

**BEFORE  
THE OHIO POWER SITING BOARD**

In the Matter of the Application of	)	
Eastern Cottontail Solar LLC for a	)	Case No. 24-495-EL-BGN
Certificate of Environmental	)	
Compatibility and Public Need	)	

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**REPLY BRIEF OF ALLEN TURNBULL AND BETSY ALT IN FURTHER SUPPORT  
OF THE JOINT STIPULATION AND RECOMMENDATION**

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Dated: April 28, 2025

Respectfully submitted,

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## **PRELIMINARY STATEMENT**

The Eastern Cottontail Solar Project (the “Project”) should be approved. As the Staff Report of Investigation (“Staff Report”) found, the Project meets all of the criteria for approval set out in Ohio Revised Code 4906.10(A). In addition, as intervenors Allen Turnbull and Betsy Alt argued in their initial post-hearing brief, the Project will deliver real benefits to the State and to Fairfield County: electricity to meet rising demand, jobs to employ local workers, funding for local schools and services, native plantings to support pollinators like honeybees, and new opportunities for sheep grazing, while also providing participating landowners like Mr. Turnbull and Mrs. Alt with the financial security they need to retire after many decades of farming and to pay for the care of aging spouses. Finally, the conditions in the Joint Stipulation and Recommendation (“Stipulation”) will ensure that adverse environmental impacts are minimized, and that the integrity of agricultural soil on-site is protected.

This Reply Brief, however, will not rehash the many arguments in support of the Project. Instead, this Reply Brief will focus on explaining why none of the arguments presented by the Project’s opponents, Citizens for Fair Fields (CFFF) or Walnut Township, provides any basis for rejecting the Project.<sup>1</sup> As described below, in their arguments against the Project, the opponents have misconstrued the legal requirements for approval, relied too heavily on unsubstantiated concerns, and failed to recognize the property rights at stake in this proceeding. Because the Project meets all of the criteria for approval, and because the opponents have failed to identify

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<sup>1</sup> This Brief does not address the arguments presented by Fairfield Soil and Water Conservation District (FSWCD), which seem to revolve primarily around questions about the Board’s technical expertise concerning agricultural matters. *See, e.g.*, FSWCD Br. at 3 (“[T]he Board simply lacks sufficient knowledge and resources to determine whether or not a grazing plan is sufficient to protect the environment.”). To the extent, however, that FSWCD implies in its Brief that the Board lacks ongoing oversight authority after issuing a certificate or that the Board cannot enforce its conditions, neither of those propositions is true. *See, e.g.*, Ohio Admin.Code 4906-7 (compliance monitoring by the Board).

any basis to reject it, the Board should approve it.

## **ARGUMENT**

The opponents' case for denying the Certificate suffers from three major defects. First, the opponents misconstrue the legal requirements for approval of a solar facility, including what types of studies are required and what it means for a solar facility to represent the minimum adverse environmental impact. Second, they rely on unsubstantiated concerns of anticipated harms, including concerns about hypothetical impacts to local meat producers, local wildlife populations, and public health. Third, they incorrectly assert that advancing the public interest requires sacrificing the property rights of participating landowners. To the contrary, the public interest is served by protecting the property rights of those who seek to make a lawful, productive, and responsible use of their land.

### **I. CFFF and Walnut Township Misconstrue the Legal Requirements for Approval of a Solar Facility**

The opponents misconstrue the current state of the law in two ways. First, CFFF and Walnut Township incorrectly assert that the Applicant was required to conduct certain field surveys of plants and wildlife, and that the Applicant failed to conduct those surveys. In fact, however, the Applicant was not required to conduct such surveys—but did so anyway. Second, CFFF incorrectly asserts that, because the Project will remain visible from certain locations, the Applicant failed to minimize visual impacts. However, the Supreme Court of Ohio has held that there is no requirement that a project be completely screened from view and that an Applicant can satisfy the requirement of achieving the minimum adverse environmental impact without reducing visual impacts to zero.

### **A. Field surveys are not required**

CFFF and Walnut Township each argue—incorrectly—that the Applicant violated Ohio Administrative Code (“OAC”) 4906-4-08(B)(1) by purportedly failing to conduct field surveys to determine which animal species were present on-site. *See* CFFF Br. at 33-34; Walnut Township Br. at 56-57. They are wrong that a field study was required, and they are wrong that the Applicant failed to conduct such a survey.

