

**IN THE SUPREME COURT OF OHIO**

In the Matter of the Application of Firelands	)	
Wind, LLC for a Certificate of Environmental	)	Case No. 2022-055
Compatibility and Public Need to Construct	)	
a Wind-Powered Electric Generation Facility	)	On Appeal from the Ohio Power
in Huron and Erie Counties, Ohio.	)	Siting Board, 18-1607-EL-BGN
	)	
	)	

---

**BRIEF OF AMICUS CURIAE OHIO ENVIRONMENTAL COUNCIL  
IN SUPPORT OF APPELLEES**

---

**Chris Tavenor** (0096642)  
*Counsel of Record*  
OHIO ENVIRONMENTAL COUNCIL  
1145 Chesapeake Ave, Suite I  
Columbus, OH, 43212  
[ctavenor@theoec.org](mailto:ctavenor@theoec.org)  
614-558-8913

June 6, 2022

*Counsel for Amicus Curiae*  
*Ohio Environmental Council*

Jack A. Van Kley (0016961)  
*Counsel of Record*  
Van Kley & Walker, LLC  
132 Northwoods Blvd., Suite C-1  
Columbus, OH 43235  
Tel: (614) 431-8900  
Fax: (614) 431-8905  
[jvankley@vankleywalker.com](mailto:jvankley@vankleywalker.com)  
*Attorney for Appellants Didion, et al.*

Christine M.T. Pirik (0029759)  
*Counsel of Record*  
Terrence O'Donnell (0074213)  
William Vorys (0093479)  
Jonathan R. Secrest (0075445)  
Matthew C. McDonnell (0090164)  
[cpirik@dickinsonwright.com](mailto:cpirik@dickinsonwright.com)  
[todonnell@dickinsonwright.com](mailto:todonnell@dickinsonwright.com)  
[wvorys@dickinsonwright.com](mailto:wvorys@dickinsonwright.com)  
[jsecrest@dickinsonwright.com](mailto:jsecrest@dickinsonwright.com)  
[mmcdonnell@dickinsonwright.com](mailto:mmcdonnell@dickinsonwright.com)  
Dickinson Wright PLLC  
180 East Broad Street, Suite 3400  
Columbus, OH 43215  
Tel: (614) 591-5461  
Fax: (844) 670-6009  
*Attorneys for Intervenor-Appellee Firelands  
Wind, LLC*

David Yost (0056290)  
Attorney General of Ohio  
Werner L. Margard III (00224858)  
*Counsel of Record*  
Robert A. Eubanks (0073386)  
Assistant Attorney  
General Public Utilities Section  
30 East Broad Street, 16th Floor  
Columbus, OH 43215-3414  
Tel: (614) 466-4397  
Fax: (614) 644-8764  
[werner.margard@ohioAGO.gov](mailto:werner.margard@ohioAGO.gov)  
[robert.eubanks@ohioAGO.gov](mailto:robert.eubanks@ohioAGO.gov)  
*Counsel for Appellee Ohio Power Siting  
Board*

David Yost (0056290)  
Attorney General of Ohio  
Brett A. Kravitz (0069101)  
*Counsel of Record*  
Katherine Walker  
Assistant Attorney General  
Environmental Enforcement Section  
2045 Morse Road, Building A-3  
Columbus, OH 43229  
Tel: (614) 265-6870  
Fax: (614) 268-8871  
[Brett.kravitz@ohioattorneygeneral.gov](mailto:Brett.kravitz@ohioattorneygeneral.gov)  
[Katherine.walker@ohioattorneygeneral.gov](mailto:Katherine.walker@ohioattorneygeneral.gov)  
*Counsel for the Ohio Department of Natural  
Resources*

Michael B. Gerrard (PHV 21914-2021)  
*Counsel of Record*  
Arnold & Porter Kaye Scholer, L.L.P.  
New York, NY 10019-9710  
Tel: (212) 836-8000  
[Michael.gerrard@arnoldporter.com](mailto:Michael.gerrard@arnoldporter.com)

Philip J. Leppla (0089075)  
Leppla Associates, Ltd.  
2100 S. Patterson Blvd.  
Dayton, OH 45409  
Tel: (937) 294-5959  
Fax: (937) 294-4411  
[pjleppla@leplaw.com](mailto:pjleppla@leplaw.com)  
*Attorneys for Tom Yingling and Kevin Erf*

John & Missy Eberle  
9706 Bemis Road  
Bellevue, OH 44811  
Tel: (419) 217-9450  
[missyeb3@gmail.com](mailto:missyeb3@gmail.com)  
*Pro Se*

Randall & Della Ladd  
7625 State Route 269  
Bellevue, OH 44811  
Tel: (419) 217-9354  
[r\\_ladd@frontier.com](mailto:r_ladd@frontier.com)  
*Pro Se*

Joseph & Pamela Jenkins  
9413 State Route 99  
Monroeville, OH 44847  
Tel: (419) 656-4127  
baanc@aol.com  
*Pro Se*

Heather Niedermeier Heyman (0089270)  
*Counsel of Record*  
City of Willard Law Director  
111 S. Myrtle Avenue  
Willard, OH 44890  
Tel: (419) 935-0171  
Fax: (419) 933-2076  
heather@hnattys.com  
*Attorney for the City of Willard, Ohio*

Randal L. Strickler (0034539)  
*Counsel of Record*  
Chief Assistant Prosecuting Attorney  
Civil Division  
Huron County Prosecutor's Office  
12 East Main Street, 4th Floor  
Norwalk, OH 44857  
Tel: (419) 668-8215  
Fax: (419) 663-3844  
rstrickler@huroncountyohprosecutor.com  
*Attorney for Board of Commissioners of  
Huron County, Ohio*

Jacob S. Stephens (0098116)  
*Counsel of Record*  
Assistant Prosecuting Attorney  
Huron County Prosecutor's Office  
12 East Main Street, 4th Floor  
Norwalk, OH 44857  
Tel: (419) 668-8215  
Fax: (419) 663-3844  
jstephens@huroncountyohprosecutor.com  
*Attorney for Boards of Trustees of Norwich  
& Richmond Townships, Huron County,  
Ohio*

