to 5.7 MWs.<sup>9</sup> While Firelands' Application to the Board evaluated 87 proposed turbine locations, Firelands expects that, depending on the turbine model chosen, only 52 to 71 turbines will actually be constructed.<sup>10</sup> The total generating capacity of the facility will not exceed 297.66 MWs alternating current, with an annual energy production of approximately 847,000 to 952,000 megawatt hours ("MWh").<sup>11</sup> In addition to the turbines, the facility will include access roads, buried collection line, an operations and maintenance ("O&M") building, a laydown yard, meteorological towers, and a substation that will be located in Lyme Township, Huron County.<sup>12</sup> The buried collection line will be buried to approximately 36 to 48 inches below the surface and will be a total length of between 105 and 194 circuit miles depending on the number of turbines constructed.<sup>13</sup>

The purpose of the facility is to produce wind-powered electricity that will maximize energy production from the Project area wind resources in order to deliver clean, renewable

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<sup>7</sup> ICN 4, Application (Jan. 31, 2019), Firelands Ex. 1 at 2, 6; ICN 138, Testimony of Nate Pedder (Sept. 11, 2020), Firelands Ex. 31 at 5.

<sup>8</sup> ICN 4, Application (Jan. 31, 2019), Firelands Ex. 1 at 7.

<sup>9</sup> *Id.* at 2; ICN 38, Firelands Ex. 4; ICN 52, Firelands Ex. 52; ICN 138, Testimony of Nate Pedder (Sept. 11, 2020) Firelands Ex. 31 at 5.

<sup>10</sup> *Id.* Pursuant to the Stipulation, the Applicant agreed to remove four of the turbines that were located in the southernmost section of the Project area. See ICN 124, Stipulation (Sept. 11, 2020) at 9.

<sup>11</sup> ICN 4, Application (Jan. 31, 2019), Firelands Ex. 1 at 2; ICN 138, Testimony of Nate Pedder (Sept. 11, 2020), Firelands Ex. 31 at 5-6; ICN 124, Stipulation (Sept. 11, 2020) at 4.

<sup>12</sup> ICN 4, Application (Jan. 31, 2019), Firelands Ex. 1 at 14.

<sup>13</sup> *Id.* at 12-13.

electricity to the Ohio bulk power transmission system to serve the needs of electric utilities and their customers. The electricity generated will be transferred to the transmission grid operated by PJM Interconnection, LLC (“PJM”), for sale at wholesale or under a power purchase agreement (“PPA”). Firelands already has a PPA contract in place with AEP Energy Partners, who in turn is seeking to meet the energy demands of its customers.<sup>14</sup>

On September 11, 2020, Firelands, the City of Willard, the Board of Commissioners of Huron County, the Board of Trustees of Richmond Township of Huron County, the Board of Trustees of Norwich Township of Huron County, residents Tom Yingling and Kevin Erf, and the Board’s Staff filed the Stipulation with the Board. The evidentiary hearing in this matter commenced on October 5, 2020. The parties filed post-hearing briefs and reply briefs on November 20, 2020, and December 4, 2020, respectively.

On June 24, 2021, the Board issued an order approving and modifying the Stipulation, and issued a certificate of environmental compatibility and public need to Firelands for the construction, operation, and maintenance of a wind-powered electric generation facility in Huron and Erie Counties (“Order”). In its Order, the Board made the following relevant findings:

Consistent with the Staff Report and the evidence presented at hearing, the Board finds that the probable impact of the project on socioeconomic conditions has been evaluated and determined. We observe the positive economic impact that the construction and operation of the project will have on the local community. We accept the testimony supportive of the project’s favorable economic impact on the citizens served by the increased funding to local governments finding that, overall, the project is economically beneficial to those in the project area. (Firelands Ex. 36 at 5-8, 19.)<sup>15</sup> Further, we find that the project is designed in a manner that minimizes the affect to local (1) viewsheds, (2) recreational activities, and (3) cultural or historical resources. Balancing these considerations, we find that the project is consistent with the socioeconomic conditions in the project area and should be approved pursuant to this consideration.<sup>16</sup>

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<sup>14</sup> ICN 138, Testimony of Nate Pedder (Sept. 11, 2020), Firelands Ex. 31 at 6.

<sup>15</sup> ICN 130, Testimony of Erica Tauzer (Sept. 11, 2020), Firelands Ex. 36 at 5-8, 19.

<sup>16</sup> ICN 182, Appellants Appx. 001, Order (June 24, 2021) at 28, ¶ 65.

...

The Board also accepts the stipulated finding that the project can safely occur despite the karst features at issue, subject to the following modification. Initially, we find that construction is not permitted at locations T24, T25, T26, T42, T43, T73, T74, and T75. According to Firelands' geotechnical expert witness, these sites have been identified as locations where either (1) potential solution cavities within bedrock were encountered during drilling activities, (2) available geologic maps and literature document mapped karst features, or (3) boring logs, geological maps, and literature demonstrate a moderate to high probability of karst development (Firelands Ex. 38 at 6-8).<sup>17</sup> We reject the contention that these sites may be further reviewed using additional testing to determine whether they can be considered for installation using grouting techniques. While grouting may be an effective measure to safeguard installation in certain instances, we are opposed to the use of grouting techniques on a widespread basis. Here, much of the proposed project lies outside of areas where karst is expected to be encountered at a moderate to high level. We find that construction in these areas is reasonable. But in areas where initial review and testing confirm that karst is likely to be encountered at a level that is moderate or above, we conclude that those areas must be avoided for construction purposes.<sup>18</sup>

...

As for operational noise, including low frequency noise and infrasound, we accept the stipulated finding that the project complies with sound limitations necessary for the public's protection, subject to clarification that the maximum permissible nighttime Leq is below, rather than "at or below" 49 dBA [A-weighted decibels]. We conclude that the baseline sound analysis is reasonable in establishing the background Leq at 44 dBA, rejecting the claim that Firelands acted improperly in its choice of monitoring sites. (Firelands Ex. 1 at 69, Ex. G; Firelands Ex. 41 at 8).<sup>19</sup> Further, we find that Stipulated Condition 33<sup>20</sup> is intended to describe the requirement that Firelands must adhere to the nighttime noise level limits that are below 5 dBA, as set forth in Ohio Adm.Code 4906-4-09(F)(2). Moreover, relying on the expert testimony of Dr. Mundt<sup>21</sup> in support of the application, we reject the claim that the sound effects, including infrasound, preclude the project's safe operation.<sup>22</sup>

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<sup>17</sup> ICN 141, Testimony of Alfred Williams (Sept. 11, 2020), Firelands Ex. 38 at 6-8.

<sup>18</sup> ICN 182, Appellants Appx. 001, Order (June 24, 2021) at 35, ¶ 83.

<sup>19</sup> ICN 9, Application (Jan. 31, 2019), Firelands Ex. 1 at 69, Ex. G; ICN 129, Testimony of Eddie Duncan (Sept. 11, 2020), Firelands Ex. 41 at 8.

<sup>20</sup> ICN 124, Stipulation (Sept. 11, 2020) at 8.

<sup>21</sup> ICN 134, Testimony of Dr. Kenneth Mundt (Sept. 11, 2020), Firelands Ex. 42.

<sup>22</sup> ICN 182, Appellants Appx. 001, Order (June 24, 2021) at 36, ¶ 87.

As for shadow flicker, we find that the project complies with shadow flicker limitations. We acknowledge that the studies relied upon by Firelands are conservative, maximum-case, scenarios. In reality, the final project will involve between 16-25 fewer turbines than the 87 that have been modeled to date. Moreover, while the specifications of turbine models and exact siting remain under development, the Board is convinced that the project will not cause adverse shadow flicker impacts based on (1) the requirement in Stipulated Condition 34<sup>23</sup> that Firelands submit a final study 30 days prior to construction, and (2) the ability of Firelands to employ post-construction techniques, including curtailment of operations, in order to maintain shadow flicker conditions within permissible tolerances. We further concur that (1) the predictive value of the preliminary shadow flicker studies, and (2) Staff's reservation of final approval of a final shadow flicker report prior to construction, provide assurances that the project will comply with the shadow flicker requirements set forth in Ohio Adm.Code 4906-4-09(H)(1).<sup>24</sup>

...

