

BEFORE THE OHIO POWER SITING BOARD

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In the Matter of the :
Application of Icebreaker :
Windpower Inc. for a :
Certificate to Construct : Case No. 16-1871-EL-BGN
a Wind-Powered Electric :
Generation Facility in :
Cuyahoga County, Ohio. :

- - -

PROCEEDINGS

before Mr. Nick Walstra and Ms. Megan Addison,
Administrative Law Judges, at the Public Utilities
Commission of Ohio, 180 East Broad Street, Room 11-A,
Columbus, Ohio, called at 9:05 a.m. on Tuesday,
October 2, 2018.

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VOLUME VII

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1 Tuesday Morning Session,
2 October 2, 2018.

3 - - -

4 ALJ WALSTRA: We'll go back on the
5 record.

6 And, Dr. Streby, I will just remind you
7 you are still under oath.

8 THE WITNESS: Yes, sir.

9 ALJ WALSTRA: I believe we are at
10 recross.

11 MR. SECREST: That's correct. Thank you,
12 your Honor.

13 ALJ WALSTRA: Whenever you are ready.

14 MR. SECREST: Thank you, your Honor.

15 - - -

16 HENRY M. STREBY, PH.D.
17 being previously duly sworn, as prescribed by law,
18 was examined and testified further as follows:

19 RECROSS-EXAMINATION

20 By Mr. Secrest:

21 Q. Good morning, Dr. Streby.

22 A. Good morning.

23 Q. Since last evening, have you reviewed
24 anything, any materials related to this case?

25 A. I have not.

1 Q. Have you reviewed any literature related
2 to bird migration or radar studies?

3 A. No.

4 Q. Okay. Thank you.

5 Doctor, you should still have in front of
6 you what was marked as Applicant's 50. It is the
7 Diehl radar observation study.

8 A. Yes.

9 Q. This study was peer-reviewed, correct?

10 A. Yes.

11 Q. And published in The Auk, correct?

12 A. Yes, it was.

13 Q. And you touched on The Auk during your
14 redirect, correct?

15 A. I think so. Yes.

16 Q. Do you recall discussing --

17 A. Yeah, I did.

18 Q. What is The Auk?

19 A. The Auk is the predecessor to The Auk:
20 Ornithological Advances. It's a publication of,
21 first, the American Ornithologists' Union, and now
22 the American Ornithological Society.

23 Q. Thank you.

24 Would you please turn to page 284. Do
25 you recall a discussion on redirect related to

1 significant statistical differences regarding the
2 chart that is on -- or the table, excuse me, that is
3 on page 284?

4 A. Yes.

5 Q. Okay. For KCLE, the KCLE station
6 covering Lake Erie in fall 2000, there was no
7 significant statistical difference, was there?

8 A. KCLE, fall 2000, there was a
9 statistically-significant difference.

10 Q. Was there a statistically-significant
11 difference in KCLE in spring of 2000?

12 A. No. We might stretch and try to say that
13 there's a nonsignificant trend if we're really
14 pushing for a result, but at an alpha of .05.

15 Q. I would prefer you not to stretch,
16 Doctor.

17 A. Well, I am trying to help him out.

18 Q. Understood.

19 A. He's close.

20 Q. Well, is there a statistic -- significant
21 statistical difference with the P value for KCLE Erie
22 for spring 2000?

23 A. KCLE, spring 2000, there is not a
24 statistically-significant difference.

25 Q. Thank you, Doctor.

1 Will you please refer to the Fish and
2 Wildlife Service's Great Lakes Avian Radar Technical
3 Report.

4 MR. HAFFKE: It's Tab Q in the Gordon
5 binder.

6 ALJ WALSTRA: Thank you.

7 THE WITNESS: Thank you.

8 Q. Doctor, please refer to page 1.

9 A. Yes.

10 Q. Under the "Introduction" section, I am
11 looking at the second full paragraph, a little less
12 than halfway down, the sentence begins with "For
13 migrants." Do you see where I am?

14 A. A little -- okay. Yes, right.

15 Q. It states "For migrants that rely on
16 powered flight, it is more efficient to make several
17 short flights than a single long flight because of
18 the cost of carrying high fuel loads...and this may
19 be one reason why migrants partially circumnavigate
20 the Great Lakes despite being physiologically capable
21 of crossing them...." Do you agree with that
22 statement, Doctor?

23 A. I disagree with the premise of that
24 statement.

25 Q. How so?

1 A. I don't think that there is much
2 conclusive evidence of birds circumnavigating the
3 Great Lakes. It has largely been a confusion of
4 birds using the shorelines as nav -- navigation
5 paths, and so if you are flying along a shoreline,
6 you are not necessarily circumnavigating; you are
7 just using a geographic queue. And that's where the
8 state of knowledge is now, as opposed to 1990, when
9 Alerstam was suggesting this without having tracked
10 any birds.

11 Q. Well, Alerstam is not suggesting it right
12 here. It's the U.S. Fish and Wildlife Service
13 suggesting it, correct?

14 A. They are citing that paper.

15 Q. For the premise that birds circumnavigate
16 the Great Lakes, correct?

17 A. Maybe one reason why they partially
18 circumnavigate.

19 Q. Now, Doctor, please turn to page 30 of
20 the Fish and Wildlife Service report. You spent a
21 fair amount of time on this page yesterday. One
22 thing we never heard, though, what is max count?

23 A. The most counted.

24 Q. Most counted what?

25 A. The most targets counted, in this case

1 migratory birds.

2 Q. It doesn't state migratory birds, does
3 it? It states targets counted, correct?

4 A. Semantics but, yes.

5 Q. Well, you don't know whether the Fish and
6 Wildlife Service ruled out other targets such as
7 insects, correct?

8 A. No. I do know that they did that.

9 Q. How so?

10 A. It's stated in their reports, and also
11 they used S-band radar which is not as sensitive to
12 fog and smaller targets as X-band radar which is a
13 smaller frequency.

14 Q. It's not as sensitive, but S-band can
15 still pick up insect clutter, correct?

16 A. Yes.

17 Q. Especially if you are not adjusting your
18 study for wind speed; is that accurate?

19 A. I don't know if wind speed plays a role
20 in picking up insects or not.

21 Q. You are not aware whether wind speed
22 plays a role in picking up insects related to radar
23 studies?

24 A. I am not aware.

25 Q. Okay. And when you say "targets"

1 represents birds, are you limiting that to songbirds,
2 or does "targets" equal any taxa of birds?

3 A. Well, since it's done at nighttime, no, I
4 would not limit it to songbirds. There are a lot of
5 birds that migrate through that are not passerines.

6 Q. So targets doesn't necessarily equal
7 passerines or songbirds in this chart or table; is
8 that accurate?

9 A. No. Nocturnally migrating birds does not
10 necessarily mean songbirds. There are swifts and
11 swallows and a lot of other things that are
12 nocturnally migrating near passerines. I didn't -- I
13 never understood that we were only talking about
14 passerines at any point in this proceeding.

15 Q. Okay. Is it possible that the targets
16 also include waterfowl?

17 A. I go back to my "possible" versus
18 "probable" from yesterday. It's highly unlikely that
19 there were nocturnally-migrating diurnal migrants.
20 Waterfowl migrate during the day. But certainly one
21 could have been up there.