Gerhard R. Gross (0072214)  
*Counsel of Record*  
Assistant Prosecuting Attorney  
247 Columbus Ave., Suite 319  
Sandusky, OH 44870  
Tel: (419) 627-7697  
Fax: (419) 627-7567  
ggross@eriecounty.oh.gov

Alexandria Esposito (0099740)  
Flynn, Py & Kruse  
165 East Washington Row  
Sandusky, OH 44870  
Tel: (419) 625-8324  
Fax: (419) 625-9007  
aesposito@flynnpykruse.com  
*Attorneys for Board of Commissioners of  
Erie County, Ohio*

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES .....	2
INTRODUCTION .....	4
INTERESTS OF AMICUS CURIAE.....	5
STATEMENT OF THE FACTS AND CASE .....	7
STANDARD OF REVIEW .....	7
ARGUMENT .....	9
PROPOSITION OF LAW: the Siting Board acted lawfully and reasonably by issuing a certificate for the Emerson Creek Wind Project. ....	9
(1) The Ohio Supreme Court should defer to the Siting Board’s expertise in assessing the facts regarding environmental, public health, and economic impacts of renewable energy projects.....	9
(2) The Siting Board properly considered environmental impacts to birds and bats through its review of the application and the stipulation.....	14
(3) The Appellants’ arguments illustrate an ongoing tactic to systematically oppose wind development in the state of Ohio when the public need to combat climate change calls for a rapid increase in renewable energy. ....	17
CONCLUSION.....	20

## TABLE OF AUTHORITIES

### Cases

<i>Consumers’ Counsel v. Pub. Util. Comm.</i> , 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992).....	8
<i>In re Application of Buckeye Wind, LLC</i> , 131 Ohio St.3d 449, 2012-Ohio-878 .....	11, 15
<i>In re Application of Champaign Wind, L.L.C.</i> , 146 Ohio St.3d, 2016-Ohio-1513.....	passim
<i>Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.</i> , 68 Ohio St.3d 559, 629 N.E.2d 423 (1994).....	8
<i>Payphone Assn. v. Pub. Util. Comm.</i> , 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4.....	11

### Statutes

R.C. 4906.10(A).....	7, 16
R.C. 4906.10(A)(2).....	7, 14
R.C. 4906.10(A)(3).....	7, 14, 16
R.C. 4906.10(A)(6).....	7, 11, 16, 17

### Agency Decisions

<i>Champaign Wind</i> , Case No. 12-160, Opinion, Order and Certificate (May 28, 2013). .....	11
<i>Cincinnati Gas &amp; Electric Co.</i> , Case No 91-410-EL-AIR (Order on Remand) (Apr. 14, 1994) ...	8
<i>Firelands Wind</i> , 18-1607-EL-BGN, Order on Rehearing, Ohio Power Siting Board, (November 18, 2021).....	9
<i>Firelands Wind</i> , Case No. 18-1607, Opinion, Order, and Certificate, Ohio Power Siting Board, (June 24, 2021).....	passim

### Regulations

Ohio Admin. Code 4906-4-06(E)(3).....	12
Ohio Admin. Code 4906-4-06(E)(4).....	12
Ohio Admin. Code 4906-4-08(A)(4)(a).....	10

### Other Sources

Alvin Powell, <i>Tracing Big Oil’s PR war to delay action on climate change</i> , The Harvard Gazette, September 28, 2021, (accessed June 5, 2022), available at: <a href="https://news.harvard.edu/gazette/story/2021/09/oil-companies-discourage-climate-action-study-says/">https:// news.harvard.edu/gazette/story/2021/09/oil-companies-discourage-climate-action-study-says/</a> .....	20
Dave Anderson, <i>Ohio House debates renewable energy and misinformation abounds</i> , Energy and Policy Institute, March 31, 2017, (accessed June 5, 2022), available at: <a href="https://www.energyandpolicy.org/ohio-house-debates-renewable-portfolio-standard-misinformation-abounds/">https://www.energyandpolicy.org/ohio-house-debates-renewable-portfolio-standard- misinformation-abounds/</a> .....	19
<i>Deposition of Richard Brown</i> , Case No. 16-1871-EL-BGN, Ohio Power Siting Board, at 16-19 (September 20, 2018) .....	18
<i>Deposition of Susan Dempsey</i> , Case No. 16-1871-EL-BGN, Ohio Power Siting Board, at 126 - 127 (August 2, 2018).....	18

Julia Simon, *Misinformation is derailing renewable energy projects across the United States*, NPR, February 15, 2022, (accessed June 5, 2022), available at: <https://www.npr.org/2022/03/28/1086790531/renewable-energy-projects-wind-energy-solar-energy-climate-change-misinformation> ..... 18

Julie Carr Smith and Mark Gillespie, *Utility Regulator Targeted by FBI Saw a Whirlwind Rise*, AP News, November 21, 2020, (accessed June 6, 2022), <https://apnews.com/article/columbus-confirmation-hearings-mike-dewine-utilities-ohio-97920b4628977921c9dde93f7f8bfa57.....> 20

*Murray Energy paid over \$1 million to law firm that's fought renewable energy*, Energy and Policy Institute, available at <https://www.energyandpolicy.org/murray-energyrenewable-energy/>..... 18

*Survival by Degrees: 389 Bird Species on the Brink*, The Audubon Center, (accessed June 5, 2022), available at: <https://www.audubon.org/climate/survivalbydegrees> ..... 17

yan Haac, Ryan Darlow, Ken Kaliski, Joseph Rand, Ben Hoen, *In the shadow of wind energy: Predicting community exposure and annoyance to wind turbine shadow flicker in the United States*, Energy Research & Social Science, Volume 87, 2022, 102471, ISSN 2214-6296, <https://doi.org/10.1016/j.erss.2021.102471>..... 19

## INTRODUCTION

The Ohio Environmental Council (the “OEC”) urges the Ohio Supreme Court to uphold the decision of the Ohio Power Siting Board (the “Siting Board”) in the Matter of the Application of Firelands Wind, LLC for a Certificate of Environmental Compatibility and Public Need (18-1607-EL-BGN). Wind energy has the potential to truly revitalize Ohio’s energy economy and establish a new paradigm for the state as it transitions to modern, renewable sources of power. With the impacts of the climate crisis looming in the present and beyond the horizon, all Ohio communities should step up to the challenge of sustainably revolutionizing our systems. Whether its public transportation services, city building codes, or solar panels on the roofs of homes, everyone has a part to play. And in many communities in Ohio, wind energy presents an incredible opportunity both for carbon reductions and sustainable economic development.