Initially, the Board acknowledges the extensive evidence provided in order to evaluate the nature of the probable environmental impact of the project on birds and bats, including 29 site-specific surveys conducted between 2009 and 2020, in dedication to understanding the estimated impact to raptors, passerines, eagles, breeding birds, owls, and bats. In addition to Firelands' coordinated efforts with ODNR [Ohio Department of Natural Resources] and USFWS [United States Fish and Wildlife Services] at estimating the project's expected impacts to bats and birds, we also acknowledge the value of the knowledge gained from the aggregated data from more than 200 post-construction monitoring studied wind projects, which further describe mortality expectations from wind farm projects, as described by Witness Good.<sup>25</sup> Further, we acknowledge the value of the eagle risk assessment data presented by Witness Farmer<sup>26</sup> in coordination with USFWS.

From this evidence, we conclude that the nature of the probable environmental impact can be determined....<sup>27</sup>

...

...with respect to eagle conservation measures, as proposed in Joint Stipulation Condition 31,<sup>28</sup> Applicant must work with USFWS to ..... develop and obtain approval as to mitigation measures intended to protect eagle populations. We find

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<sup>23</sup> ICN 124, Stipulation (Sept. 11, 2020) at 8.

<sup>24</sup> ICN 182, Appellants Appx. 001, Order (June 24, 2021) at 36, ¶ 88; Appellants Appx. 295.

<sup>25</sup> ICN 142, Testimony of Rhett Good (Sept. 11, 2020), Firelands Ex. 32.

<sup>26</sup> ICN 128, Testimony of Christopher Farmer (Sept. 11, 2020), Firelands Ex. 33.

<sup>27</sup> ICN 182, Appellants Appx. 001, Order (June 24, 2021) at 43, ¶¶ 105-106.

<sup>28</sup> ICN 124, Stipulation (Sept. 11, 2020) at 7.

that these wildlife safeguards ensure that this project meets the requirements of R.C. 4906.10 and represents the minimum adverse environmental impact.<sup>29</sup>

The Appellants filed an application for rehearing with the Board on July 23, 2021, and an errata to the application for rehearing on July 26, 2021.<sup>30</sup> On August 8, 2021, Kevin Erf together with Tom Yingling, and Firelands filed memoranda contra the Appellants' application for rehearing.<sup>31</sup> On November 18, 2021, the Board issued its Order on Rehearing denying the application for rehearing because it lacked merit.<sup>32</sup> This appeal followed.

### **III. LAW & ARGUMENT**

#### **A. Standard of Review**

The proceedings in this matter were conducted by the Board in accordance with the provisions in R.C. 4906 and Ohio Adm.Code 4906.

R.C. 4906.12 provides for this Court to apply the same standard of review to power-siting determinations as to Public Utilities Commission determinations.<sup>33</sup> Under that standard, the Court will reverse, modify, or vacate an order only when its review of the record reveals that the order is unlawful or unreasonable.<sup>34</sup> In deference to the Board's specialized expertise, the Court will not reverse or modify its decision as to questions of fact when 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

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<sup>29</sup> ICN 182, Appellants Appx. 001, Order (June 24, 2021) at 55, ¶ 142.

<sup>30</sup> Appellants Appx. 082, 008, 239.

<sup>31</sup> ICN 186 and 187, respectively.

<sup>32</sup> ICN 190, Appellants Appx. 243, Order on Rehearing (Nov. 18, 2021) at 14, ¶ 47.

<sup>33</sup> *In re Application of Buckeye Wind, LLC*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, ¶ 26.

<sup>34</sup> R.C. 4903.13; *see also Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 50.

disregard of duty.<sup>35</sup> It is Appellants who 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.<sup>36</sup>

In their brief, Appellants raise several issues and cite to the three criteria summarized above as being in dispute, *i.e.*, R.C. 4906.10(A)(2), (3), and/or (6). Appellants allege the Board improperly:

- (1) Issued a certificate allowing wind turbines in an alleged known karst plain in non-compliance with R.C. 4906.10(A)(3);
- (2) Issued a certificate without receiving information required by the Board's rule and R.C. 4906.10(2) and (3) concerning the Project's potential impact on groundwater supplies;
- (3) Issued a certificate authorizing noise that will cause stress, annoyance, and health damage among the utility's neighbors in violation of R.C. 4906.10(A)(3);
- (4) Issued a certificate to a wind energy utility that does not comply with the shadow flicker standard in the Board's rule and in violation of R.C. 4906.10(A)(2) and (3);
- (5) Issued a certificate without receiving information about the Project's probable environmental impact on migratory birds as required by R.C. 4906.10(A)(2);
- (6) Issued a certificate without evaluating the Project's negative economic impact as required by the Board's rule and R.C. 4906.10(A)(6); and
- (7) Issued a certificate that did not represent the minimum adverse impact under R.C. 4906.10(A)(3) due to the Project's potential for killing bald eagles.<sup>37</sup>

As detailed below, all of the issues raised on appeal by Appellants lack merit. Therefore, this Court should affirm the Board's decision because it is in accordance with the law, including R.C. 4906.10(A)(2), (3), and (6).

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<sup>35</sup> *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 29.

<sup>36</sup> *In re Application of Champaign Wind, LLC*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 7.

<sup>37</sup> Appellants Br. at 19-44.

**B. The Board Properly Issued A Certificate To Construct The Project In Areas That Avoid Or Mitigate The Potential Presence Of Karst In Compliance With R.C. 4906.10(A)(3).**

Appellants claim, because the Board did not permit building on eight potential turbine sites due to the potential presence of karst, the certificate should be denied for the other turbine sites, as well.<sup>38</sup> However, Appellants are incorrect, and the Board properly accounted for karst and stated:

Here, much of the proposed project lies outside of areas where karst is expected to be encountered at a moderate to high level. We find that construction in these areas is reasonable. But in areas where initial review and testing confirm that karst is likely to be encountered at a level that is moderate or above, we conclude that those areas must be avoided for construction purposes.<sup>39</sup>

As Appellants acknowledge, the Board only found moderate to high levels of karst in the extreme northwestern portion of the Project area.<sup>40</sup> Despite this, Appellants argue, without support, that karst is prevalent over a large portion, if not all, of the Project area and, therefore, the area is not suitable for turbine construction.<sup>41</sup> That is simply not true, and Appellants readily admit they do not know if karst is present in the rest of the Project area.<sup>42</sup> The vast majority of the proposed turbine sites are located to the east and south in the Ohio Shale Formation where the underlying bedrock is shale. Shale is not prone to karst development.<sup>43</sup> The Board recognized these distinctions and made its determination based on the substantial evidence introduced by Firelands' geotechnical expert witness, Mr. Williams.<sup>44</sup> As Mr. Williams' testimony showed,

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<sup>38</sup> *Id.* at 19-20.

<sup>39</sup> ICN 182, Appellants Appx. 001, Order (June 24, 2021) at 34-35, ¶ 83.

<sup>40</sup> Appellants Br. at 21; ICN 4, Application (Jan. 31, 2019), Firelands Ex. 1 at 80, 82, Ex. E; ICN 141, Testimony of Alfred Williams (Sept. 11, 2020), Firelands Ex. 38 at 5-6.

<sup>41</sup> Appellants Br. at 19-22.

<sup>42</sup> *Id.* at 22. ("Although karst is especially prominent in the Bellevue-Castalia Karst Plain, karst also **may be** present in the rest of the Project Area." [*emphasis added*], citing ICN 148, Testimony of Appellants Witness Ira Sasowsky [Sept. 21, 2020], BSBO/LR Ex. 3 at 7-9)

<sup>43</sup> ICN 141, Testimony of Alfred Williams (Sept. 11, 2020), Firelands Ex. 38 at 5; ICN 137, Testimony of Rob Corzatt (Sept. 11, 2020), Firelands Ex. 39 at 5.