22 Q. Is this table on -- is this table, on
23 page 30, not showing density at a given time in a
24 certain altitude band?

25 A. It's a figure, and it is showing maximum

1 densities or counts. Density and count would be
2 equal when the count is made within a given area
3 because density is just the count divided by the
4 area.

5 Q. But do you know whether the densities
6 reflected in this table are taken at a given time?

7 A. I do not.

8 Q. Okay. Are you suggesting that this graph
9 indicates the number or density of birds flying in a
10 particular altitude band?

11 A. The maximum number -- it's the percentage
12 of nights during which the maximum number was within
13 a particular altitudinal band.

14 Q. Okay. But you're not contending this
15 graph indicates the number or density of birds flying
16 in a particular altitude band, are you?

17 A. No. It's demonstrating percentages of
18 nights.

19 Q. Okay. It's demonstrating outliers, is it
20 not?

21 A. No.

22 Q. Isn't a max count essentially the end of
23 the distribution?

24 A. No. You've misunderstood what an outlier
25 is.

1 Q. For this chart, it's possible that a
2 thousand birds could migrate through the radar beam
3 for the S-band radar and the greatest density of
4 birds at a given time was let's say 100 and that
5 greatest density was at an altitude of 50 meters. So
6 despite the fact there is a thousand birds migrating
7 through this radar beam, if the greatest density at a
8 given time was 50, wouldn't the percent of nights
9 count as -- in the 50-to-100 range?

10 A. Yes, that's exactly right.

11 Q. Okay.

12 A. But that's not an outlier. It's an
13 observation.

14 Q. Well, this chart was presented to you to
15 suggest that the greatest number of density of birds
16 were migrating at altitudes under the rotor-swept
17 zone. I am going to ask you --

18 A. It is.

19 Q. I am going to ask you to refer to page 52
20 of the Fish and Wildlife study. Page 52 is
21 Appendix 4, and the table is titled "Comparison of
22 methods to estimated target density by altitude band
23 during the night biological period in Ohio, spring
24 2002." Do you see that?

25 A. I do.

1 Q. And page 30, the chart on page 30 was
2 percent of nights, correct?

3 A. Yes.

4 Q. Okay. Doctor, if you look at the
5 50-millimeter -- 50-meter, excuse me, altitude band,
6 the total target count was 3,437, correct?

7 A. Yes.

8 Q. And if you look at the 100-meter altitude
9 band, the total target count was 20,788, correct?

10 A. Yes.

11 Q. The 150-meter band, the total target
12 count was 16,036, correct?

13 A. Yes.

14 Q. And for the 200-meter band, the target
15 count was 18,862.

16 A. Yes.

17 Q. And we could go on and on but there is
18 various other 20,000 target counts associated with
19 the 250-, 300-, and 350-meter altitude band, correct?

20 A. Yes.

21 Q. As well as a 20,000 target count
22 associated with the 500-meter band, correct?

23 A. Yes.

24 Q. And do you see the "Running Total Target
25 Count" column, it's the third column?

1 A. I do.

2 Q. Do you understand that to be the total
3 targets at each altitude band as the altitude
4 increases?

5 A. No. It's the total count at all altitude
6 bands that have been included so far, not in each.

7 Q. Okay. Thank you for the clarification.

8 So for the 50-, 100-, and 150-meter
9 altitude bands, the total target count for this study
10 was 40,000; is that accurate? 40,261?

11 A. Yes, that's accurate.

12 Q. Thank you.

13 The total target count for all altitude
14 bands is listed at the bottom of that column,
15 correct?

16 A. Correct.

17 Q. And the total target count for all
18 altitude bands was 325,687, correct?

19 A. Yes.

20 Q. I am sitting here today partly because
21 math is certainly not my strong suit, but if you look
22 at 40,261, is that approximately 12 percent of
23 325,687?

24 A. Could you ask the question again. Is the
25 total of 40,261 approximately 12 percent?

1 Q. Correct, of 325,687.

2 A. That sounds about right. You are not
3 correcting for area sampled, so this isn't a density
4 estimate.

5 Q. So based upon this study, the total
6 target count, 150 meters and below, was 12 percent of
7 the total number of targets counted; is that
8 accurate?

9 A. Yes, 12 percent in 150 meters -- well,
10 really what I was referring to and what they were
11 referring to before was just the 100 and 150, not the
12 50.

13 Q. Okay.

14 A. So really the 100 and 150, being 10
15 percent of the area, contained 12 percent of the
16 birds which would be a higher density than the
17 average.

18 Q. Do you know specifically whether or not
19 this Fish and Wildlife study accounted for insect
20 clutter?

21 A. Yeah. Well, I don't know if it was this
22 one or one of the other ones, but I do know they do
23 account for insect clutter.

24 Q. But you don't know specifically with
25 regard to this study.

1 A. Is this the 2012 one? I do remember
2 reading they did in the 2012 one.

3 Q. Okay. And do you know if this study was
4 correlated for distance?

5 A. "Correlated for distance" meaning
6 correcting for reduced reflectivity with distance
7 from the radar?

8 Q. Well, would you agree with me that
9 probability of detection related to radar is a
10 function of distance?

11 A. It can be.

12 Q. Okay.

13 A. If there's a dense enough -- if there are
14 enough things between here and there. If there is
15 nothing between here and there, then no.

16 Q. Let's look at page 6 of this study,
17 Doctor. I am looking at the first full paragraph on
18 page 6, a little -- about a third of the way down.
19 The sentence starts with "These settings...." Do you
20 see what I am referring to?

21 A. Yes.

22 Q. It states "These settings are necessary
23 because an object reflects more energy at close range
24 than it does when it is further from the radar. For
25 example, an object within a range of 50 meters will

1 return approximately 16-times more energy compared
2 with an object at 100 meters...." Do you agree with
3 that, Doctor?

4 A. Yes.

5 Q. Okay. So do you know if this particular
6 study was correlated for distance?

7 A. Apparently it was.

8 Q. Okay. You are aware that the radar units
9 for this study were approximately 1.5 kilometers
10 inshore?

11 A. Yes.

12 Q. In agricultural fields, correct?

13 A. Yes, to reduce ground clutter.

14 Q. Doctor, do you still have Mr. Erickson's
15 testimony up there in front of you?

16 A. Most likely.

17 Q. I think you have a lot in front of you,
18 so you most likely do.

19 A. Is it a binder or?

20 Q. Yes, it should be a binder. It should --

21 MR. STOCK: His name is on the front
22 lower right hand.

23 MR. HAFFKE: This is the Erickson. It is
24 Tab 1 in the beginning of the Erickson binder. It is
25 not under a tab.

1 Q. (By Mr. Secrest) Do you have the right
2 binder, Doctor?

3 A. I do.

4 Q. Great. May I direct you to page 13,
5 please.

6 MR. STOCK: Is his testimony in there?

7 THE WITNESS: Do you know which tab it
8 should be?

9 Q. It should be -- it should be the first,
10 correct?

11 A. Yes. I'm sorry, what page?

12 Q. 13, please.

13 MR. STOCK: I don't know that it is, Jon.

14 THE WITNESS: It is.

15 MR. STOCK: Oh, it is? Okay. Good.

16 MR. HAFFKE: I am just going to object.
17 There were no questions asked on direct examination
18 regarding Wally -- on my redirect regarding Wally
19 Erickson's testimony, so this, by definition, is
20 outside the scope of the redirect.