The OEC files this amicus brief through that lens—one of essential climate action. Firelands Wind, LLC’s decision to construct a wind generation facility in Erie and Huron Counties (the “Emerson Creek Wind Farm Project”) will create renewable sources of electricity for Ohioans and reduce the need for fossil-fuel-fired generation on the regional transmission grid. However, climate action cannot be pursued at the expense of all other impacts. Fortunately, the Siting Board plays an important role in the review of facilities like the Emerson Creek Wind Farm Project, ensuring minimal adverse impacts to the environment and surrounding community. The Siting Board’s job is to balance a variety of factors and the interests of many stakeholders as it reviews potential projects. Its staff comprehensively reviews the facts; they are an invaluable source of expertise for the state of Ohio.

In their arguments disputing the Siting Board’s decision, the appellants mischaracterize the legal duties of the Siting Board and propose arguments that should be categorically rejected. The

Siting Board has ensured minimum adverse environmental impact, through its review of the application and the established stipulation. The Siting Board's plan with the company appropriately protects important environmental resources, including the region's bird and bat populations, especially in the context of climate change's threat to those organisms.

Of utmost importance, however, is the context in which this appeal arises. Renewable energy generation is under constant attack in Ohio, and its assailants utilize the same tactics from case to case, spreading misinformation about projects more protective of human health and the environment than almost any other form of energy generation. In some instances, the opposition to renewable energy has its legal fees directly funded by fossil fuel interests. The pattern and practice of renewable energy facility appeals illustrate a coordinated opposition designed to deprive Ohio companies, communities, and consumers of the benefits of renewable energy—and Ohio's future as a leader in the fight against the climate crisis.

As explained in further detail below, the OEC urges the Ohio Supreme Court to uphold the Siting Board's decision to approve the Emerson Creek Wind Farm Project. Ohioans, and Ohio's environment, cannot wait another day for the renewable energy sources they deserve.

### **INTERESTS OF AMICUS CURIAE**

The OEC is a statewide non-profit, non-partisan environmental and conservation organization, composed of nearly one hundred organizational groups and thousands of individual members across Ohio. Over the past five decades, the OEC has advocated for policies to secure healthy air, land, and water for all who call Ohio home. We have thousands of members across Ohio, including members in Erie and Huron Counties, the counties soon to house the Emerson Creek Wind Farm Project. Our organization's Energy Program advocates strongly for more



renewable energy development in order to meet the growing demand for emission-free energy while mitigating the causes of climate change. Through our Natural Resources program, the OEC also advocates strongly for the protection of water resources as well as critical habitats for native and migratory species.

As the OEC pushes for a renewable energy future for Ohio, the fossil fuel industry often resists, as it is threatened by the need to shift energy sources from carbon-intensive fossil fuel generation toward sources that produce no greenhouse gasses (GHGs)—particularly wind, solar, and other emerging clean energy technologies. The fossil fuel industry goes to great lengths to tamp down clean energy advocacy or, alternatively, to prop up anyone fighting against clean energy projects regardless of why they oppose. Fossil fuel interests also engage in aggressive misinformation campaigns surrounding renewable energy technology, spreading junk science intended to deceive communities who could benefit from renewable energy.

The OEC has followed the development of renewable energy generation in Ohio for many years, directly intervening in some cases at the Siting Board. *See Petition to Intervene and Memorandum in Support electronically filed by Ms. Miranda R Leppla on behalf of Ohio Environmental Council*, 16-1871-EL-BGN, Ohio Power Siting Board, October 13, 2017. *See also Petition Ohio Environmental Council and Environmental Defense Fund's Petition to Intervene and Memorandum in Support electronically filed by Ms. Miranda R Leppla on behalf of Ohio Environmental Council and Environmental Defense Fund*. 17-2295-EL-BGN, Ohio Power Siting Board, August 23, 2018. Based on our review of the Emerson Creek Wind Farm Project, its environmental considerations, and its stipulation, the project presents minimal adverse impact to the environment while providing significant benefits to the community, Ohio, and the energy grid

itself. This appeal should be denied, and the Emerson Creek Wind Farm Project should move forward, subject to the requirements in the Certificate granted by the Siting Board.

### **STATEMENT OF THE FACTS AND CASE**

Amicus Curiae hereby adopts and incorporates by reference the Statement of the Facts and Case delineated by appellee, the Siting Board, and the intervening party, Firelands Wind, LLC.

### **STANDARD OF REVIEW**

The Ohio Supreme Court's authority in reviewing decisions of the Siting Board centers on questions of law, with broad discretion given to the Siting Board's review of evidence in determining whether to grant a Certificate to an energy generation facility. When considering whether to approve an application for a certificate to construct the Emerson Creek Wind Farm Project, the Siting Board makes its determination pursuant to R.C. 4906.10(A). The Siting Board cannot grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified, unless the Siting Board determines the project meets eight statutory criteria. The Appellants in this case rest their case on purported violations of R.C. 4906.10(A)(2)/(3)/(6), requirements focused on the nature of the probable environmental impact (R.C. 4906.10(A)(2)); confirmation that the facility represents minimum adverse environmental impact (R.C. 4906.10(A)(3)); and that the facility serves the public interest, convenience, and necessity (R.C. 4906.10(A)(6)).