The OAC provides that an applicant “shall provide information on ecological resources.” That much is mandatory. Importantly, however, the OAC allows substantial flexibility in the types of information that an applicant may provide. *See* Ohio Admin.Code 4906-4-08(B)(1). Indeed, instead of *mandating* field surveys, the OAC lists field surveys as one of many “[e]xamples of relevant information” that *may* be submitted. *Id.*

Walnut Township erroneously argues that the OAC requires applicants to conduct a literature review of animal and plant species, followed by a field survey of species identified in that literature review. As Walnut Township argues:

Under OAC 4906-4-08(B)(1)(c), an applicant must conduct a literature survey of plant and animal life within at least one-fourth mile of the project area boundary, including endangered, threatened, commercial, and recreational species. Subsection (B)(1)(d) further requires that applicants conduct field surveys based on findings from the literature review.

Walnut Township Br. at 56. This is not an accurate description of current law, as described above, which does not mandate field surveys.

Moreover, it is readily apparent that Walnut Township relied on an outdated version of the OAC in formulating this argument. Most obviously, the citations in the excerpt above do not line up with the relevant subsections of the current OAC—but they do line up with the relevant subsections of the April 26, 2018 version of the OAC. In the current version of the OAC,

effective May 30, 2024, subsection (B)(1)(c), which Walnut Township cites as the basis for a requirement to conduct literature surveys, does not mention literature surveys at all; instead, it deals with the submission of a “description of the probable impact of [the] construction.” *See* Walnut Township Br. at 56; Ohio Admin.Code 4906-4-08(B)(1)(c), *available at* <https://codes.ohio.gov/ohio-administrative-code/rule-4906-4-08>. Likewise, subsection (B)(1)(d), which Walnut Township cites as the basis for a requirement to conduct field surveys does not mention field surveys; instead, it deals with literature surveys. *See* Walnut Township Br. at 56; Ohio Admin.Code 4906-4-08(B)(1)(d). In the April 26, 2018 version of the OAC, however, subsection (B)(1)(c) dealt with literature surveys, and subsection (B)(1)(d) dealt with field surveys, thus matching the citations in Walnut Township’s initial brief. *See* Ohio Admin.Code 4906-4-08(B)(1)(c)-(d) (version effective Apr. 26, 2018), *available at* [https://codes.ohio.gov/assets/laws/administrative-code/authenticated/4906/0/4/4906-4-08\\_20180426.pdf](https://codes.ohio.gov/assets/laws/administrative-code/authenticated/4906/0/4/4906-4-08_20180426.pdf).

More importantly, the outdated version of OAC 4906-4-08 on which the Township relied was substantively less flexible than the current version. In particular, unlike the current version, the outdated version of the OAC did not include a statement that field surveys and literature surveys were only “[e]xamples of relevant information” that an applicant could provide. *See* Ohio Admin.Code 4906-4-08(B) (version effective Apr. 26, 2018), *available at* [https://codes.ohio.gov/assets/laws/administrative-code/authenticated/4906/0/4/4906-4-08\\_20180426.pdf](https://codes.ohio.gov/assets/laws/administrative-code/authenticated/4906/0/4/4906-4-08_20180426.pdf).

While CFFF, for its part, may not have relied on an outdated version of the OAC, it incorrectly asserts that not conducting “species-specific surveys” was a “blatant violation of OAC 4906-4-08(B)(1)(e),” arguing that that section “requires an applicant to provide the ‘results

of field surveys.” CFFF Br. at 33-34. As discussed above, the OAC provides that the “results of field surveys” are an “example[] of relevant information” that may be submitted as part of an application but does not mandate such surveys. Ohio Admin.Code 4906-4-08(B).

Finally, whether or not field surveys were required, the record is clear that a field study was conducted. *See* Company Exh. 19 (McBurney Testimony) at 5:15-22.

### **B. Minimizing visual impacts does not mean reducing those impacts to zero**

CFFF erroneously argues that, because the Project will remain visible from certain vantage points, due to the topographical features and other factors, the Board should find that the Applicant failed to submit a “description of measures that will be taken to minimize any adverse visual impacts” pursuant to Ohio Admin.Code 4906-04-08(D)(6)(g). CFFF Br. at 17-24. For the same reasons, CFFF argues that the Board should find that the facility does not represent the “minimum adverse environmental impact” pursuant Ohio Rev.Code 4906;10(A)(3). *See id.*

These arguments are incorrect. As the Supreme Court of Ohio has found, there is not “any legal authority that requires solar farms to be completely screened off from neighboring properties.” *In re Application of Alamo Solar I, L.L.C.*, 2023-Ohio-3778, ¶ 43. Furthermore, achieving the “minimum” adverse environmental impact “does not require the elimination of all adverse impacts.” *Id.* Here, the Stipulation ensures that the Project will mitigate adverse visual impacts, by mandating vegetative screening and other measures, subject to Staff approval. Stipulation, Conditions 16, 64. That is sufficient for approval. *See Alamo Solar I, L.L.C.*, 2023-Ohio-3778, ¶ 43.