21 MR. SECREST: On redirect there were
22 questions asked about the Fish and Wildlife study.
23 This particular page is a table related to six U.S.
24 Fish and Wildlife study reports.

25 MR. HAFFKE: I don't believe none of --

1 none of those other wildlife reports were discussed
2 on my redirect.

3 MR. SECREST: The topic of U.S. Fish and
4 Wildlife reports was discussed on redirect, including
5 the results of those reports.

6 MR. HAFFKE: I would just note that
7 during my redirect of, I think, Dr. Brown, when the
8 topic was discussed, the table was discussed in
9 Dr. Brown's cross-examination of a report, when I was
10 not permitted to conduct redirect on questions sort
11 of beyond the -- relating to the topic of the table
12 itself beyond what the specific cross-examination
13 questions were.

14 ALJ WALSTRA: I will give him some
15 leeway. See where it goes.

16 MR. SECREST: Thank you, your Honor.

17 Q. (By Mr. Secrest) Doctor, are you on page
18 13 of Mr. Erickson's testimony?

19 A. I believe so, yes.

20 Q. It should be a table titled "Avian radar
21 metrics from 6 USFWS reports posted online." Is that
22 where you are?

23 A. Yes.

24 Q. And do you recall Mr. Erickson's
25 testimony related to this table?

1 A. Not specifically, I don't.

2 Q. Okay. So you don't recall that he took
3 the results of six U.S. Fish and Wildlife studies,
4 used the targets, total targets for each, and
5 developed a percentage of targets below 150 meters
6 for each night?

7 A. Clearly he has, but I don't recall
8 reading that part.

9 Q. All right. Have you ever undertaken such
10 an exercise?

11 A. I have not.

12 Q. Okay. Thank you, Doctor.

13 Based upon the frequency with which you
14 cite the Fish and Wildlife Service reports in your
15 testimony as well as in your expert reports, do you
16 consider the Fish and Wildlife Service authoritative
17 related to migrating songbirds?

18 A. I consider that radar team authoritative
19 and relevant.

20 Q. Doctor, do you still have the wind energy
21 guidelines in front of you?

22 A. Probably. Yes.

23 Q. It's marked as Applicant's 36. Could you
24 please turn to page 30.

25 A. Yes.

1 Q. I'm looking at the first full paragraph
2 in the middle column about halfway down. The
3 sentence starts "For most of their flight...." Do
4 you see that?

5 A. Middle column, first full paragraph?

6 Q. Yes, sir.

7 A. Yes. "For most of their flight....," yes.

8 Q. Thank you.

9 It states "For most of their flight,
10 songbirds and other nocturnal migrants are above the
11 reach of wind turbines, but they pass through the
12 attitudinal range of wind turbines during ascents and
13 descents and may also fly closer to the ground during
14 inclement weather." Did I read that correctly?

15 A. Yes, that's their citation to other
16 people's research.

17 Q. But Fish and Wildlife Service is stating
18 for most of their flight, songbirds fly above the
19 reach of wind turbines, correct?

20 A. They are citing papers that state that in
21 an introductory -- in introductory language.

22 Q. Well, they are not quoting those papers;
23 they are stating it.

24 A. Right. That's how scientific writing
25 works though. We don't usually use quotations

1 because that's generally frowned upon or
2 plagiarizing. We state what other research has said
3 and then quote them. I regularly, in introductions
4 of my papers, state things I disagree with by saying
5 these people said this and these people said this.

6 Q. Okay. Does this state that Fish and
7 Wildlife Service disagrees with the literature or the
8 studies?

9 A. It doesn't state that they do agree is my
10 point.

11 Q. Doctor, do you frequently cite studies in
12 literature that you don't believe are reliable?

13 A. Not that I don't believe are reliable,
14 but that I believe are wrong, yes. That's why you do
15 a study generally is to test the hypothesis that
16 others have tested; some found it one way, some found
17 it another. It's inappropriate to only cite the ones
18 you agree with.

19 Q. When you cite literature you don't agree
20 with, do you make it clear you don't agree with that
21 literature?

22 A. No.

23 Q. No?

24 A. In the introduction, I cite what -- I
25 cite what people have found. Then I state my

1 hypothesis at some point later if I'm testing it, and
2 then, in the discussion, I would go back and say that
3 my report supports or refutes findings by different
4 people. But in the introduction, it would defeat the
5 purpose of a paper to beat up on or agree with one
6 side or the other of a hypothesis.

7 Q. Okay. Would you tell me where, in that
8 Fish and Wildlife study, they state they disagreed
9 with that statement that birds, nocturnally-migrating
10 songbirds, generally fly above the reach of wind
11 turbines?

12 A. This isn't a peer-reviewed scientific
13 research paper in the format of a single study
14 addressing one question and as I'm talking about, so
15 it's not a parallel. They have a bunch of
16 introductory information where they are stating
17 what's out there; what is thought to be the known
18 knowledge.

19 MR. SECREST: Move to strike as
20 nonresponsive.

21 A. No. No, I cannot, just to answer your
22 question.

23 MR. SECREST: Withdraw the motion.

24 ALJ WALSTRA: Thank you.

25 Q. Thank you.

1 Doctor, you just mentioned "hypothesis."
2 Do you recall, in your deposition, I asked you a
3 question related to your belief with regard to
4 nocturnally-migrating songbirds and passage rates,
5 and specifically you stated "Higher passage rates at
6 the right altitudes logically would correlate to
7 higher mortality rates. Not just in general. It
8 could be -- yeah, I mean, it just makes sense.
9 That's how I would hypothesize."

10 Is that still your hypothesis that higher
11 passage rates, at the right altitudes, logically
12 would correlate to higher rates?

13 A. I disagree with the characterization as a
14 belief. This isn't a faith system. It's an
15 understanding.

16 Q. Will you please prefer to what's been
17 marked as Bratenahl Residents No. 9. It's the risk
18 assessment.

19 MR. HAFFKE: Tab K of the Gordon.

20 THE WITNESS: Thank you.

21 Q. Specifically page 4, Doctor. Are you
22 there?

23 A. Yes.

24 Q. Thank you.

25 Doctor, you are aware that the Ohio

1 Department of Natural Resources performed a two-year
2 aerial survey that included the project site,
3 correct?

4 A. It did include the project site, yes.

5 Q. And are you aware that Figures 2 and 3 on
6 page 4 represent the results of that study?

7 A. They represent some of the results of
8 that study.

9 Q. Okay. And what do you mean by "some of
10 the results"?

11 A. I think they did more than this.

12 Q. Okay. Tables 1 -- excuse me -- Figures 2
13 and 3 represent that the majority of birds, observed
14 during the ODNR two-year aerial survey, were within
15 5 miles of the shoreline; is that accurate?

16 A. Yes, and this is a good example of bias
17 distribution where if you wanted to use the mean, you
18 might end up with 9 or 10 and that would have been
19 inconvenient, so we've gone back to using the
20 appropriate measure of central tendency here.