Additionally, the Emerson Creek Wind Farm Project's Certificate implemented conditions originally part of a Stipulation joined by some of the parties. When reviewing a Stipulation agreement, the Siting Board must consider the reasonableness of the stipulation, which it does by

using a three-part test: (1) whether the settlement is a product of serious bargaining among capable, knowledgeable parties; (2) whether the settlement, as a package, benefits customers and the public interest; and (3) whether the settlement package violates any important regulatory principle or practice. *See e.g., Cincinnati Gas & Electric Co.*, Case No 91-410-EL-AIR (Order on Remand) (Apr. 14, 1994); *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 561, 629 N.E.2d 423 (1994), citing *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992). When reviewing a contested stipulation, the Siting Board must still require evidentiary support for the terms of the stipulation. The Siting Board is permitted to “place substantial weight on the terms of a stipulation,” but it still “must determine, from the evidence, what is just and reasonable.” *Consumers' Counsel, supra*. Notably, the Appellants do not object to the Stipulation itself, though they dispute the use of some of the conditions of the Stipulation as integrated into the Siting Board’s decision and Certificate.

When reviewing decisions of the Siting Board, the Ohio Supreme Court reverses, modifies, or vacates an order only when its “review of the record reveals that the order is unlawful or unreasonable.” *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d at 491, 2016-Ohio-1513 at ¶7. The Court does not reverse or modify board decisions regarding questions of fact “when the record contains sufficient probative evidence to show that the Siting Board’s decision was not manifestly against the weight of evidence and was not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty.” *Id.* The Court defers to the expertise of the Siting Board, and “Appellants bear the burden of demonstrating that the Siting Board’s decision is against the manifest weight of the evidence or is clearly unsupported by the record.” *Id.* The Court has “complete and independent power of review as to *all questions of law* in appeals from the Siting Board.” *Id.*, emphasis added.

## ARGUMENT

**PROPOSITION OF LAW: the Siting Board acted lawfully and reasonably by issuing a certificate for the Emerson Creek Wind Project.**

**(1) The Ohio Supreme Court should defer to the Siting Board’s expertise in assessing the facts regarding environmental, public health, and economic impacts of renewable energy projects.**

The Siting Board, through its Staff Report, Stipulation process, hearing, and ultimately its initial decision and decision on rehearing, assessed a vast array of information before it regarding the potential impacts, both negative and positive, of the Emerson Creek Wind Farm Project. In its decision on rehearing, the Siting Board emphasized its factual analysis originally included in its decision: setbacks (¶82), karst and grouting impacts on water supply, quality, and flooding (¶83-85), shadow flicker (¶88), communications (¶89-90), property value impacts (¶64-65), and more. *See Firelands Wind*, 18-1607-EL-BGN, Order on Rehearing, Ohio Power Siting Board, (November 18, 2021). Its review was comprehensive, and the Siting Board acted lawfully and reasonably in balancing all of the facts before it in issuing a Certificate for this project.

The arguments of the Appellants ultimately ask the Ohio Supreme Court to substitute its own factual analysis in place of the Siting Board’s examination of the project, an approach that runs contrary to the Court’s established precedent in Siting Board appeals. When appealing the Siting Board’s analysis of many of these factors, the Appellants’ arguments ultimately fall into two categories: (1) the Siting Board should have required additional studies; or (2) the Siting Board should not be permitted to allow certain information to be submitted following the issuance of the Certificate. For instance, the Appellants claim that the Siting Board’s decision does not require the “evaluation of the impact to public and private water supplies due to construction and operation of the proposed facility” mandated by Ohio Admin. Code 4906-4-08(A)(4)(a). *See Appellants’ Merit Brief*, at 24. The Appellants also claim the Applicant has not even provided information regarding

the Project Area’s public and private water supplies. The Appellants simply ignore the evidence provided by the Applicant regarding drinking water, including a survey of landowners in the project area regarding water wells on their properties<sup>1</sup> and geotechnical subsurface exploration and hydrogeological studies designed to address the requirements of the Siting Board’s rules, including Ohio Admin. Code 4906-4-08(A)(4)(a). *See* Case No. 18-1607-EL-BGN, Ohio Power Siting Board, App. Ex. 1 at Ex. E; App. Ex. 39 at 3-4; App Ex. 38 at 3-4, Att AW-2. In the eyes of the Appellants, for some reason these studies do not exist.

Similarly, the Appellants dispute the Siting Board’s ability to impose Conditions, especially those Conditions agreed upon by parties through a Stipulation. For example, Condition 34 will allow the Applicant to submit a new shadow flicker study prior to construction “showing that cumulative shadow flicker impacts will not exceed 30 hours per year at any non-participating sensitive receptor.” *Firelands Wind*, Case No. 18-1607, Opinion, Order, and Certificate, Ohio Power Siting Board, (June 24, 2021) at ¶ 50. According to the Appellants, conditioning construction on completion of a new study deprives them of their rights to participate in the review process.

These arguments misstates the role of the Siting Board and its Certificate process. It is reasonable, and consistent with precedent, to condition construction upon completion of a new study that satisfies the Siting Board’s Conditions within the Certificate. The study will be required to be docketed, which means intervening parties and other interested individuals can see the study and comment on it. Fundamentally, this Court has explained this issue in full—the Siting Board’s certification process is “a dynamic process that does not end with the issuance of a construction certificate” and “proper facility siting is subject to modification as the process continues—

---

<sup>1</sup> Case No. 18-1607-EL-BGN, Ohio Power Siting Board, App. Ex. 1 at 75, Ex. E.

proposals are tested and matched to the defined conditions.” *In re Application of Buckeye Wind, LLC*, 131 Ohio St.3d 449, 2012-Ohio-878 at ¶16, 17. It is a historical practice the Siting Board has utilized in other wind farms. *See Champaign Wind*, Case No. 12-160, Opinion, Order and Certificate (May 28, 2013).

The Siting Board has assessed the facts of the case and made its determinations according to the statutory requirements for a Certificate. The Appellants wish the Siting Board would use their approach, but while there may be multiple methods to weigh evidence, the decision-makers ultimately deserve deference. When a statute “does not prescribe a particular formula or methodology, the appropriate administrative agency has broad discretion in deciding how to implement its duties.” *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, ¶ 36, citing *Payphone Assn. v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4, ¶25 (“When a statute does not prescribe a particular formula, the PUCO is vested with broad discretion”). In *Champaign Wind*, the Siting Board staff found an expert’s noise assessment reliable. *Id.* With the Siting Board being the agency with expertise, the Court found its decision was entitled to deference. *Id.*

And fundamentally, the Appellants cannot point to a statutory formula indicating how the Siting Board abused its discretion in reviewing the evidence in this case. For example, in the Siting Board’s review under R.C. 4906.10(A)(6), where the Siting Board must determine whether a facility will serve the public interest, convenience, and necessity, it weighed what it viewed as both the positives and negatives of the facility. *See Firelands Wind*, Case No. 18-1607, Opinion, Order, and Certificate, Ohio Power Siting Board, (June 24, 2021), at ¶¶ 162 - 169. The Appellants believe the Siting Board should have required the Applicant to submit specific economic evidence

about very particular impacts, such as the economic loss due to bird and bat kills, or impacts to other generation sources.