## **II. CFFF and Walnut Township Rely on Unsubstantiated Concerns About Anticipated Harms**

The opponents allege a wide range of harms that are unsubstantiated by evidence,

misinformed, and extremely attenuated. Examples include: (A) CFFF's claim that customers will not buy beef from cattle raised near solar panels; (B) CFFF's vague insinuations that wildlife on members' properties, such as bald eagles, will be harmed by the Project; and (C) Walnut Township's purported concern that the Project will result in increased waterborne illnesses and other attenuated harms.

**A. There is no evidence that customers will be reluctant to buy meat grown from cattle pastured near solar panels**

CFFF argues that, if solar panels are installed near a pasture that CFFF member Bradley Berry uses for grazing beef cattle, Mr. Berry will lose business because customers will not "want to eat meat from cattle that have fed on pasture grass watered by runoff from the panel field." CFFF Br. at 15. This claim is baseless along two dimensions. First, there is no evidence on the record that customers will be less willing to purchase meat from livestock raised near solar panels. Second, and more importantly, there is no evidence that any harmful substances will run off from the solar panels.

In fact, all of the evidence points in the opposite direction. The Stipulation ensures that no toxic chemicals will leach out of the solar panels, requiring that "[t]he Applicant shall only use solar panel modules that do not exhibit the characteristic of toxicity verified through analysis or documentation with the USEPA's Toxicity Characteristics Leaching Procedure test." *See* Stipulation, Condition 6. Thus, CFFF's claim that customers will not purchase beef raised on pastures near solar panels would require customers to be misinformed about the safety of solar panels and to make decisions based on that misinformation. The Board should give no weight to these unsubstantiated concerns.



**B. There is no evidence that birds or other wildlife on CFFF members' properties will be affected**

CFFF also makes unsubstantiated arguments about harms to wildlife. While the Staff Report of Investigation (“Staff Report”) found that the project is “unlikely to pose a significant adverse impact” to wildlife, CFFF vaguely insinuates, without evidence, that the Project will be harmful to wildlife on members’ properties, including bald eagles and other birds. *See* CFFF Br. at 14, 17.<sup>2</sup> CFFF provides no evidence, however, for the Board to conclude that any of these birds or animals on CFFF members’ properties will be significantly affected by the Project.

While it is true that noise during construction may temporarily disturb some species, there is no basis for concern about any long-term impact to wildlife on members’ properties. *See* CFFF Br. at 33. In addition, while it is plausible that the planting of grasses, clovers, and pollinator-friendly plants on the project site in lieu of crops may affect the availability of food sources for certain species of wildlife, CFFF has presented no evidence to suggest that this temporary conversion of the land use will have significant adverse impacts on the local ecosystem. *See* CFFF Br. at 33; Staff Report at 27 (describing the “Fuzz and Buzz Mix” and the “Diverse Pollinator Mix with Grasses” that the Applicant intends to use). The Board should defer to the expertise of its Staff rather than the speculative concerns put forth by CFFF.

**C. There is no evidence that the Project will cause an increased risk of waterborne illness or other health impact**

In its initial brief, Walnut Township goes to great lengths to argue that it opposes the Project for reasons of public health and safety, rather than just aesthetic concerns. *See* Walnut

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<sup>2</sup> To be clear, CFFF does not explicitly argue that these birds will be harmed. However, by repeatedly mentioning the presence of these birds on CFFF members’ properties as part of a discussion of why the Application should be denied, CFFF strongly implies that the Project would harm them. *See* CFFF Br. at 14, 17.

Township Br. at 11-15. In that vein, Walnut Township makes the unsubstantiated argument that “damage to field tiles and the alteration of drainage patterns could lead to property damage, unsanitary conditions, and an increased risk of waterborne illnesses, directly impacting the health and safety of residents.” Walnut Township Br. at 14. While damage to drain tile is possible during the construction of a solar facility—or any other type of project—the Stipulation requires that any damage be promptly repaired. *See, e.g.*, Stipulation, Condition 23(d) (“Damaged field tile systems shall be promptly repaired or rerouted to at least original conditions or modern equivalent at the Applicant's expense to ensure proper drainage.”). Moreover, Walnut Township has provided no evidence to support its purported concerns that damage to drain tile could result in “unsanitary conditions” or “waterborne illnesses.” *See* Walnut Township Br. at 14. These unsubstantiated concerns should be given no weight.