21 Q. But the "we" is the Ohio Department of
22 Natural Resources, correct?

23 A. No. The interpretation of it from WEST
24 in their report.

25 Q. You are not aware that these graphs were

1 pulled from the Ohio Department of Natural Resources?

2 A. I am aware, but this is how they are
3 being interpreted here, not how they were --

4 Q. You aren't contending that WEST created
5 these graphs or tables, are you?

6 A. Physically through photocopying them
7 maybe, but no, they didn't come up with the data and
8 make these.

9 Q. Okay. The Ohio Department of Natural
10 Resources came up with the data, correct?

11 A. That's my understanding.

12 Q. Will you please turn to page 22 of the
13 risk assessment.

14 A. That's the same document, right?

15 Q. Yes, sir. Are you there, Doctor?

16 A. Yes, I am.

17 Q. Page 22, the title is "Bird Fatality
18 Rates-Great Lakes Region."

19 A. Yes.

20 Q. For each one of the listings, for
21 example, Blue Sky -- the first one, Blue Sky, Green
22 Field, Wisconsin. Do you see that, Doctor? It's on
23 the left-hand side.

24 A. Yes, I do.

25 Q. In parens there is two dates, 2008 and

1 2009.

2 A. Correct.

3 Q. Do you know if that -- those were the
4 dates the study was completed or the dates that the
5 study became publicly available?

6 A. As I've stated in previous testimony, a
7 publishable figure in a peer-reviewed journal would
8 have a figure legend that explained that. From this
9 figure alone, I don't know that.

10 Q. Okay. So it's possible that the date
11 associated with each one of these studies, for
12 example, 2008 and 2009 with Blue Sky, Blue Sky, Green
13 Field, Wisconsin, is not necessarily the date that
14 that data became publicly available, correct?

15 A. Well, from the table that it references
16 2008, 2009, and then they refer to the author of
17 whatever report it was as 2009, so one of those dates
18 is apparently the date that that result became
19 available.

20 Q. Okay. Well, if you look at -- you
21 believe 2008 or 2009 was when the result became
22 available as opposed to when the tests were
23 conducted?

24 A. That's what I can infer from these -- I
25 won't editorialize these tables and figures.

1 Q. Okay. And, Doctor, if you look at the
2 studies, there are 16 from the state of New York.
3 Feel free to count them if you would like.

4 A. I trust you.

5 Q. Thank you. Be careful. Is it accurate
6 or are you aware that New York requires developers to
7 disclose fatalities?

8 A. I don't know what they require them to
9 disclose.

10 Q. Okay. And with regard to these
11 particular studies, was it your testimony that you
12 are not aware of the specific methodologies employed
13 with the studies?

14 A. It's my testimony that no one, outside of
15 the industry company and the consultant or the
16 internal person that does it, would be aware of most
17 of these methodologies. I am aware of the general
18 methods used, but I don't know how they applied it.

19 Q. So for a particular study that's included
20 in this table, you don't know if the studies used
21 carcass removal trials.

22 A. Right. Most people don't use carcass
23 removal trials. They just estimate carcass removal
24 rates from the data. A carcass removal trial would
25 be an excellent way to help correct a lot of these

1 studies.

2 Q. But you don't know if any of these
3 studies employed such a methodology, correct?

4 A. I don't. It's trade secrets.

5 Q. And you're skeptical -- is it accurate
6 you're skeptical of these mortality rates because the
7 majority of these studies are conducted by the
8 developers or operators?

9 A. I have an appropriate level of skepticism
10 shared by the rest of the scientific community in any
11 study that's not transparent. It could be objective
12 and be paid for by the developers, but we have no way
13 of knowing. That's where the skepticism comes in.

14 Q. Okay. So you don't know, for the studies
15 listed in this table, whether they were conducted by
16 the developers or not; is that correct?

17 A. Not each of these individually, I don't.

18 Q. Okay. Are you aware that peer-reviewed
19 literature has relied upon studies by developers
20 related to mortality rates?

21 A. I'm aware that peer-reviewed literature
22 uses the best-available information and, when there
23 is no other information, that's usually used with a
24 caveat.

25 Q. So the best-available information related

1 to mortality rates are studies conducted by or paid
2 for by developers; is that your testimony?

3 A. By default, when it's the only available
4 information, it has to be the best-available
5 information.

6 Q. Do you -- you know Scott Loss, correct?

7 A. Yes.

8 Q. Who is Scott Loss?

9 A. He is an ornithologist, population
10 ecologist, evolutionary biologist, I believe now at
11 Oklahoma State. We got our Ph.D.s at the same time
12 at the University of Minnesota. He worked, for a
13 while, at the Smithsonian Migratory Bird Institute.

14 Q. Have you relied upon Mr. Loss's
15 literature or studies for any studies or publications
16 of your own?

17 A. I don't know that I relied upon any of
18 them. I have certainly cited some papers by him.

19 MR. SECREST: Your Honor, may I approach
20 the Bench and the witness?

21 ALJ WALSTRA: You may.

22 MR. HAFFKE: I am going to object to the
23 use of this exhibit. It was certainly not raised or
24 discussed on my redirect examination, and so it's
25 outside of the scope.

1 ALJ WALSTRA: Mr. Secrest.

2 MR. SECREST: The fatality rates set
3 forth on page 22 of the risk assessment summary were
4 directly addressed on redirect, and Dr. Streby's
5 testimony insinuated some bias related to, one,
6 mortality studies in general and, two, mortality
7 studies conducted by WEST. This document
8 specifically addresses mortality studies and
9 specifically addresses 20 mortality studies relied
10 upon by Mr. Loss that were conducted by WEST.

11 MR. HAFFKE: Well, it still has not been
12 discussed, was not raised, and sort of this idea of
13 opening up the whole subject matter by touching on
14 the topic of this specific chart and specific
15 evidence, I don't think it's appropriate to then open
16 it up for recross on the whole subject matter of and
17 many new exhibits regarding -- you know, it's not
18 even clear what these exactly are, but new exhibits
19 just related to the subject matter.

20 MR. SECREST: The subject matter is
21 exactly the same; it's mortality studies and
22 Dr. Streby's perceived bias as to the results of
23 those studies.

24 MR. STOCK: We were not permitted --

25 ALJ WALSTRA: We stick to one attorney

1 per witness.

2 MR. HAFFKE: I mean, to the point, we
3 were not permitted to ask -- still, it's true, we
4 were not permitted to ask different questions
5 regarding the table in Dr. Brown's report that
6 cross-examination questions were asked about. We
7 were not permitted to ask different questions about
8 Dr. Brown's interpretation, understanding, of what
9 that table set forth of the very same document that
10 Dr. Brown was crossed about.

11 ALJ WALSTRA: Why don't we start with
12 some initial foundational questions, see if he is
13 even familiar with this document.

14 MR. SECREST: Certainly. Doctor -- I'm
15 sorry, should I mark the exhibit now, your Honor?

16 ALJ WALSTRA: Yes.

17 MR. SECREST: May I move to have this
18 marked as Applicant's 52.

19 ALJ WALSTRA: So marked.

20 (EXHIBIT MARKED FOR IDENTIFICATION.)