<sup>44</sup> ICN 182, Appellants Appx. 001, Order (June 24, 2021) at 34-35, ¶ 83.

Firelands conducted geotechnical testing at turbine locations. This information was used by the Board in its determination to prohibit the eight turbines that had moderate to high probability levels of karst. All of the other turbine locations' tests revealed low probability of karst.<sup>45</sup> Thus, Appellants' position lacks merit and the Board properly assessed and determined where turbines can be built in compliance with R.C. 4906.10(A)(3).

**C. The Board Properly Determined the Project Satisfied R.C. 4906.10(A)(2) and (3) As the Board Received All Necessary Information To Determine Potential Impacts On Groundwater Supplies.**

Appellants claim Firelands did not conduct the requisite hydrogeologic studies in accordance with Ohio Adm.Code 4906-4-08(A)(4)(a).<sup>46</sup> First, there is no requirement in Ohio Adm.Code 4906-4-08(A)(4)(a) that Firelands conduct the hydrogeologic study as asserted by Appellants. Ohio Adm.Code 4906-4-08(A)(4)(a) simply requires that an applicant provide information regarding water impacts and provide an evaluation of the impact to public and private water supplies.

Second, there is clear evidence in the record demonstrating Firelands conducted a proper evaluation of impacts to public and private water supplies through its subsurface geological studies, as well as hydrogeological field work in the Project area that enabled the Board to make a proper and lawful determination as to the probable environmental impact of the facility in accordance with R.C. 4906.10(A)(2). These geotechnical/hydrogeological reviews, reconnaissance, subsurface explorations, and engineering evaluations explored and evaluated subsurface conditions at the proposed building sites, conducted a risk hazard assessment, and resulted in the development of geotechnical design and construction recommendations for the

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<sup>45</sup> ICN 141, Testimony of Alfred Williams (Sept. 11, 2020), Firelands Ex. 38 at 6-7.

<sup>46</sup> Appellants Br. at 23; Appellant Appx. 284.



Project.<sup>47</sup> The geological and hydrogeological studies performed for the Project addressed all of the requirements set forth in the Board's rules and regulations, including, but not limited: evaluating the impact to public and private water supplies; reviewing maps aquifers, water wells, and drinking water source protection; compliance with drinking water source protection plans; analyzing prospects for flooding in the area; evaluating suitability of the site geology and plans to remedy any inadequacies; evaluating the suitability of soil for grading, compaction, and drainage, and plans to remedy any inadequacies and restore the construction reclamation; and describing plans for test borings and the timing for providing information to the Board regarding subsurface soil properties, static water level, rock quality description, percent recovery, and depth and description of bedrock contact.<sup>48</sup>

Appellants attempt to rely upon witness Dr. Sasowsky and his knowledge of karst.<sup>49</sup> Appellants readily acknowledged in their briefing before the Board, which they conveniently fail to mention in this appeal, that more than a simple visual inspection of the Project area is needed to determine the subsurface conditions.<sup>50</sup> Dr. Sasowsky, however, based his entire opinion of the geological and hydrogeological configuration of the Project area on just his own personal observation that there are places in northwest Ohio where karst is present. In fact, Dr. Sasowsky did not personally perform any subsurface studies in the Project area.<sup>51</sup> Further, Dr. Sasowsky did not personally perform any studies or analyses relating to existing wind projects or the effects

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<sup>47</sup> ICN 8, Application (Jan. 31, 2019), Firelands Ex. 1 at Ex. E; ICN 137, Testimony of Rob Corzatt (Sept. 11, 2020), Firelands Ex. 39 at 5.

<sup>48</sup> ICN 8, Application (Jan. 31, 2019), Firelands Ex. 1 at Ex. E; ICN 141, Testimony of Alfred Williams (Sept. 11, 2020), Firelands Ex. 38 at 3-4, AW-2; ICN 137, Testimony of Rob Corzatt (Sept. 11, 2020), Firelands Ex. 39 at 3-4; ICN 170, Firelands Br. (Nov. 20, 2020) at 27-28.

<sup>49</sup> Appellants Br. at 22-23.

<sup>50</sup> ICN 172, BSBO/LR Br. (Nov. 20, 2020) at 22.

<sup>51</sup> *Id.* at 19; Tr. VIII (Oct. 15, 2020), Testimony of Ira Sasowsky at 1065.

of karstic features on existing wind projects.<sup>52</sup> Dr. Sasowsky could not even recall the excavation depth for the Project's turbines and does not know the bearing pressure that will be exerted by the turbine foundations.<sup>53</sup> Dr. Sasowsky also did not perform any study or analysis of existing structures in the Project area to determine what effect, if any, the karstic features have on these structures.<sup>54</sup> Despite indicating familiarity with the Project area, Dr. Sasowsky was not aware of the existence of a large quarry and its blasting operations in the Project area.<sup>55</sup> On the other hand, Firelands' expert witness, Mr. Williams, performed geotechnical investigation, including boring analyses, throughout the Project area and is familiar with the Firelands Project area.<sup>56</sup>

Appellants also theorize that grouting the karst cavities under turbine foundations to promote foundation stability could threaten the groundwater supplies with contamination by blocking the natural drainage of surface waters into the cavities and destabilize elsewhere in the area.<sup>57</sup> While the Board does not support the use of grouting on a widespread basis, the Board made it clear that its decision in this case was not intended to reject the notion of using grouting techniques for all construction purposes.<sup>58</sup> In fact, the Board recognized that grouting could be an effective technique for ensuring the safe construction of future turbines.<sup>59</sup>

Lastly, Appellants misrepresent Stipulation Condition 7<sup>60</sup> and claim the lack of language concerning retention of a hydrogeologist violates Ohio Adm.Code 4906-4-08(A)(4)(a).<sup>61</sup> Again,

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1066.

<sup>54</sup> *Id.* at 1067.

<sup>55</sup> *Id.* at 1074.

<sup>56</sup> ICN 141, Testimony of Alfred Williams (Sept. 11, 2020), Firelands Ex. 38 at 9; ICN 8, Application (Jan. 31, 2019), Firelands Ex. 1 at Ex. E.

<sup>57</sup> Appellants Br. at 22.

<sup>58</sup> ICN 182, Appellants Appx. 001, Order (June 24, 2021) at 35, ¶ 83.

<sup>59</sup> *Id.* at ¶ 84.

<sup>60</sup> ICN 124, Stipulation (Sept. 11, 2020) at 3.

<sup>61</sup> Appellants Br. at 24-25; Appellants Appx. 284.

there is no language in Ohio Adm.Code establishing such a requirement. Further, Stipulation Condition 7 ensures appropriate safeguards and requires, in part, that 30 days prior to the preconstruction conference, Firelands shall submit:

- (1) Detailed engineering drawings of the final Project design so that Staff can determine that the final design is in compliance with the Certificate.
- (2) The detailed engineering drawings for the final Project design and foundation design shall account for karst topography and include the identity of the registered professional engineer(s), structural engineer(s), or engineering firm(s), licensed to practice engineering in the state of Ohio who reviewed the approved designs.<sup>62</sup>

In sum, the record confirms that the Board properly determined the Project satisfies R.C. 4906.10(A)(2) and (3) and it did, in fact, receive and consider all necessary information to determine potential impacts on groundwater supplies.

**D. The Board Properly Determined The Project’s Operational Noise Complies With R.C. 4906.10(A)(3).**

Contrary to the assertion of Appellants, the Board is not tasked with protecting the “comfort of the neighborhood in and near the Project.”<sup>63</sup> Rather, the Board’s task is to determine if Firelands provided sufficient information to enable it to determine that the facility represents the minimum environmental impact and is in the public interest.<sup>64</sup> The record and the Board’s decision reflects that the Board received sufficient evidence and made the correct and appropriate determinations.