Yet Ohio Admin. Code 4906-4-06(E)(4) only requires “an estimate of the economic impact of the proposed facility on local commercial and industrial activities.” Other subsections of Ohio Admin. Code 4906-4-06(E) have similar mandates, such as the “estimate of the increase in county, township, and municipal tax revenue accruing from the facility.” Ohio Admin. Code 4906-4-06(E)(3). These requirements do not have prescribed formulas; the Siting Board must assess the facts presented and determine their sufficiency. *See Champaign Wind*, 2016-Ohio-1513 at ¶ 36.

Even so, the Siting Board assessed the alternative information provided by the Appellants regarding negative economic impacts, as well as their critiques of the Applicant’s economic experts. For example, the Siting Board considered the potential for “diminished property values” when the Appellants “disputed the conclusions of witness Michael MaRous, who testified on Applicant’s behalf in support of the position that the project will not negatively impact local property values.” *Firelands Wind*, Case No. 18-1607, Opinion, Order, and Certificate, Ohio Power Siting Board, (June 24, 2021), at ¶ 63. The Siting Board also considered the Appellants’ critiques of Erica Tauzer, who testified regarding economic welfare. *Id.* at ¶ 64. While these discussions occurred regarding the Applicant’s review of socioeconomic considerations, they relate to the Siting Board’s ultimate decision regarding public interest, convenience, and necessity. Other factors considered by the Siting Board include opinions of local farmers and community members, who stressed “the project’s (1) local economic benefits, and (2) positive impact on reducing the state’s production of greenhouse gasses.” *Id.* at ¶ 165. In reaching its conclusion that the Applicant satisfied R.C. 4906.10(A)(6), the Siting Board noted:

- (1) The local governmental support from Willard, Huron County, Richmond township, and Norwich Township, and

(2) There was no local governmental opposition to the project. *Id.* at ¶ 168.

The Siting Board has determined that “public interest, convenience, and necessity” should be examined through a broad lens. *Id.* The analysis is a balancing test, not only including “the public’s interest in energy generation that ensures continued utility services and the prosperity of the State of Ohio,” but also encompasses “local public interest, ensuring a process that allows for local citizen input, while taking into account local government opinion and impact to natural resources.” *Id.* The Siting Board’s opinions demonstrate that its analysis under R.C. 4906.10(A)(6), and its analysis of the project holistically, considered a variety of perspectives, including local landowners both for and against the project, as well as the perspective of the applicant, local governments, and beyond. Ultimately, the Siting Board found that Mr. Schreiner, a witness for the Appellants, was less credible in his experience regarding grid management than the Applicant’s witness. *Id.*, at ¶ 169. This Court should not substitute its own formula for assessing the evidence before the Siting Board when it comes to the public interest, rather respecting the discretion afforded the Siting Board by the laws of this state. *See Champaign Wind*, 2016-Ohio-1513 at ¶ 36, (When a statute “does not prescribe a particular formula or methodology, the appropriate administrative agency has broad discretion in deciding how to implement its duties”).

In reality, the Appellants want to use the Ohio Supreme Court as a venue through which it can relitigate factual disputes already considered closely by the Ohio Power Siting Board, the venue with the expertise to consider these facts. The Siting Board appropriately determined what information it needed to make its determinations. The Ohio Supreme Court should defer to the Siting Board’s expertise in assessing the facts regarding environmental, public health, and economic impacts of renewable energy projects. The issues at hand are not issues of law, they are factual concerns where the Siting Board acted lawfully and reasonably.



**(2) The Siting Board properly considered environmental impacts to birds and bats through its review of the application and the stipulation.**

The Siting Board paid special attention to the project’s impacts to birds and bats, properly considering the impacts under R.C. 4906.10(A)(3): “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.” Under R.C. 4906.10(A)(2), the Siting Board is also required to determine the “nature of the probable environmental impact” caused by projects. In the context of these requirements, the Siting Board considered the environmental impact to birds and bats “one of the most contested issues in [the] case.” *Firelands Wind*, Case No. 18-1607, Opinion, Order, and Certificate, (June 24, 2021), at ¶ 140. The Siting Board specifically noted how Firelands provided extensive information, including 29 surveys between 2009 and 2020, from surveys on raptor nests and passerine migration to bat activity and eagle use of the project area. *Id.* All surveys conducted for the Emerson Creek Wind Farm Project satisfied “the recommendations of [Ohio Department of Natural Resources] and [U.S. Fish and Wildlife Service], the agencies with expertise in the management of these wildlife resources.” *Id.*

Despite this evidence, the Appellants once again claim the Applicant did not have sufficient evidence on the record for the Siting Board to make a determination. The Appellants demand particular types of bird and bat studies, studies different from those provided to support the Emerson Creek Wind Farm Project. They argue it is impossible for the Siting Board to make determinations regarding the environmental impact of the project without the precise study they request. *See Appellants’ Merit Brief*, at 37.