### **III. The Public Interest Is Served by Upholding Property Rights**

Walnut Township argues that the “property rights” of participating landowners “must be balanced against the public good, particularly when the project affects the long-term sustainability of the region’s agricultural foundation.” Walnut Township Br. at 40. This formulation, however, sets up a false dichotomy between property rights, on one hand, and the public interest, on the other hand. Indeed, there is a public interest in protecting property rights.

To be sure, there are individualized interests at stake in this Project. Mr. Turnbull testified that he needs the income from this Project to pay for his wife’s Alzheimer’s care—and that he may be forced to sell the farm and the home where he has lived for more than 50 years if the Application is denied. *See* Direct Testimony of Allen Turnbull (“Turnbull Tr.”), dated February 21, 2025, Turnbull Tr. at 5:23, 6:1-2. Mrs. Alt testified that the income from this Project will allow her to retire while keeping the land in her family for future generations of

farmers, including her son and grandson. Direct Testimony of Betsy Alt (“Alt Tr.”), dated February 21, 2025, Tr. at 3:12-18.

But there is more at stake in this proceeding than whether Mr. Turnbull and Mrs. Alt should be allowed to earn a lease income from a solar project. There is broader question at stake concerning what farmers and landowners should be allowed to do with the land that they have lawfully purchased and cared for, often at great risk.

On the facts of this proceeding, the case for upholding property rights is clear. First, the types of lease agreements that Mr. Turnbull and Mrs. Alt signed with the Applicant are a responsible option for farmers of retirement age, such as themselves, to earn an income, without needing to sell out to a real estate developer. *See* Local Public Hearing Tr. Vol II. at 342:2-5 (Allen Turnbull) (“I dread the point – point when my savings are exhausted, since I would hate to have to *sell my farm and not hav[e] any control over what it might be used for.*” (emphasis added)). The Project will generate much-needed electricity, without significant adverse environmental impacts, *see* Staff Report at 33, and the conditions in the Stipulation will ensure that the vast majority of the farmland on-site will be preserved for future use, *see* Stipulation, Condition 23. On the question of agricultural preservation, CFFF argues that “[i]f any of the landowners leasing land for the Project truly wanted to preserve their land for agriculture in future generations, they could apply for Ohio Preserved Farmland Easements on the land.” CFFF Br. at 11. However, as Mrs. Alt testified, she applied twice to participate in a state farmland preservation program and was denied both times. Local Public Hearing Tr. Vol. II at 318:3-5. This Project will keep the vast majority of Mrs. Alt’s 78-acre parcel of farmland intact for future use, so that her children and grandchildren can decide at the end of the life of this Project whether to resume farming on the land. Alt Tr. 3:12-20.

Second, contrary to CFFF’s assertion that the planning and development of the project was “heartless,” *see* CFFF Br. at 2, the landowners have given their neighbors every reasonable courtesy. Mr. Turnbull, for his part, ultimately decided to participate in this Project only after concluding that raising feeder pigs on his property would be too bothersome to his new neighbors. *See* Turnbull Tr. at 3:6-12. Since entering into a lease, Mr. Turnbull has met with at least 10 of his neighbors to explain his reasons for entering into the Project. *Id.* at 5:6-13.

Finally, while one CFFF member testified that none of the participating landowners informed him of their plans prior to entering into a lease, he did not testify that the news actually caught him by surprise. *See* Direct Testimony of Bradley Berry, dated Feb. 21, 2025, Tr. at 6:12-21. Further, if that CFFF member wanted to control the use of the 78-acre parcel that Mrs. Alt purchased in 2005, he could have purchased that property for himself in 2005 and taken on the financial risks and burdens of maintaining it for the last 20 years. However, it was Mrs. Alt who took on those financial risks and burdens. *See* Local Public Hearing Tr. Vol II. at 319:4-7 (Betsy Alt) (“We love farming. It’s what we do and who we are. It’s a risky business. No retirement, health insurance, salary, or overtime. Nothing but what you can squeeze out of the land.”). It is not for CFFF to dictate what Mrs. Alt can or cannot do with that land—especially when the Project offers meaningful benefits, with minimal adverse environmental impacts. The Board should validate the property rights of farmers and landowners who have decided to participate in responsibly designed projects like this solar facility.

### **CONCLUSION**

For the foregoing reasons, the Board should approve the Stipulation and grant a Certificate for the Eastern Cottontail Solar Project.

Dated: April 28, 2025

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this filing will be electronically served via the Ohio Power Siting Board's e-filing system and via electronic mail on all parties referenced in the service list of the docket.

Dated: April 28, 2025

/s/ Trent Dougherty  
Trent Dougherty

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electronically filed by Mr. Trent A. Dougherty on behalf of Alt, Betsy and Turnbull,  
Allen.