21 MR. SECREST: Thank you.

22 Q. (By Mr. Secrest) Doctor, you already
23 indicated you are familiar with Scott Loss, correct?

24 A. Yes.

25 Q. Scott Loss is one of the authors of this

1 article; is that right?

2 A. He is the lead author, yes.

3 Q. Have you seen this article before?

4 A. I have.

5 Q. Okay. In what context?

6 A. I read it in approximately 2013. I can't
7 say I read every detail, but I certainly looked at
8 it.

9 Q. You understand that this article
10 discusses mortality rates at wind facilities in the
11 United States?

12 A. That's my understanding.

13 Q. It is your understanding that Mr. Loss
14 relied upon publicly-available studies related to
15 mortality rates, including studies conducted by
16 developers of wind farms?

17 A. Yes.

18 Q. Okay.

19 A. It's my understanding, in discussions
20 with Scott Loss, that he is similarly skeptical, as I
21 am, to those.

22 Q. Mr. Loss relied upon those studies though
23 for this article; is that correct?

24 A. He used them. I don't -- I am not sure I
25 like the idea "relied upon" as if they were.

1 Q. Mr. Loss used those studies to determine
2 percentage mortality rate and the total approximate
3 mortality rate for songbirds in the United States
4 related to their interaction with wind energy; is
5 that accurate?

6 A. Yes. And very few of those were from the
7 midwest or the Great Lakes region, so not terribly
8 relevant, but yes.

9 Q. Well, look at Table 2, Doctor, which is
10 on page 204. I'm sorry, first, Doctor, let me direct
11 you to page 202 under the "Literature Search" section
12 which is 2.1.

13 A. Yes.

14 Q. The second sentence states "We also
15 searched Google because most industry reports are not
16 indexed in databases."

17 A. That's right because they are not peer
18 reviewed.

19 Q. Okay. And you understand "industry
20 reports" to be mortality reports by developers,
21 correct?

22 A. That's what it sounds like. I agree,
23 yes.

24 Q. Thank you.

25 On page 204, do you see that Table 2 at

1 the bottom?

2 A. Yes.

3 Q. Mr. Loss determined that the total United
4 States mortality -- the mean mortality per megawatt
5 was 4.2; is that correct? 4.12, excuse me.

6 A. He did not determine that. He found that
7 the average of the available estimates shows that.

8 Q. Okay. So based upon the mortality
9 studies he reviewed, the numbers bear out that mean
10 mortality per megawatt for the total United States is
11 4.12; is that your understanding?

12 A. That's the mean that he was able to get
13 from those studies, yes.

14 Q. Okay. Will you turn to page 208, please.
15 Towards the bottom on the right-hand side, "Appendix
16 A. Supplementary material." Do you see that?

17 A. Yes.

18 Q. Turn two more pages, please, Doctor. Are
19 you at Appendix A?

20 A. Yes.

21 Q. If you look to the far right-hand column
22 of this table, it says "Study citation." Do you see
23 that?

24 A. Yes.

25 Q. Do you understand that to refer to who

1 conducted the mortality study?

2 A. No.

3 Q. What do you understand that to refer to?

4 A. I understand that to refer to the lead
5 author, and "et al." means "and colleagues" or "and
6 others" of the report, which doesn't necessarily have
7 to be the people that conducted the study.

8 Q. Okay. So the study citation refers to
9 the author of the report related to mortality
10 studies; is that accurate?

11 A. Yes.

12 Q. Okay. Looking on the first page, do you
13 see the second-to-last author, Kerlinger?

14 A. I do.

15 Q. Okay. Are you aware Mr. Kerlinger is an
16 employee of WEST?

17 A. I was not aware of that.

18 MR. HAFFKE: I am going to renew my
19 objection to this line of questioning about this
20 document that he is now taking him through and going
21 through pages that have not been sort of previously
22 provided, that have not been marked before, and
23 certainly they were not in any way addressed in the
24 scope of my redirect examination of Dr. Streby. I
25 move to strike the whole line of questioning on this

1 document.

2 MR. SECREST: The documents have been
3 provided before. They are Attachment 11 to
4 Dr. Gordon's testimony.

5 ALJ WALSTRA: This study was?

6 MR. SECREST: That's right.

7 ALJ WALSTRA: You could have mentioned
8 that earlier.

9 MR. SECREST: Sorry. Ms. Pirik just
10 assisted me.

11 MR. HAFFKE: Again, there was no
12 examination of this document or discussion of
13 Dr. Gordon's testimony regarding it. Dr. Streby was
14 not present for Dr. Gordon's testimony. And so it's
15 entirely inappropriate to bring up, on a recross,
16 this entire scope of questioning on the new document.

17 ALJ WALSTRA: I'll deny the motion to
18 strike. I think on redirect there was a lot of
19 questions about page 22 of the figure there, so I'll
20 allow the questions.

21 MR. SECREST: Thank you, your Honor.

22 Q. (By Mr. Secrest) Doctor, directing your
23 attention to page 2 of the Appendix. Do you see the
24 first entry for WEST for 2006?

25 A. Yes.

1 Q. Thank you.

2 And do you see two other entries, three,
3 four other entries on that page for Mr. Kerlinger?

4 A. I count three, but I am sure you found --
5 oh, there's two together. Yes.

6 Q. Thank you.

7 And do you see the two entries for
8 Mr. Erickson; one alone and one with Mr. Poulton or
9 Ms. Poulton?

10 A. Yes.

11 Q. Thank you, Doctor.

12 Do you still have in front of you what
13 was marked as CEG-12?

14 MR. STOCK: What is that, Jon?

15 MR. SECREST: It's this graph.

16 A. Yes, sir.

17 MR. HAFFKE: I am going to again object.
18 This document certainly was not discussed during
19 cross-examination, redirect examination, at any point
20 in the examination of Dr. Streby. So this is another
21 new document that's being attempted to be examined by
22 on recross.

23 ALJ WALSTRA: Mr. Secrest.

24 MR. SECREST: Just briefly, your Honor.
25 Discussed on redirect was total mortality rates as

1 well as percentage of mortality rates for songbirds
2 and that's what this chart depicts.

3 ALJ WALSTRA: I'll allow the question
4 first.

5 Q. (By Mr. Secrest) Doctor, it may be
6 difficult to read, but do you see under the bottom of
7 the bar graph it states "This data is adapted from
8 Loss SR, Will T, Marra"?

9 A. It's Will T and Marra PP. That's Tom.
10 He doesn't use a middle initial.

11 Q. Thank you. I appreciate the
12 clarification. Do you see that reference?

13 A. I do.

14 Q. Do you understand that this graph was
15 based upon the literature that was introduced as
16 Applicant's 52?

17 A. This might be based on a different paper
18 by the three of those authors. I think the one we
19 just discussed was only dealing with wind turbines,
20 and they published another paper about this.

21 Q. All three of them?

22 A. Yeah. They are three authors on several
23 papers, on some cap papers and some -- they are
24 not -- they are not picky.

25 Q. If you look in the right-hand column, do

1 you see that USGS and Audubon and American Bird
2 Conservancy, do you see their logos there?