The Appellants misunderstand the Siting Board’s role in the process of assessing bird and bat impacts, as well as the “nature of the probable environmental impact.” In addition to the surveys conducted specifically for this project, the Applicant, and subsequently the Siting Board,

relied upon over “200 post-construction monitoring studied wind projects.” *Firelands Wind*, Case No. 18-1607, Opinion, Order, and Certificate, (June 24, 2021), at ¶ 105. Based on both the tests conducted for the Project Area and the survey of similarly situated projects, “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.” *Id.*, at ¶ 106 (the Siting Board accepting the testimony of Witness Good). The bat mortality rate was projected to be 7.9 bats per MW per year. *Id.*

Accordingly, the Siting Board found that it could use the Applicant’s studies, compared to the studies of similarly situated projects, and determine the nature of the “probable environmental impact.” *Id.*, at ¶ 108 (“the Siting Board is tasked with identifying the nature of the probable impact, not the actual impact”). Through the Siting Board’s “dynamic process,” *Buckeye Wind* at ¶ 16, it will require the Emerson Creek Wind Farm Project to conduct multiple post-construction studies, mitigation plans, and other measures with Staff, ODNR, and USFWS. *See Firelands Wind*, Case No. 18-1607, Opinion, Order, and Certificate, (June 24, 2021), at ¶¶ 142 - 148. These studies ensure the Siting Board can confirm that the Project represents minimum environmental impact consistent with the nature of the probable environmental impact. The actual impacts of any project cannot be known until after its construction.

Its job is not to guarantee no environmental impacts from energy projects, whether to birds, bats, or otherwise; if that were the case, likely no energy project would ever be constructed. Likewise, the Siting Board’s job is not to ensure that every project receives an exhaustive analysis, exploring absolutely every potential possible data point. Such a process would be administratively untenable. In actuality, the Siting Board properly tailors its review under R.C. 4906.10(A) to

acquire the necessary information to make an informed decision regarding the impacts of a project to environmental resources, local economies, and the energy grid itself.

R.C. 4906.10(A)(3) best illustrates the Siting Board’s narrowly tailored obligation: the facility must represent “the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations.” The Siting Board should oversee applications in such a way that ensures “minimum adverse environmental impact,” yet the statutory requirement acknowledges some environmental impact will likely occur. Those impacts are then balanced against other countervailing considerations, as required by R.C. 4906.10(A)(6) when the Siting Board considers whether the project, as a whole, serves the public interest, convenience, and necessity.

The Appellants consistently expect the Siting Board to perform duties simply not written into statute. They request hyper-specific studies on bird and bat impacts while selectively ignoring the voluminous data provided by the Applicant demonstrating the probable impact.<sup>2</sup> The Appellants act as if wind farms are a new technology in the midwest—as if companies haven’t constructed turbines in a variety of similarly situated environments. Wind turbine post-construction surveys provide accurate estimates of actual bird and bat mortality rates. The Siting Board utilizes that data to appropriately quantify the “probable impact” of the project. Working with Staff and other state and federal agencies, the Applicant can then develop programs and plans to ensure this project hits similar numeric impacts—and if it does not hit those numbers, state agencies can require additional actions. In recognizing the potential total bat and bird impacts, the Siting Board then asks: are these impacts to birds and bats sufficiently outweighed by the benefits

---

<sup>2</sup> For instance, the Appellants request a survey specifically determining the risk of passerines colliding with wind turbines at night-time. *See Appellant’s Brief*, at 37.

to public interest, convenience, and necessity? *See* R.C. 4906.10(A)(6). The Siting Board’s job is not to ensure no birds or bats die as a result of the project.

The R.C. 4906.10(A)(6) calculus is particularly important when considering, more generally, the greatest risks to bird and bat populations. The Audubon Center recently conducted an intensive observational and modeling study to determine the likely impact of climate change to bird populations, including species that live in the Great Lakes region. According to the Audubon Center, “the results are clear: Birds will be forced to relocate to find favorable homes. And they may not survive.” *Survival by Degrees: 389 Bird Species on the Brink*, The Audubon Center, (accessed June 5, 2022), available at: <https://www.audubon.org/climate/survivalbydegrees>. Wind projects, as well as solar projects, directly reduce reliance on fossil-fuel-powered energy sources, a fact specifically noted in the Siting Board’s 4906.10(A)(6) analysis: local farmers and community members stressed “(1) local economic benefits, and (2) positive impact on reducing the state’s production of greenhouse gasses.” *Firelands Wind*, Case No. 18-1607, Opinion, Order, and Certificate, (June 24, 2021), at ¶ 165.

Climate change may cause entire bird species to go extinct. Wind turbines directly counteract the causes of climate change. The Siting Board, and other governmental entities, should appropriately tailor development of renewable energy sources to ensure “minimum adverse environmental impact,” especially to bird and bat populations. But the calculus should also include the stark reality that without wind farms, communities may lose the bird species they cherish most.

**(3) The Appellants’ arguments illustrate an ongoing tactic to systematically oppose wind development in the state of Ohio when the public need to combat climate change calls for a rapid increase in renewable energy.**

The Appellants’ arguments against the Emerson Creek Wind Farm Project represent an unfortunate trend in opposition to renewable energy projects. All Ohioans should have the right to

express their concerns in public forums, and in the context of siting wind farms, the Siting Board has developed a robust public input process while ensuring developers hold public hearings within Project Areas to hear from the local community. However, public misinformation of renewable energy projects has been weaponized by both fossil fuel companies and their political allies to stall renewable energy development in Ohio.

In at least one instance, fossil fuel interests directly funded local opposition to a wind project. In the Siting Board case for the Icebreaker Windpower project, Case No. 16-1871-EL-BGN, it was discovered that the Appellants' legal fees were funded by Murray Energy Corporation, a coal company.<sup>3</sup> This trend is not isolated to Ohio. The Texas Public Policy Foundation, with ties to the fossil fuel industry, released a misinformation anti-wind "film trailer" regarding a Massachusetts offshore wind farm, including "the untrue statement that the proposed project didn't do any environmental impact assessments and the incorrect idea that offshore wind projects 'haven't worked anywhere in the world.'" Julia Simon, *Misinformation is derailing renewable energy projects across the United States*, NPR, February 15, 2022, (accessed June 5, 2022), available at: <https://www.npr.org/2022/03/28/1086790531/renewable-energy-projects-wind-energy-solar-energy-climate-change-misinformation>. This type of misinformation has infected Facebook groups in Ohio organized around opposing wind farms, including "a large wind opposition group . . . fighting the Republic Wind Farm." *Id.* Researchers at the University of Minnesota Duluth studied the posts in these anti-wind groups, concluding that posts were