Appellants essentially allege that Firelands and its experts employed deceptive acoustic techniques in an attempt to justify siting turbines closer to non-participating and sensitive receptors. Specifically, relying purely on conjecture, the Appellants try to make an issue out of the sound monitoring locations chosen by Firelands’ engineer for the sound studies, saying that two

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<sup>62</sup> ICN 124, Stipulation (Sept. 11, 2020) at 3.

<sup>63</sup> Appellants Br. at 26.

<sup>64</sup> Appellants Appx. 267, R.C. 4906.10(A)(3) and (6).

of the nine locations were outside the Project area.<sup>65</sup> However, there was no scheme to choose monitoring locations that were guaranteed to be noisy.<sup>66</sup> In fact, the locations for monitoring were chosen by the expert noise control engineer in accordance with industry standard practices.<sup>67</sup> Moreover, in its Order, the Board explicitly rejected Appellants' claim that Firelands acted improperly in its choice of monitoring sites.<sup>68</sup> Appellants provided no evidence on the record concerning the sound studies performed by the Firelands' experts or the review of such studies by the Board's Staff. Instead, Appellants simply make unsubstantiated assertions in their brief that have no factual or evidentiary basis.<sup>69</sup>

Appellants also argue Ohio Adm.Code 4906-4-08(A)(3)(e)<sup>70</sup> requires that the monitoring sites for the sound studies must be located within the Project area. No such requirement is found in the rules; rather, Ohio Adm.Code 4906-4-08(A)(3)(e) requires an applicant to submit with its application "a preconstruction background noise sound study of the project area." Furthermore, the Board's determination on the topic of sound in this matter is consistent with its precedent in other cases where it approved applications for wind facilities in Ohio.<sup>71</sup>

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<sup>65</sup> Appellants Br. at 28.

<sup>66</sup> *Id.* at 5.

<sup>67</sup> ICN 129, Testimony of Eddie Duncan (Sept. 11, 2020), Firelands Ex. 41 at 9.

<sup>68</sup> ICN 182, Appellants Appx. 001, Order (June 24, 2021) at 36, ¶ 87.

<sup>69</sup> Appellants Br. at 26.

<sup>70</sup> Appellants Appx. 284.

<sup>71</sup> *See, e.g., In re Application of Hog Creek Wind Farm, LLC*, OPSB Case No. 09-277-EL-BGN, Opinion, Order, and Certificate (Mar. 22, 2010); *In re Application of Paulding Wind Farm, LLC*, OPSB Case No. 09-980-EL-BGN, Opinion, Order, and Certificate (Aug. 23, 2010); *In re Application of Blue Creek Wind Farm, LLC*, OPSB Case No. 09-1066-EL-BGN, Opinion, Order, and Certificate (Aug. 23, 2010); *In re Application of Paulding Wind Farm II, LLC*, OPSB Case No. 10-369-EL-BGN, Opinion, Order, and Certificate (Nov. 18, 2010); *In re Application of Hog Creek Wind Farm, LLC*, OPSB Case No. 10-654-EL-BGN, Opinion, Order, and Certificate (Aug. 29, 2011); *In re Application of Northwest Ohio Wind Energy, LLC*, OPSB Case No. 13-197-EL-BGN, Opinion, Order, and Certificate (Dec. 16, 2013); *In re Application of Paulding Wind Farm IV, LLC*, OPSB Case No. 18-91-EL-BGN, Opinion, Order, and Certificate (Feb. 21, 2019).

It is also noteworthy that the sound evaluation conducted for the Project was a conservative study; thus, the sound levels at many locations will be lower than those modeled. For instance, the results were based on 87 turbines utilizing the worst-case scenario sound levels and Firelands is likely to only construct 52 to 71 turbines.<sup>72</sup> The Project will likely produce even less sound than modeled.<sup>73</sup>

Appellants also make the erroneous claim that sound from the Project will cause adverse health effects.<sup>74</sup> That is not true. Dr. Mundt, an expert epidemiologist and public health professional with over 30 years of experience, provided undisputed evidence that “at or below the proposed noise levels for the Emerson Creek Wind Facility<sup>75</sup> [49 dBA nighttime noise outside non-participating residences], the epidemiological evidence does not demonstrate that wind turbine emissions harm human health.”<sup>76</sup>

Finally, Appellants allege that Ohio Adm.Code 4906-4-09(F)(2)<sup>77</sup> must somehow be found unconstitutional if it is interpreted to require project-wide averaging that raises the community’s noise level as much as 15.5 dBA.<sup>78</sup> First, the cases cited by Appellants are inapposite to the instant matter and provide no support for Appellants’ challenge to constitutionality.<sup>79</sup> Second, contrary

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<sup>72</sup> ICN 4, Application (Jan. 31, 2019), Firelands Ex. 1 at 73-74; ICN 138, Testimony of Nate Pedder (Sept. 11, 2020), Firelands Ex. 31 at 5.

<sup>73</sup> *Id.*

<sup>74</sup> Appellants Br. at p. 26.

<sup>75</sup> The Firelands Project is also known as the “Emerson Creek Wind Farm.” See ICN 4, Application (Jan. 31, 2019), Firelands Ex. 1 at 1.

<sup>76</sup> ICN 134, Testimony of Dr. Kenneth Mundt (Sept. 11, 2020), Firelands Ex. 42 at 8.

<sup>77</sup> Appellants Appx. 295.

<sup>78</sup> Appellants Br. at 31.

<sup>79</sup> *Id.*, citing *City of Cleveland v. City of Shaker Hts.*, 30 Ohio St.3d 49, 51, 507 N.E.2d 323, 325 (1987) (This case evaluates whether a neighboring municipality had standing to challenge the actions of a neighboring municipality in partially closing several streets, which is clearly not relevant for the Board’s evaluation of the Firelands Project.); *Stouffer Corp. v. Bd. of Liquor Control*, 165 Ohio St. 96, 100, 133 N.E.2d 325, 327 (1956) (This case resulted in a finding that a

to Appellants' assertions, the record reflects that all residences, both non-participating and participating, are projected to experience sound levels of 49 dBA or less from the Project. In fact, all non-participating residences are projected to be at 48 dBA or less,<sup>80</sup> which complies with Ohio Adm.Code 4906-4-09(F)(2).<sup>81</sup> The rule requires the Project to stay below 5 dBA above the existing nighttime background ambient noise level ("Leq"), and the modeling in the record shows that the Project stays below that threshold.<sup>82</sup> Further, Condition 33 in the Stipulation requires the Project to strictly follow the Ohio Adm.Code rule in question.<sup>83</sup> Overall, the Board had more than sufficient evidence to determine that the Project's operational noise complies with R.C. 4906.10(A)(3).

**E. The Board Properly Determined The Project Satisfies The Shadow Flicker Standards And Complies With R.C. 4906.10(A)(2) and (3).**

Without any evidentiary basis Appellants claim Firelands will not comply with the conditions in the Stipulation or O.A.C. 4906-4-09(H)(1) pertaining to shadow flicker.<sup>84</sup> Appellants ignore the evidence to the contrary, which includes the Stipulation itself that demonstrates Firelands' legally binding commitment to comply with shadow flicker requirements.<sup>85</sup> The Board has the authority to enforce the conditions in the Stipulation pursuant to R.C. 4906.97 through 4906.99.

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regulation from the Board of Liquor Control was unreasonable where it deprived a restaurant from acquiring a liquor license, which is also clearly not relevant for the Firelands' case.)

<sup>80</sup> ICN 129, Testimony of Eddie Duncan (Sept. 11, 2020), Firelands Ex. 41 at 10.

<sup>81</sup> Appellants Appx. 295.

<sup>82</sup> ICN 9, Application (Jan. 31, 2019), Firelands Ex. 1 at Ex. G; ICN 129, Testimony of Eddie Duncan (Sept. 11, 2020), Firelands Ex. 41 at 11.