3 A. I do.

4 Q. Do you interpret that as them accepting
5 and adopting the graph and data contained on this
6 document?

7 A. I see that as them putting their stamp of
8 approval on what is essentially a top 8 most-wanted
9 bird killers list.

10 Q. Excuse me.

11 Doctor, did you testify yesterday that
12 you instruct your students to consider the source of
13 information?

14 A. I think I testified something along those
15 lines, not necessarily "consider the source."
16 Consider where the -- in a peer-reviewed scientific
17 paper, checking where the funding came from, can help
18 you if you decide if you want to contact others to
19 find out if a paper was done objectively. I am not
20 sure "consider" the -- oh, in general, yes, the
21 source meaning a peer-reviewed scientific paper or a
22 newspaper or a blog or, yes, that's true.

23 Q. Okay. Well, with regard to checking
24 where the funding came from, I believe that came up
25 in relation to the mortality studies that were cited

1 in the risk assessment; is that your recollection?

2 A. Yes. There can be the perception. It
3 doesn't have to be true that there is not objectivity
4 but there can be the perception of it if the authors
5 knowingly did the research with the funding from an
6 organization that may have had a reason to find a
7 certain answer. It's a little bit different than
8 what was implied yesterday of people who didn't know
9 where their funding was coming from or shields, I
10 believe, was the word.

11 Q. Well, that's my point, Doctor. You've
12 testified you don't believe that anywhere in Lake
13 Erie or within 1 to 3 miles of the shoreline is
14 appropriate for wind energy, and you are sitting here
15 today being paid by the nation's largest coal
16 company. Shouldn't we, too, consider the source?

17 A. I wrote my entire report before I found
18 out, from you, who was paying Benesch and paying me
19 so, no. My point is if they came to me, Murray, and
20 said, "I need you to support this," I would not have
21 been able to do that. But a law firm came to me and
22 said "I need an objective review of this." And then
23 you told me I was getting paid by Murray, so that's
24 not the same thing.

25 Q. Doctor, you reference, in your redirect

1 yesterday, current research going on by is it Mr. or
2 Dr. Smallwood?

3 A. I don't know where it's goes. It's been
4 a long time since I have discussed that with them.
5 It was before having anything, but yeah, they had
6 been reexamining.

7 Q. Okay. And your knowledge of that survey
8 is based upon comments made by someone with Black
9 Swamp Bird Observatory; is that correct?

10 A. It was a group of people discussing
11 Smallwood, the reanalysis he was doing.

12 Q. Okay. So you have not discussed that
13 study or reanalysis with the actual individual
14 conducting that study, correct?

15 A. It's my understanding that the -- a
16 couple of people at Black Swamp Observatory were
17 helping with the reanalysis.

18 Q. But you have not discussed that with
19 Mr. or Dr. Smallwood, correct?

20 A. I have never talked to Dr. Smallwood.

21 Q. Okay. Are you aware that Dr. Smallwood
22 has relied upon industry mortality data to publish
23 papers?

24 A. He has to, like I said, if it's the only
25 data available.

1 Q. When was the last time you spoke with
2 anyone at Black Swamp Bird Observatory regarding this
3 project?

4 A. A couple of days after my deposition, I
5 talked to multiple members of the Black Swamp Bird
6 Observatory because I'm helping out with their
7 public -- their research committee, so I help edit
8 publications and decide who gets to collaborate with
9 them and all those things, and I mentioned, because
10 Mark Shieldcastle was on the phone, that I had been
11 deposed, and asked him if he was being deposed, but
12 that was the extent of the conversation.

13 Q. Are you aware that the Ohio Power Siting
14 Board has cited other wind projects in Ohio?

15 A. Yes.

16 Q. Okay. Have you attended any public
17 hearings related to those wind projects?

18 A. No. I don't want to be influenced by
19 public opinion when I'm providing an objective
20 scientific review.

21 Q. Well, I am talking about prior to your
22 engagement for this matter. Have you ever attended a
23 public hearing related to a wind project?

24 A. No.

25 Q. Have you ever spoken out publicly related

1 to a wind project in Ohio?

2 A. Not outside of my house.

3 Q. Okay. Songbirds use the shorelines of
4 the Lake Erie for nesting; is that correct?

5 A. Some do.

6 Q. Okay. Songbirds use the shorelines of
7 Lake Erie for foraging, correct?

8 A. Many do.

9 Q. Okay. And they use the shoreline,
10 songbirds that is, for stopover habitats; is that
11 accurate?

12 A. Yes.

13 Q. Okay. When -- when stopping over, they
14 are taking off and landing from the shoreline or area
15 around the shoreline, correct?

16 A. I can't imagine them coming from anywhere
17 else, yes.

18 Q. Naturally, when they're taking off or
19 landing, they are going to be within an altitudinal
20 range of the rotor-swept zones of wind turbines,
21 correct?

22 A. Yes. As I testified, they go up and
23 down, in and out of the rotor-swept zone many times
24 during flights, and would, by definition, have to
25 cross through it if they were above it at any point

1 to get down to the ground.

2 Q. Sure. When descending or ascending, they
3 have to cross through the altitudinal range of the
4 rotor-swept zone.

5 A. They have to.

6 Q. Okay. If this project were on land,
7 isn't it accurate more songbirds would be exposed to
8 it? Let me rephrase that, Doctor.

9 If this project were on land in the Great
10 Lakes region, isn't it accurate that more songbirds
11 would be exposed to it?

12 A. No, not within the Great Lakes region,
13 no. Within a few miles of the shoreline, I would say
14 equal to or more would be exposed to it.

15 Q. If this project were located within 1 to
16 3 miles of the Lake Erie shoreline, as many or more
17 songbirds would be exposed to it; is that your
18 testimony?

19 A. Yes.

20 Q. Okay. Are you aware that the Ohio
21 Department of Natural -- Ohio Department of Natural
22 Resources classifies land-based wind projects into
23 three categories?

24 A. I am not aware of that.

25 Q. So you're not aware there is a minimum,

1 moderate, and extensive category of classification
2 for wind-based wind projects in Ohio?

3 A. I don't know what that would refer to.

4 Q. So I assume you are not aware that only
5 the extensive category or classification requires
6 pre-construction monitoring, correct?

7 A. I guess I am aware that there is some
8 cutoff of, like, if it's going to produce less than
9 5 megawatts or something like that, then you can do
10 anything you want. But there are plenty of people
11 that put up, like, one turbine without having to go
12 through a review process is my understanding, but I
13 didn't realize there was a category or -- I thought
14 there was a cutoff.

15 Q. Okay. Thank you, Doctor.

16 MR. SECREST: Your Honor, may I have a
17 moment to confer?

18 ALJ WALSTRA: Sure.

19 MR. SECREST: Thank you, Dr. Streby.

20 Thank you, your Honor, nothing further.

21 ALJ WALSTRA: Thank you.

22 Mr. Settineri?

23 MR. SETTINERI: No questions, your Honor.
24 Thank you for asking.

25 ALJ WALSTRA: Ms. Leppla?

1 MS. LEPPLA: No questions.

2 ALJ WALSTRA: Staff?

3 MR. JONES: No questions, your Honor.

4 MR. HAFFKE: I would move for an
5 opportunity to review this document, the document
6 that was marked as Exhibit 52, and conduct a re --
7 redirect examination of Dr. Streby on that document
8 given that it was not raised at any point on my
9 redirect.