---

<sup>3</sup> *Deposition of Richard Brown*, Case No. 16-1871-EL-BGN, Ohio Power Siting Board, at 16-19 (September 20, 2018) (See Exhibit 1, Retention Letter from Appellants' Counsel to Expert Richard Brown, Sept. 11, 2017, noting that Murray Energy Corporation, a coal company, was paying the Expert's retention fees and expenses); *Deposition of Susan Dempsey*, Case No. 16-1871-EL-BGN, Ohio Power Siting Board, at 126 - 127 (August 2, 2018) (See Exhibit 3, Letter from Appellants' Counsel to Expert Richard Brown, Sept. 11, 2017, noting that Murray Energy Corporation, a coal company, was paying the Expert's retention fees and expenses); *see also Murray Energy paid over \$1 million to law firm that's fought renewable energy*, Energy and Policy Institute, available at <https://www.energyandpolicy.org/murray-energyrenewable-energy/>

“increasing perceptions of human health and public safety risks related to wind by sharing news of disasters and misinformation over health assessment risks.” *Id.*

Experts studying renewable energy development across the country emphasize that misinformation has real implications for how communities interact with proposed projects. In the context of the Emerson Creek Wind Farm Project, the Appellants take direct issue with the Applicant’s approach to shadow flicker and oppose the Siting Board’s approach to approving the project’s shadow flicker mitigation strategies. *See Appellants’ Brief*, at 33. Shadow flicker is a common concern raised by people who live near wind farms. However, strong evidence indicates “annoyance” with shadow flicker may be more closely linked to annoyance with the project itself, rather than the shadows. *See* yan Haac, Ryan Darlow, Ken Kaliski, Joseph Rand, Ben Hoen, *In the shadow of wind energy: Predicting community exposure and annoyance to wind turbine shadow flicker in the United States*, Energy Research & Social Science, Volume 87, 2022, 102471, ISSN 2214-6296, <https://doi.org/10.1016/j.erss.2021.102471> (“self-reported SF annoyance was correlated with subjective factors, e.g., project appearance and general annoyance”).

In the Ohio General Assembly, elected officials have relied on misinformation linked with fossil fuel interests to support their opposition to renewable energy development. In 2016, Representative Louis Blessing III cited a debunked 2009 report that made erroneous claims about the impact of wind energy on job loss in Spain. *See* Dave Anderson, *Ohio House debates renewable energy and misinformation abounds*, Energy and Policy Institute, March 31, 2017, (accessed June 5, 2022), available at: <https://www.energyandpolicy.org/ohio-house-debates-renewable-portfolio-standard-misinformation-abounds/>. The author of the report had close ties to ExxonMobil. *Id.* ExxonMobil frequently makes headlines for its history of climate misinformation. *See e.g.*, Alvin Powell, *Tracing Big Oil’s PR war to delay action on climate*

*change*, The Harvard Gazette, September 28, 2021, (accessed June 5, 2022), available at: <https://news.harvard.edu/gazette/story/2021/09/oil-companies-discourage-climate-action-study-says/>.

The story goes on. It is common knowledge by now that in Ohio, utility interests allegedly bribed the former Speaker of the House to pass a bill gutting renewable portfolio standards while bailing out legacy generation resources, including nuclear and coal. Those same utility interests allegedly paid a former Public Utilities Commission Chair \$4 million for favorable decisions.<sup>4</sup> We provide this context to note that opposition to renewable generation, like the Emerson Creek Wind Farm Project, does not occur in a vacuum. Social media echo chambers create space for local communities to receive misinformation regarding renewable generation, and sometimes nefarious parties use that misinformation to garner legal opposition, gumming up the operations of state administrative processes like the Siting Board. Fossil fuel and utility interests have a vested interest in ensuring those misinformation campaigns continue, and they have demonstrated their willingness to directly fund and exploit local opposition to wind development to stall the construction of those projects.<sup>5</sup>

## CONCLUSION

Wind farms across the country generate safe, renewable energy for their communities, eliminating the need for energy generation that produces air pollutants and GHGs. Decades of environmental review of wind farms has demonstrated the net benefit of these projects—as well as the appropriate methods needed to ensure minimum adverse environmental impact, as the Siting Board has done in this case. The Emerson Creek Wind Farm Project is a run-of-the-mill project,

---

<sup>4</sup> Julie Carr Smith and Mark Gillespie, *Utility Regulator Targeted by FBI Saw a Whirlwind Rise*, AP News, November 21, 2020, (accessed June 6, 2022), <https://apnews.com/article/columbus-confirmation-hearings-mike-dewine-utilities-ohio-97920b4628977921c9dde93f7f8bfa57>

<sup>5</sup> *Supra* FN 3.

capitalizing on the coming renewable energy revolution and preparing to provide the needed electricity desired by future generations.

The Siting Board correctly determined that the project satisfies the requirements of R.C. 4906.10(A). It assessed the nature of the probable environmental impact. It represents minimum adverse environmental impact, given the state of technology available. It is in pursuit of the public interest, convenience, and necessity, especially in the context of climate change and its future impacts to communities and environmental resources, especially bird and bat populations. The Ohio Supreme Court should see through the baseless legal assertions of the Appellants and uphold the Siting Board's June 24, 2021 decision granting the Emerson Creek Wind Farm Project a Certificate. In the end, the Siting Board should continue to be viewed as an administrative agency with "broad discretion in deciding how to implement its duties." *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, ¶ 36. The Ohio Supreme Court has no reason to intervene in the Siting Board's actions pertaining to the Emerson Creek Wind Farm Project; the Siting Board acted lawfully and reasonably in its approval.

Respectfully submitted,

**Chris Tavenor** (0096642)  
*Counsel of Record*  
OHIO ENVIRONMENTAL COUNCIL  
1145 Chesapeake Ave, Suite I  
Columbus, OH, 43212  
[ctavenor@theoec.org](mailto:ctavenor@theoec.org)  
614-558-8913

June 6, 2022

*Counsel for Amicus Curiae*  
*Ohio Environmental Council*



## CERTIFICATE OF SERVICE

I hereby certify that a digital copy of the foregoing brief was served upon the following parties of record via electronic transmission on June 6, 2022.