<sup>83</sup> ICN 124, Stipulation (Sept. 11, 2020) at 8.

<sup>84</sup> Appellants Appx. 295, Ohio Adm.Code 4906-4-09(H)(1) establishes the requirement that the facility shall be operated so that shadow flicker levels do not exceed 30 hours per year at any non-participating receptor.

<sup>85</sup> ICN 124, Stipulation (Sept. 11, 2020) at 8.

In addition, as the record and the Board’s determination reflects, Firelands’ shadow flicker studies were conducted using a conservative, maximum-case scenario, which incorporated various assumptions including: that all 87 turbines would be constructed (when only 52 to 71 will likely be constructed);<sup>86</sup> that the turbines are in continuous operation during daylight hours (which is not the case); and sensitive receptors were assumed to have only windows and no screening from trees or buildings.<sup>87</sup> In other words, the studies were conservative and overestimated the actual shadow flicker that may result from a given turbine. Importantly, Firelands has committed that the cumulative shadow flicker impacts will not exceed 30 hours per year at any non-participating sensitive receptor.<sup>88</sup> Firelands committed to meet this requirement and Appellants provided no evidence to the contrary.

Appellants misconstrue and complain about the fact that Stipulation Condition 34<sup>89</sup> requires Firelands to file another shadow flicker study 30 days prior to construction.<sup>90</sup> In effect, Appellants seek to eliminate the Board’s discretion to issue a certificate in reliance on legally binding certificate conditions that will ensure the requisite “minimum adverse environmental impact” under R.C. 4906.10(A)(3).<sup>91</sup> However, the Board’s approval of the conditions contested by Appellants is entirely consistent with the Board’s implementing regulations, which in several places lay out a process for certain details to be finalized after issuance of a certificate to ensure

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<sup>86</sup> ICN 138, Testimony of Nate Pedder (Sept. 11, 2020), Firelands Ex. 31 at 5.

<sup>87</sup> ICN 182, Appellants Appx. 001, Order (June 24, 2021) at 36, ¶ 88; ICN 4, Application (Jan. 31, 2019, App. Ex. 1 at 91, 95; ICN 138, Testimony of Nate Pedder (Sept. 11, 2020), Firelands Ex. 31 at 5.

<sup>88</sup> ICN 124, Stipulation (Sept. 11, 2020) at 8.

<sup>89</sup> *Id.*

<sup>90</sup> Appellants Br. at 33.

<sup>91</sup> Appellants Appx. 267.

that the Applicant is complying with the requirements of the certificate.<sup>92</sup> This is a process that the Board has utilized to address the environmental impacts of projects throughout its history, knowing that some details of implementing agreed-upon environmental safeguards will not be definitive until closer to project construction and operation.<sup>93</sup> As this Court has recognized, the Ohio siting 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, conditions upon which the [project opponents] already had the chance to be heard.<sup>94</sup>

The Court has documented that an agency has “broad discretion in deciding how to implement its duties” where its actions are not specifically prescribed by statute.<sup>95</sup>

In one recent example, the Board approved a certificate amendment for a natural gas combined cycle plant in May 2019 with a condition for the applicant to develop a Stormwater Pollution Prevention Plan for a new temporary laydown area under the auspices of the Ohio Environmental Protection Agency.<sup>96</sup> On May 16, 2019, the Board also approved certificates for two solar facilities with conditions requiring post-issuance finalization of public information

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<sup>92</sup> See, e.g., Ohio Adm.Code 4906-4-07(C)(3) (requiring applicants to provide a schedule for receiving a National Pollution Discharge Elimination System permit under the Federal Clean Water Act, but not the permit itself); Ohio Adm.Code 4906-4-09(D)(4) (requiring development and submission of a mitigation plan to address significant bird or bat mortality only if such an event occurs during the operation of a wind facility).

<sup>93</sup> *In re Application of Hog Creek Wind Farm, LLC*, OPSB Case No. 09-277-EL-BGN, Opinion, Order, and Certificate (Mar. 22, 2010); *In re Application of Northwest Ohio Wind, LLC*, OPSB Case No. 13-197-EL-BGN, Opinion, Order, and Certificate (Dec. 16, 2013); *In re Application of Paulding Wind Farm IV, LLC*, OPSB Case No. 18-91-EL-BGN, Opinion, Order, and Certificate (Feb. 21, 2019); *In re Application of Hecate Energy Highland LLC*, OPSB Case No. 18-1334-EL-BGN, Opinion, Order, and Certificate (May 16, 2019); *In re Application of Cadence Solar Energy, LLC*, OPSB Case No. 20-1677-EL-BGN, Opinion, Order, and Certificate (Nov. 18, 2021).

<sup>94</sup> *In re Application of Buckeye Wind, LLC*, 131 Ohio St.3d 449, 452, 2012-Ohio-878, ¶¶ 16-17.

<sup>95</sup> *In re Application of Champaign Wind, LLC*, 146 Ohio St.3d 489, 2016-Ohio-1513.

<sup>96</sup> *In re Application of South Field Energy LLC*, OPSB Case No. 19-638-EL-BGN, Opinion, Order, and Certificate (May 16, 2019).



programs, landscape and lighting plans, vegetation management plans, frac-out contingency plans for horizontal directional drilling, cultural resources survey programs, and more.<sup>97</sup> On February 21, 2019, the Board approved an overhead transmission line project with a condition providing that, post-approval, the applicant would retain a herpetologist approved by ODNR to determine if the project route included suitable habitat for the timber rattlesnake and, if so, develop an avoidance/minimization plan.<sup>98</sup>

Thus, Appellants assertion that the Board acted unlawfully and unreasonably by issuing a Certificate to Firelands, a wind energy utility, because the Applicant does not comply with the shadow flicker standard and R.C. 4906.10(A)(2) and (3) is groundless.

**F. The Board Properly Determined The Project Posed A Minimum Environmental Impact On Migratory Birds Pursuant To R.C. 4906.10(A)(2).**

Appellants allege that the Board erred in determining the minimum environmental impact of the facility under R.C. 4906.10(A)(2) pertaining to migratory birds because Firelands did not conduct a nighttime radar monitoring study to evaluate the possible threat to migrating birds.<sup>99</sup> Appellants' arguments have no evidentiary support. Contrary to Appellants' position, the Board relied upon extensive evidence of studies in making its determination:

Initially, the Board acknowledges the extensive evidence provided in order to evaluate the nature of the probable environmental impact of the project on birds and bats, including 29 site-specific surveys conducted between 2009 and 2020, in dedication to understanding the estimated impact to raptors, passerines, eagles, breeding birds, owls, and bats. In addition to Firelands' coordinated efforts with ODNR and USFWS at estimating the project's expected impacts to bats and birds, we also acknowledge the value of the knowledge gained from the aggregated data

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<sup>97</sup> *In re Application of Hecate Energy Highland LLC*, OPSB Case No. 18-1334-EL-BGN, Opinion, Order, and Certificate (May 16, 2019); *In re Application of Hardin Solar Energy II, LLC*, OPSB Case No. 18-1360-EL-BGN, Opinion, Order, and Certificate (May 16, 2019); *In re Application of Fox Squirrel Solar, LLC*, OPSB Case No. 20-931-EL-BGN, Opinion, Order, and Certificate (July 15, 2021).

<sup>98</sup> *In re Application of AEP Ohio Transmission Co., Inc.*, OPSB Case No. 18-30-EL-BTX, Opinion, Order, and Certificate (Feb. 21, 2019).