10 MR. SECREST: As noted, this document was
11 attached to Dr. Gordon's testimony. Dr. Gordon's
12 testimony has been referenced several times
13 throughout Dr. Streby's testimony. Specifically, in
14 redirect, Dr. Streby was asked questions about
15 mortality studies, opined regarding mortality
16 studies, and specifically those conducted by the
17 industry.

18 Mr. Loss's report, Applicant's 52, is
19 directly relevant, in fact on point, with regard to
20 Dr. Streby's testimony on redirect related to those
21 industry mortality studies.

22 MR. HAFFKE: I would just reiterate that,
23 you know, we were not provided the opportunity to ask
24 questions about a specific table in a document that
25 cross-examination was conducted on, and this

1 document -- extensive testimony was just elicited
2 on -- on recross-examination about a document that
3 was never discussed on prior to the cross -- the
4 recross.

5 ALJ WALSTRA: We are -- we will conclude
6 here. This was part -- already admitted into the
7 record and you can address anything on brief as
8 needed.

9 Thank you, Dr. Streby.

10 THE WITNESS: Thank you.

11 ALJ WALSTRA: Would the Residents like to
12 move their exhibit?

13 MR. HAFFKE: Yes. Bratenahl Residents
14 move for the admission of Exhibit 23 which is the
15 Direct Testimony of Dr. Henry Streby.

16 ALJ WALSTRA: Any objections?

17 Hearing none, it will be admitted.

18 (EXHIBIT ADMITTED INTO EVIDENCE.)

19 ALJ WALSTRA: Applicants?

20 MR. SECREST: Your Honor, may we move for
21 the admission of Applicant's Exhibits 50, 51, and 52.

22 ALJ WALSTRA: Any objections?

23 MR. HAFFKE: Bratenahl Residents object
24 to the admission of Exhibit 52 for the reasons we've
25 discussed regarding it is beyond the scope of

1 redirect examination.

2 ALJ WALSTRA: As it's already been
3 admitted, I will allow it to be readmitted, as well
4 as Exhibits 50 and 51.

5 (EXHIBITS ADMITTED INTO EVIDENCE.)

6 ALJ WALSTRA: Do you guys conclude?

7 MR. STOCK: We do.

8 ALJ WALSTRA: Thank you.

9 ALJ ADDISON: Thank you.

10 Staff may call its first witness.

11 MR. JONES: Thank you, your Honor. Staff
12 would call Stuart Siegfried to the stand.

13 ALJ ADDISON: Welcome, Mr. Siegfried.

14 (Witness sworn.)

15 ALJ ADDISON: Thank you. Please be
16 seated.

17 Please proceed, Mr. Jones.

18 MR. JONES: Thank you, your Honor.

19 - - -

20 STUART M. SIEGFRIED

21 being first duly sworn, as prescribed by law, was
22 examined and testified as follows:

23 DIRECT EXAMINATION

24 By Mr. Jones:

25 Q. Could you please state your name for the

1 record, please.

2 A. Stuart Siegfried.

3 Q. And where are you employed?

4 A. With the Public Utilities Commission of
5 Ohio.

6 Q. And what is your job title and
7 responsibilities?

8 A. I am a Utilities Specialist in the Rates
9 and Analysis Department, and my responsibilities
10 include implementation of the State's renewable
11 portfolio standard as well as Power Siting
12 activities.

13 Q. Okay. Do you have -- did you take part
14 in the investigation of this Application?

15 A. Yes, sir.

16 Q. And I have what's before you marked as
17 Staff Exhibit 3. Could you please identify that for
18 the record, please.

19 ALJ ADDISON: Mr. Jones, I believe we are
20 on Staff Exhibit 4.

21 MR. JONES: Staff Exhibit 4. What's
22 Staff Exhibit 3?

23 ALJ ADDISON: Hazelton's.

24 MR. JONES: Staff Exhibit 4, excuse me.

25 ALJ ADDISON: It will be so marked.

1 (EXHIBIT MARKED FOR IDENTIFICATION.)

2 MR. JONES: Does anybody need a copy of
3 Stuart's testimony?

4 A. That's my prefiled testimony in this
5 proceeding.

6 Q. And was this testimony prepared by you or
7 at your direction?

8 A. It was.

9 Q. And do you have any changes or additions
10 to make to that testimony?

11 A. I do have a couple of changes this
12 morning.

13 Q. Okay. Can you direct us to the page and
14 line -- lines where those changes would then be
15 placed.

16 A. Yes, sir. So starting on page 6, line 7.
17 So Staff Witness Erin Hazelton, in her prefiled
18 testimony, she offers clarification of Condition 19
19 but not a change to Condition 19. So the reference
20 to Condition 19 in line 7 should be deleted.

21 Similarly, down at the bottom of page 6,
22 line 22, it reads "Report condition 19 comma." That
23 comma should be a period, with the remainder of that
24 sentence then deleted.

25 Q. Okay. So you noted two changes on page

1 6. Beginning on line 6, carrying over to line 7, and
2 we're talking about what's in the parens. How does
3 it end up, what's being in the parens, your change
4 for line 6 and 7?

5 A. So then within parentheses would just be
6 Condition 24.

7 Q. And likewise, at the bottom of page 6, on
8 line 22, there would be a period after "19" and the
9 remainder of that sentence then would be removed --
10 stricken?

11 A. Yes, sir. So the answer would read
12 "Staff requires a change of Stipulation condition 19
13 to the language in Staff Report condition 19."

14 Q. Okay.

15 A. And then it would resume with the "Staff
16 requires" language on page 7.

17 Q. Okay. Any other changes?

18 A. No, sir.

19 Q. Any additions?

20 A. No, sir.

21 Q. And if I were to ask you the same
22 questions contained in your testimony as now modified
23 as to the changes you made, would your answers be the
24 same?

25 A. Yes, sir.

1 MR. JONES: Your Honor, at this time, I
2 would offer Mr. Siegfried for cross-examination.

3 ALJ ADDISON: Thank you, Mr. Jones.
4 Mr. Secrest?

5 MR. SECREST: Well, your Honor, a
6 question as to procedure. I understand that the
7 Bratenahl Residents previously indicated that they do
8 not have cross for Staff witnesses. If that's still
9 the case, we are happy to proceed. However, if it is
10 not the case, we would request that the Bratenahl
11 Intervenors proceed with cross-examination first.

12 ALJ ADDISON: I will ask if they have any
13 questions first. Mr. Stock?

14 MR. STOCK: Well, I want to hear what
15 they have to ask and what the answers are.

16 ALJ ADDISON: Do you have any cross for
17 this witness?

18 MR. STOCK: It will depend upon what he
19 asks and what he elicits from the witness.

20 ALJ ADDISON: That's fair.

21 MR. SECREST: Your Honor, respectfully,
22 we do have a stipulation with a number of the parties
23 to this case; whereas, the Bratenahl Residents
24 obviously do not.

25 ALJ ADDISON: But Staff is not one of

1 those stipulating parties, correct?