/s/Chris Tavenor  
Chris Tavenor  
Attorney for Amicus Curiae

### SERVICE LIST

Jack A. Van Kley (0016961)  
*Counsel of Record*  
Van Kley & Walker, LLC  
132 Northwoods Blvd., Suite C-1  
Columbus, OH 43235  
Tel: (614) 431-8900  
Fax: (614) 431-8905  
[jvankley@vankleywalker.com](mailto:jvankley@vankleywalker.com)  
*Attorney for Appellants Didion, et al.*

Christine M.T. Pirik (0029759)  
*Counsel of Record*  
Terrence O'Donnell (0074213)  
William Vorys (0093479)  
Jonathan R. Secrest (0075445)  
Matthew C. McDonnell (0090164)  
[cpirik@dickinsonwright.com](mailto:cpirik@dickinsonwright.com)  
[todonnell@dickinsonwright.com](mailto:todonnell@dickinsonwright.com)  
[wvorys@dickinsonwright.com](mailto:wvorys@dickinsonwright.com)  
[jsecrest@dickinsonwright.com](mailto:jsecrest@dickinsonwright.com)  
[mmcdonnell@dickinsonwright.com](mailto:mmcdonnell@dickinsonwright.com)  
Dickinson Wright PLLC  
180 East Broad Street, Suite 3400  
Columbus, OH 43215  
Tel: (614) 591-5461  
Fax: (844) 670-6009  
*Attorneys for Intervenor-Appellee Firelands  
Wind, LLC*

David Yost (0056290)  
Attorney General of Ohio  
Werner L. Margard III (00224858)  
*Counsel of Record*  
Robert A. Eubanks (0073386)  
Assistant Attorney  
General Public Utilities Section  
30 East Broad Street, 16th Floor  
Columbus, OH 43215-3414  
Tel: (614) 466-4397  
Fax: (614) 644-8764  
[werner.margard@ohioAGO.gov](mailto:werner.margard@ohioAGO.gov)  
[robert.eubanks@ohioAGO.gov](mailto:robert.eubanks@ohioAGO.gov)  
*Counsel for the Appellee The Ohio Power  
Siting Board*

David Yost (0056290)  
Attorney General of Ohio  
Brett A. Kravitz (0069101)  
*Counsel of Record*  
Katherine Walker  
Assistant Attorney General  
Environmental Enforcement Section  
2045 Morse Road, Building A-3  
Columbus, OH 43229  
Tel: (614) 265-6870  
Fax: (614) 268-8871  
[Brett.kravitz@ohioattorneygeneral.gov](mailto:Brett.kravitz@ohioattorneygeneral.gov)  
[Katherine.walker@ohioattorneygeneral.gov](mailto:Katherine.walker@ohioattorneygeneral.gov)  
*Counsel for the Ohio Department of Natural  
Resources*

Michael B. Gerrard (PHV 21914-2021)  
*Counsel of Record*  
Arnold & Porter Kaye Scholer, L.L.P.  
New York, NY 10019-9710  
Tel: (212) 836-8000  
[Michael.gerrard@arnoldporter.com](mailto:Michael.gerrard@arnoldporter.com)

Philip J. Leppla (0089075)  
Leppla Associates, Ltd.  
2100 S. Patterson Blvd.  
Dayton, OH 45409  
Tel: (937) 294-5959  
Fax: (937) 294-4411  
[pjleppla@leplaw.com](mailto:pjleppla@leplaw.com)  
*Attorneys for Tom Yingling and Kevin Erf*

John & Missy Eberle  
9706 Bemis Road  
Bellevue, OH 44811  
Tel: (419) 217-9450  
[missyeb3@gmail.com](mailto:missyeb3@gmail.com)  
*Pro Se*

Randall & Della Ladd  
7625 State Route 269  
Bellevue, OH 44811  
Tel: (419) 217-9354  
[r\\_ladd@frontier.com](mailto:r_ladd@frontier.com)  
*Pro Se*

Joseph & Pamela Jenkins  
9413 State Route 99  
Monroeville, OH 44847  
Tel: (419) 656-4127  
[baanc@aol.com](mailto:baanc@aol.com)  
*Pro Se*

Heather Niedermeier Heyman (0089270)  
*Counsel of Record*  
City of Willard Law Director  
111 S. Myrtle Avenue  
Willard, OH 44890  
Tel: (419) 935-0171  
Fax: (419) 933-2076  
[heather@hnattys.com](mailto:heather@hnattys.com)

*Attorney for the City of Willard, Ohio*  
Randal L. Strickler (0034539)  
*Counsel of Record*  
Chief Assistant Prosecuting Attorney  
Civil Division  
Huron County Prosecutor's Office  
12 East Main Street, 4th Floor  
Norwalk, OH 44857  
Tel: (419) 668-8215  
Fax: (419) 663-3844  
[rstrickler@huroncountyohprosecutor.com](mailto:rstrickler@huroncountyohprosecutor.com)  
*Attorney for Board of Commissioners of  
Huron County, Ohio*

Jacob S. Stephens (0098116)  
*Counsel of Record*  
Assistant Prosecuting Attorney  
Huron County Prosecutor's Office  
12 East Main Street, 4th Floor  
Norwalk, OH 44857  
Tel: (419) 668-8215  
Fax: (419) 663-3844  
[jstephens@huroncountyohprosecutor.com](mailto:jstephens@huroncountyohprosecutor.com)  
*Attorney for Boards of Trustees of Norwich  
& Richmond Townships, Huron County,  
Ohio*

Gerhard R. Gross (0072214)  
*Counsel of Record*  
Assistant Prosecuting Attorney  
247 Columbus Ave., Suite 319  
Sandusky, OH 44870  
Tel: (419) 627-7697  
Fax: (419) 627-7567  
[ggross@eriecounty.oh.gov](mailto:ggross@eriecounty.oh.gov)

Alexandria Esposito (0099740)  
Flynn, Py & Kruse  
165 East Washington Row  
Sandusky, OH 44870  
Tel: (419) 625-8324  
Fax: (419) 625-9007  
[aesposito@flynnpykruse.com](mailto:aesposito@flynnpykruse.com)  
*Attorneys for Board of Commissioners of  
Erie County, Ohio*