<sup>99</sup> Appellants Br. at 34-36.

from more than 200 post-construction monitoring studied wind projects, which further describe mortality expectations from wind farm projects, as described by Witness Good.<sup>100</sup> Further, we acknowledge the value of the eagle risk assessment data presented by Witness Farmer in coordination with USFWS.<sup>101</sup> (*emphasis added*)

From this evidence, we conclude that the nature of the probable environmental impact can be determined. Firelands witness Rhett Good testified as to the studies that document the impact of terrestrial wind farms on bird and bat populations. In his opinion, the bird mortality rate is reasonably estimated to be consistent with other midwestern wind projects, which have resulted in a median bird mortality rate of 2.63 birds per MW per year.<sup>102</sup> (*emphasis added*)

Additionally, contrary to Appellants' assertions, the Project area has not been designated as an Important Bird Area by the Audubon Society. Appellants' own witness Mr. Shieldcastle acknowledged no such designation is associated with the Project area.<sup>103</sup> As the record reflects, a radar survey was not conducted because the Project lacks features that would be expected to concentrate bird migration, *i.e.*, the Project is not located within an area identified by ODNR as having high enough concern to merit radar studies.<sup>104</sup> In fact, both ODNR and USFWS visited the Project site and determined the forested riparian areas present were not of high enough quality to merit a radar study. Thus, USFWS and ODNR did not recommend that a radar study be conducted.<sup>105</sup> Indeed, ODNR classified the Project as requiring a moderate level of survey effort, which were completed, and radar studies are not required for this classification.<sup>106</sup>

Appellants' contention that radar studies are necessary in order for the Board to determine the probable environmental impact is belied by their own witness, Mr. Shieldcastle. He testified

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<sup>100</sup> ICN 142, Testimony of Rhett Good (Sept. 11, 2020), Firelands Ex. 32 at 21.

<sup>101</sup> ICN 128, Testimony of Christopher Farmer (Sept. 11, 2020), Firelands Ex. 33.

<sup>102</sup> ICN 182, Appellants Appx. 001, Order at 43, ¶¶ 105-106.

<sup>103</sup> Tr. VII (Oct. 14, 2020), Testimony of Mark Shieldcastle at 927.

<sup>104</sup> Tr. VII (Oct. 14, 2020), Firelands Ex. 47 at 30 (Oct. 27, 2020).

<sup>105</sup> ICN 142, Testimony of Rhett Good (Sept. 11, 2020), Firelands Ex. 32 at 21.

<sup>106</sup> Tr. VII (Oct. 14, 2020), Testimony of Mark Shieldcastle at 943.

that radar studies of nocturnally migrating songbirds are a manner of assessing risk.<sup>107</sup> USFWS states, “While an active area of research, the use of radar for determining passage rates, flight heights, and flight direction of nocturnally migrating animals has yet to be shown as a good indicator of collision risk.”<sup>108</sup> When questioned whether he was aware of studies that show a correlation between pre-construction passage rates and post-construction mortality, Mr. Shieldcastle admitted he was aware of attempts to show a correlation but “the correlations appear to be weak.”<sup>109</sup> Put more simply, since pre-construction radar surveys of nocturnally migrating songbirds bear no correlation to post-construction fatalities, then Appellants’ contention that radar studies are necessary has no merit.

Furthermore, all of the survey methods for birds were based on survey guidelines and recommendations from both ODNR and USFWS. Approximately 2,000 hours over multiple years of survey effort for birds was included in Firelands’ Application;<sup>110</sup> far more data and studies than has been submitted for other applications before the Board, all of which have been approved.<sup>111</sup> As shown on the record, both USFWS and ODNR reviewed the study protocols and results of all the bird studies completed for the Project and determined that they were adequate; thus, verifying

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<sup>107</sup> *Id.* at 952.

<sup>108</sup> Tr. VII (Oct. 14, 2020), Firelands Ex. 48 at 30 (Oct. 27, 2020).

<sup>109</sup> Tr. VII (Oct. 14, 2020), Testimony of Mark Shieldcastle at 953-954.

<sup>110</sup> ICN 4, Firelands Ex. 1 at 121, Exs. R- T, V-X; ICN 142, Testimony of Rhett Good (Sept. 11, 2020), Firelands Ex. 32 at 4-17.

<sup>111</sup> *See, e.g., In re Application of Hog Creek Wind Farm, LLC*, OPSB Case No. 09-277-EL-BGN, Opinion, Order, and Certificate (Mar. 22, 2010); *In re Application of Paulding Wind Farm, LLC*, OPSB Case No. 09-980-EL-BGN, Opinion, Order, and Certificate (Aug. 23, 2010); *In re Application of Blue Creek Wind Farm, LLC*, OPSB Case No. 09-1066-EL-BGN, Opinion, Order, and Certificate (Aug. 23, 2010); *In re Application of Paulding Wind Farm II, LLC*, OPSB Case No. 10-369-EL-BGN, Opinion, Order, and Certificate (Nov. 18, 2020); *In re Application of Hog Creek Wind Farm, LLC*, OPSB Case No. 10-654-EL-BGN, Opinion, Order, and Certificate (Aug. 29, 2011); *In re Application of Northwest Ohio Wind Energy, LLC*, OPSB Case No. 13-197-EL-BGN, Opinion, Order, and Certificate (Dec. 16, 2013); *In re Application of Paulding Wind Farm IV, LLC*, OPSB Case No. 18-91-EL-BGN, Opinion, Order, and Certificate (Feb. 21, 2019).

that the studies enabled the Board to determine the probable impact of the Project on birds under R.C. 4906.10(A)(2).<sup>112</sup> Consequently, the Board did not err in determining that the Project represents the minimum environmental impact to migrating birds pursuant to R.C. 4906.10(A)(2).

**G. The Board Properly Determined That The Economic Impact Of The Project Will Serve The Public Interest, Convenience And Necessity As Required By R.C. 4906.10(A)(6).**

Appellants claim the Board did not make a proper determination because it did not require Firelands to provide a negative economic impact study.<sup>113</sup> Appellants' argument is meritless as there is no requirement that a party demonstrate negative economic impact. Ohio Adm.Code 4906-4-06(E)(4) requires applicants to "provide an estimate of the economic impact of the proposed facility on local commercial and industrial activities."<sup>114</sup> The Board's duty is to determine whether the Project will serve the public interest, convenience and necessity as required by R.C. 4906.10(A)(6).<sup>115</sup> In any event, the Board did make such a determination and in doing so considered both the positive and negative impacts from the Project:

The Board concludes that the second element is satisfied. As a package, the Joint Stipulation benefits ratepayers and the public interest in multiple ways. First, **we acknowledge the positive economic impact** the project is expected to have. As mentioned, over 50 jobs would be created and more than \$170 million in economic output are expected from the project. Additionally, the project would result in significant tax revenue for local governments.<sup>116</sup> Additionally, the conditions in the Joint Stipulation, as modified, including the post-construction monitoring and curtailment requirements detailed above, ensure that the impacts on avian and bat species, as well as other environmental aspects of the project, will be effectively minimized. The Board otherwise acknowledges the support for the project from trade groups, local officials, small businesses, and many other local citizens. **While we acknowledge the concerns raised in opposition to the project**, we conclude that the project strikes a reasonable balance of the competing local interests in terms of protecting public safety, environmental concerns, landowner rights, renewable energy, and local governmental financial concerns. Thus, we determine that,

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<sup>112</sup> ICN 9, Application (Jan. 31, 2019), Firelands Ex. 1 at Ex. K.

<sup>113</sup> Appellants Br. at 37.

<sup>114</sup> Appellants Appx. 281.

<sup>115</sup> Appellants Appx. 267.

<sup>116</sup> ICN 89, Staff Ex. 1, Staff Report (Mar. 3, 2020) at 33-35.

overall, the project will benefit ratepayers and the public interest. (*emphasis added*)<sup>117</sup>

Further, upon rehearing, the Board again considered the economic harm arguments made by Appellants and issued a decision against them in light of the overwhelming expert witness testimony to the contrary.<sup>118</sup>

The alleged negative impact conjured up by Appellants concerning bird tourism, local farming, and impact on other energy providers is based on flawed evidence.<sup>119</sup> With respect to the alleged harm to bird tourism, Appellants' claim that there is a 40 million dollar impact from birdwatching relies upon the testimony of Dr. Shieldcastle.<sup>120</sup> He made that assertion along with others allegedly "[b]ased on numerous studies" but failed to identify the referenced studies or attach them to his prefiled testimony.<sup>121</sup> In fact, Dr. Shieldcastle was completely unqualified to render such an opinion as his own prefiled testimony indicated that the sole purpose of his testimony was to render purported expert opinions pertaining to the environmental impact of the Project on birds.<sup>122</sup>

With respect to bat fatalities, Appellants rely upon the testimony of Dr. Smallwood, who failed to use statistical methods that are currently recognized as the best available methods by USFWS and other agencies. This was confirmed by the testimony of Dr. Rabie, who testified that the United States Geological Survey ("USGS"), USFWS, and other agencies recommend the use of GenEst to estimate bat fatality.<sup>123</sup> In fact, Dr. Rabie conducted an analysis using

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<sup>117</sup> ICN 182, Appellants Appx. 001, Order (June 24, 2021) at 68, ¶ 179.

<sup>118</sup> ICN 190, Appellants Appx, 243, Order on Rehearing (Nov. 18, 2021) at 14, ¶ 46.

<sup>119</sup> Appellants Br. at 37-39.

<sup>120</sup> *Id.* at 38; ICN 154, Testimony of Mark Shieldcastle (Sept. 21, 2020), BSBO/LR Ex. 1 at 32.

<sup>121</sup> Appellants Br. at 32; ICN 154, Testimony of Mark Shieldcastle (Sept. 21, 2020), BSBO/LR Ex. 1 at 32.

<sup>122</sup> ICN 182, Appellants Appx. 001, Order (June 24, 2021) at 72, ¶ 186; ICN 154, Testimony of Mark Shieldcastle (Sept. 21, 2020), BSBO/LR Ex. 1 at 1.

<sup>123</sup> ICN 167, Testimony of Paul Rabie (Oct. 15, 2020), Firelands Ex. 89, Att. PR-3 at 1.

methods recommended by the USGS (GenEst), and calculated much lower estimates of bat mortality than Dr. Smallwood. As described in Dr. Rabie’s testimony, Dr. Smallwood’s analyses are incorrect, and should not be trusted.<sup>124</sup> Dr. Smallwood’s testimony also used assumptions that are not appropriate when estimating probable risk from the Project. For instance, Dr. Smallwood utilized bias correction factors and other assumptions from Altamont pass in California and Wolfe Island in Canada to calculate an expected fatality estimate for the Emerson Creek Wind Facility; however, data from California and an island in Canada are not representative of expected conditions in Ohio.<sup>125</sup> Dr. Smallwood’s method for estimating mortality did not rely on statistical methods recommended by USGS, other agencies, or the Bats and Wind Energy Cooperative, and made the assumption that mortality data from an island in Canada, adjusted using bias corrections from hilly grasslands in California, would be representative of mortality in the Project area.<sup>126</sup>

Furthermore, Appellants’ assertions that the Project will kill an estimated 14,620 bats per year<sup>127</sup> is equally flawed and incorrect as shown by the evidence of record in Mr. Rabie’s testimony.<sup>128</sup> Bat mortality rates from 36 post-construction monitoring studies in the Midwest have a median of 6.2 bats / MW / Year, and have ranged widely from 0.4 – 61.8 bats / MW / Year.<sup>129</sup> The highest bat mortality rates have occurred in largely treeless landscapes in Iowa, indicating that the presence of forest does not result in increased bat mortality rates.<sup>130</sup> It is important to note that,

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<sup>124</sup> *Id.* at 4.

<sup>125</sup> *Id.* at 4-10.

<sup>126</sup> *Id.* at 8; Tr. VIII (Oct. 15, 2020), Testimony of Kenneth Shawn Smallwood at 1030-33.

<sup>127</sup> Appellants Br. at 38.

<sup>128</sup> ICN 167, Testimony of Paul Rabie (Oct. 15, 2020), Firelands Ex. 89 at 8-12.

<sup>129</sup> ICN 142, Testimony of Rhett Good (Sept, 11, 2020), Firelands Ex. 32 at 24, FN 9, <https://awwi.org/resources/awwic-bat-technical-report/>; [https://www.west-inc.com/wp-content/uploads/2020/06/WEST\\_2019\\_RenewWildlifeFatalitySummaries.pdf](https://www.west-inc.com/wp-content/uploads/2020/06/WEST_2019_RenewWildlifeFatalitySummaries.pdf)

<sup>130</sup> ICN 4, Application (Jan. 31, 2019), Firelands Ex. 1 at 159.

unlike the safeguards committed to in the Application, required under the Stipulation, and recommended by USFWS in the technical assistance letter (“TAL”), many of the projects that record higher bat mortality rates used to create the range of .04-61.8 bats / MW / Year in the Midwest operate without any feathering or curtailment designed to minimize bat mortality.<sup>131</sup> The purpose of the TAL, which USFWS has determined are adequate,<sup>132</sup> is to avoid take of listed bat species. By implementing the measures in the TAL or a Habitat Conservation Plan, Firelands will be reducing any potential collision risk by curtailing turbines during the active nighttime for bats and, therefore, mortality is anticipated to be below the average presented above. Consequently, any purported environmental impact to bat species is mitigated.

Lastly, with respect to Appellants’ concerns regarding impact on other energy providers, they provide no evidence concerning any negative impact on other industries. The record reflects that the Project will create over 300 jobs through just construction alone and lead to significant revenue on both a local and statewide basis.<sup>133</sup> Additionally, the System Impact Study conducted by PJM, the regional transmission operator, demonstrates the Project will not harm local energy providers and will instead provide additional electrical generation to the regional transmission grid, which is consistent with plans for expansion of the regional power system, and will serve the interests of electric system economy and reliability.”<sup>134</sup> Consequently, the Board made the proper finding that the Project “will serve the public interest, convenience, and necessity” as required by R.C. 4906.10(A)(6).

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<sup>131</sup> *Id.*; ICN 124, Stipulation (Sept. 11, 2020) at 5.

<sup>132</sup> ICN 142, Testimony of Rhett Good (Sept. 11, 2020), Firelands Ex. 32 at 21.

<sup>133</sup> ICN 8, Application (Jan. 31, 2019), Firelands Ex. 1 at Ex. F.

<sup>134</sup> ICN 7, Application (Jan. 31, 2019), Firelands Ex. 1 at Ex. C; Staff Ex. 1 at 61; ICN 138, Testimony of Nate Pedder (Sept. 11, 2020), Firelands Ex. 31 at 9.

Moreover, it is notable that the Stipulation recommending approval and issuance of the Certificate to Firelands was entered in to with numerous community representatives and residents, including: the City of Willard; the Board of Commissioners of Huron County; the Board of Trustees of Richmond Township of Huron County; the Board of Trustees of Norwich Township of Huron County; and residents Tom Yingling and Kevin Erf.

**H. The Board Properly Determined The Project Represents The Minimum Adverse Impact To Bald Eagles Pursuant To R.C. 4906.10(A)(3).**

Appellants incorrectly contend that the Board should not have approved the Project as suitable for the intended area due to their exaggerated claim of there being a “widespread” presence of bald eagles.<sup>135</sup> Appellants’ contentions are not supported by evidence in the record. The truth is that Firelands went above and beyond what was required and completed seven years of surveys – well beyond what is needed to determine risk.<sup>136</sup>

Appellants make a number of inaccurate assertions about the eagle activity surveys, including Appellants’ misunderstanding regarding the purpose of the surveys. Appellants believe the surveys are to find out whether the eagles are likely to fly in the Project area.<sup>137</sup> However, on the contrary, the surveys are designed to identify eagle use rates for populating the USFWS collision risk model and to identify any important eagle use areas. An important eagle use area is not what Appellants’ witness, Mr. Shieldcastle, would have us believe. He believes it is everywhere an eagle flies or has undertaken an activity. By Mr. Shieldcastle’s definition, every square inch of Ohio is an important eagle use area. His definition is not only untenable, it does not represent the intent of the USFWS Eagle Conservation Plan Guidance (“ECPG”) for the surveys. Rather, the surveys conducted by Firelands identified areas of concentrated, repeated use

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<sup>135</sup> Appellants Br. at 40-41.

<sup>136</sup> ICN 128, Testimony of Christopher Farmer (Sept. 11, 2020), Firelands Ex. 33 at Att. CF-2.

<sup>137</sup> Appellants Br. at 43.



– and those areas are avoided, or minimization measures have been undertaken within them per ECPG. For example, the surveys are, in fact, designed to provide a representative sample of eagle use throughout the spatial extent of the Project, as recommended by the ECPG. In combination, the numerous surveys conducted sample the Project footprint in compliance with the ECPG.<sup>138</sup> Firelands’ survey protocol was robust, as it exceeded recommendations outlined within the USFWS ECPG.<sup>139</sup>

Appellants attempt to inflate the reality of eagle collisions and cite to a 2020 incident near Bowling Green, Ohio.<sup>140</sup> But Appellants conveniently fail to mention that this is the only bald eagle fatality publically known in Ohio.<sup>141</sup> For context, Ohio has 39 operating wind projects with a total of 419 turbines producing 864 MWs of electricity. The total number of projects in the state include 11 projects that are closer to the shore of Lake Erie than this Project, where bald eagle population densities are highest.<sup>142</sup>

Appellants also attempt to elevate activities conducted by local residents who are not trained in how to conduct an eagle survey and did not follow the requirements set forth in the ODNR Protocols or the USFWS Guidelines in their explorations.<sup>143</sup> Appellants introduced Ms. Beck’s testimony to quantify the total number of eagle sightings by various individuals. The first issue with this approach is that the sightings were not confirmed by trained wildlife experts. Second, unlike Firelands’ surveys, there was no limitation on the distance at which a “sighting”

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<sup>138</sup> ICN 10-11, Application (Jan. 31, 2019), Firelands Ex. 1 at Exs. R-S.

<sup>139</sup> ICN 10-11, Application (Jan. 31, 2019), Firelands Ex. 2 at Exs. R-S; ICN 128, Testimony of Christopher Farmer (Sept. 11, 2020), Firelands Ex. 33 at Att. CF-4 at 3.

<sup>140</sup> Appellants Br. at 41.

<sup>141</sup> <https://www.toledoblade.com/local/environment/2020/05/01/Bald-eagle-killed-by-wind-turbine-at-Wood-County-site/stories/20200503028>

<sup>142</sup> ICN 128, Testimony of Christopher Farmer (Sept. 11, 2020), Firelands Ex. 33 at 20; Tr. II (Oct. 6, 2020), Testimony of Christopher Farmer at 298.

<sup>143</sup> Tr. VII (Oct. 14, 2020), Testimony of Krista Beck at 885, 898-899.

could be counted and how this may relate to potential risk from the Project.<sup>144</sup> Last, unlike the Applicant's surveys, there is no indication of the effort put forth related to each sighting. For example, residents may have counted sightings that occurred 1,000 meters away and may have spent 100 hours for each sighting. It is also notable that the residents' sightings occurred during an extended time period between December 2019 and June 2020.<sup>145</sup>

Further, the eagle nest surveys conducted by the local residents were not performed in accordance with ODNR or USFWS guidelines.<sup>146</sup> Appellants argue that Firelands did not survey and record all occupied/unoccupied eagle nests in the Project area, and their brief focuses on all eagle nests within 2.5 miles of the Project boundary, contending that nests at that distance are at risk of impact from the Project.<sup>147</sup> However, there is no evidentiary basis for the 2.5 mile distance. The relevant wildlife agencies have provided context that searching for eagle nests is not advised more than 2.0 miles from the Project boundary. Firelands provided the following chart to the Board in demonstrating it used the appropriate metrics and that there was no significant risk to the bald eagle population:<sup>148</sup>

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<sup>144</sup> *Id.* at 888.

<sup>145</sup> *Id.* at 887-88.

<sup>146</sup> *Id.* at 886.

<sup>147</sup> Appellants Br. at 43.

<sup>148</sup> ICN 175, Firelands Reply Br. (Dec. 4, 2020) at 43.

**Table 1. Comparison of nest records reported by Beck and the Applicant**

Beck ID (Resident's distance to project)	Farmer ID (Applicant's distance to project)	Distance to nearest turbine (turbine ID)	No. Turbines within ½ -mean interest distance <sup>1</sup>
Billings Road (1 mi)	11 (0.96 mi)	1.34 mi (T1)	0
Route 269 (1 mi)	15 (0.91 mi)	2.12 mi (T6)	0
Ruffing (2 mi)	19 (1.97 mi)	2.31 mi (T43)	0
Pontiac Section Line (0.859 mi)	20 (0.63 mi)	1.26 mi (T45)	0
Daniels Road CSX (Inside Project area)	23 (inside Project area)	1.25 mi (T69)	0
Seneca-Huron Line Road (1.42 mi)	24 (1.49 mi)	4.50 mi (T70)	0
Bellevue Reservoir 5 (0.119 mi)	25 (0.10 mi)	0.79 mi (T41)	3
Patten Tract Road (0.730 mi)	12 (0.73 mi)	2.44 mi (T3)	0
Potter Road (0.946 mi)	Uncertain (0.87 mi)	1.70 mi (T11)	0
Huber Road (1.48 mi)	not previously reported (1.48) <sup>2</sup>	2.05 mi (T16)	0
Daniels Road North (on boundary)	RTHA <sup>3</sup> (on boundary)	0.19 mi (T69)	4

<sup>1</sup> 1/2-mean interest distance for the project is 1.18 mi

<sup>2</sup> This nest was outside the 2020 eagle nest search area. In 2018, WEST reported an unoccupied, non-eagle raptor nest slightly north of this location.

<sup>3</sup> Documented as Red-tailed hawk nest by WEST field biologist in early March 2020.

Furthermore, Stipulation Condition 31 makes it abundantly clear that Firelands is committed to a process to ensure that appropriate eagle conservation measures are developed:

Applicant shall develop and implement an Eagle Conservation Plan prior to the start of turbine construction. The Eagle Conservation Plan shall be developed in coordination with the USFWS and in accordance with the USFWS Eagle Conservation Plan Guidance document and 2016 Revised Eagle Take Permit Regulations. The Eagle Conservation Plan shall be developed in coordination with the USFWS prior to the start of turbine construction. Additionally, Applicant shall apply for an Eagle Take Permit from the USFWS prior to the project becoming operational. Further correspondence with the USFWS shall be provided to Staff and filed on the docket to confirm compliance with this condition, within seven days of receipt; but in no event, less than 30 days prior to turbine construction.<sup>149</sup>

<sup>149</sup>ICN 182, Appellants Appx. 001, Order (June 24, 2021) at 19; ICN 124, Stipulation (Sept. 11, 2020) at 7.

Appellants argue that the Eagle Take Permit may take years to approve yet they ignore that there are additional safeguards in place as the Project is subject to USFWS enforcement measures for eagle fatalities should one occur prior to issuance of the Certificate as described in the Bald and Golden Eagle Protection Act.<sup>150</sup> The foregoing establishes that the Board properly determined that Firelands' Application satisfies the minimum adverse impact to bald eagles pursuant to 4906.10(A)(3).

#### IV. CONCLUSION

In accordance with the foregoing and the record, Firelands respectfully requests this Court affirm the Board's decision on appeal.

Respectfully submitted,

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<sup>150</sup>ICN 182, Appellants Appx. 001, Order (June 24, 2021) at 56, at ¶ 145.

**CERTIFICATE OF SERVICE**

I hereby certify that on June 6, 2022, a copy of the foregoing was served upon the following counsel of record by electronic mail:

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