2 MR. SECREST: That's correct, your Honor.

3 ALJ ADDISON: Thank you.

4 EXAMINER ADDISON: Please proceed,
5 Mr. Secrest.

6 MR. SECREST: Thank you, your Honor.

7 - - -

8 CROSS-EXAMINATION

9 By Mr. Secrest:

10 Q. Good morning, Mr. Siegfried.

11 A. Good morning.

12 Q. You sat through a portion of the
13 proceedings here, perhaps all of it, so I am sure you
14 are aware my name is Jon Secrest, and I represent the
15 Applicant Icebreaker Windpower Inc. In your direct
16 testimony you indicated you authored portions of the
17 Staff Report, correct?

18 A. Yes, sir.

19 Q. Do you have the Staff Report in front of
20 you? It should be --

21 A. Somewhere.

22 Q. It should be a loose document.

23 A. Yes, sir.

24 Q. Excellent. And that's been marked as
25 Staff Exhibit 1. If you would please turn to page

1 23.

2 A. Yes, sir.

3 Q. There is a heading "Avian and Bat
4 Species" that starts on page 23, carries over to 24
5 and 25. Do you see that?

6 A. Yes, sir.

7 Q. Did you author that portion of the Staff
8 Report?

9 A. No, sir.

10 Q. Okay. Who did?

11 A. Other members of the Staff team.

12 Q. Okay. Which members specifically?

13 A. There was a member, Grant Zeto, in
14 coordination with other team members from ODNR.

15 Q. All right. Did those team members
16 include Ms. Hazelton?

17 A. Yes, sir.

18 Q. Did she have primary responsibility for
19 authoring those sections?

20 A. I do not know.

21 Q. Okay. And, Mr. Siegfried, if you would
22 please refer to page 3 of your testimony. On line 1,
23 you state "Yes, I am specifically testifying to
24 conditions 1, 2, 5, 7, 8, 9, 12, 31, and 34." And
25 you are not specifically testifying relating to

1 Conditions 19, 22, 24 and 35; is that correct?

2 You are struggling, so maybe I will ask
3 it this way: With regards to Conditions 19, 22, 24,
4 and 35, was Ms. Hazelton primarily responsible for
5 authoring those conditions?

6 A. She was part of the team --

7 Q. Okay.

8 A. -- that did, yes, sir.

9 Q. Is Ms. Hazelton primarily the OPSB Staff
10 Witness tasked with testifying relating to Conditions
11 19, 22, 24, and 35?

12 A. At least 19, 22, and 24. I believe both
13 of our prefiled testimonies address No. 35.

14 Q. Right. Thank you.

15 A. Yes, sir.

16 Q. If you turn to page 4 of your testimony.

17 A. Yes, sir.

18 Q. Starting on line 16, you state "To begin,
19 as stated by Staff witness Erin Hazelton, Staff does
20 not accept conditions 19, 22(c), 22(g), and 24 of the
21 Stipulation because those conditions do not satisfy
22 the criteria under Revised Code 4906.10(A)(3)." Did
23 I read that accurately?

24 A. Yes, sir.

25 Q. I just want to make sure that the person

1 we should be talking to regarding Conditions 19, 22,
2 and 24 is Ms. Hazelton. Is she the most
3 knowledgeable with regard to those conditions?

4 A. I believe as to the substance of those
5 conditions, yes, sir.

6 MR. SECREST: Thank you. Thank you,
7 Mr. Siegfried. That's all the questions I have.

8 ALJ ADDISON: Thank you, Mr. Secrest.
9 Mr. Stock?

10 MR. STOCK: No questions.

11 ALJ ADDISON: Mr. Settineri?

12 - - -

13 CROSS-EXAMINATION

14 By Mr. Settineri:

15 Q. Mr. Siegfried, I'm Mike Settineri on
16 behalf of The Business Network for Offshore Wind.

17 You rely on Ms. Hazelton's findings and
18 conclusions for your testimony, correct?

19 A. For portions of it, yes, sir.

20 Q. Okay. And if her findings and
21 conclusions were that the conditions satisfied
22 Revised Code Section 4906.10(A)(3) and 4906.10(A)(6),
23 your conclusions would be different in your
24 testimony, correct?

25 A. I'm sorry, could you repeat that?

1 Q. If she found that those two statutory
2 requirements were satisfied, your testimony would be
3 different, correct?

4 A. Yes, sir.

5 Q. And if she found that those conditions
6 were satisfied, you would not have an issue with the
7 conditions that you referenced here, 19, 22(c),
8 22(g), and 24, you personally, correct?

9 A. If she found that those satisfied minimum
10 adverse, are you saying that would alter my
11 conclusion?

12 Q. Yes.

13 A. Yes, sir.

14 MR. JONES: Objection, your Honor. Those
15 are not facts in evidence and that's not the position
16 of Staff.

17 ALJ ADDISON: I believe he has already
18 answered, so if you would like to bring up something
19 during redirect, you can do so at that time.

20 MR. SETTINERI: No further questions.

21 Thank you.

22 ALJ ADDISON: Thank you.

23 Ms. Leppla?

24 MS. LEPPLA: A few questions, your Honor.

25 - - -

CROSS-EXAMINATION

By Ms. Leppla:

Q. Mr. Siegfried, I'm Miranda Leppla. I'm with OEC and Sierra Club today. If you can turn to Condition 35 for me, please, in Joint Exhibit 1.

A. Joint Exhibit 1 is the?

Q. Stipulation.

MR. STOCK: They were up on the front there some time ago. I don't know if they are buried.

Q. I assumed you had it easily in front of you.

A. Thank you. Yes, I have it.

Q. And based on your testimony, Staff's concerned about this provision because it might lead to any third party having advisory authority over conditions after the OPSB has granted a certificate, correct?

A. Correct.

Q. And if you turn to page 7, Question 20 of your testimony.

A. I'm there.

Q. And it says here you're concerned about advisory authority over conditions, correct?

A. Yes.

1 Q. And you also say, in your answer to
2 Question 20, that it violates regulatory practices to
3 have third parties provide advice as to whether the
4 conditions are being met, correct?

5 A. Correct.

6 Q. Okay. So if you take a look again at
7 Condition 35 in the Joint Stipulation, where does it
8 say in that condition that -- that any signatory
9 would be giving advice about whether the condition
10 was met?

11 A. I believe from our read of 35 in the
12 Stipulation, it was not clear what was meant by
13 "advisory input throughout discussion."

14 Q. So if you take a look at Condition 35,
15 the only language -- the only right this language in
16 this condition gives to signatory parties is the
17 right to be invited to participate in and provide
18 advisory input, correct?

19 A. That they would have to be invited,
20 correct.

21 Q. Okay. It also specifically notes that
22 that input would be provided throughout discussion
23 with identified agencies and Staff during efforts to
24 finalize the programs and plans referenced in those
25 listed conditions, correct?

1 A. That's what it says, yes.

2 Q. So if you could, in that Joint
3 Stipulation, turn to Condition 17.

4 A. I'm there.

5 Q. And that -- in that condition this states
6 that the fisheries and aquatic resources construction
7 monitoring plan is still being finalized, correct?

8 A. It provides a schedule for submitting the
9 fisheries and aquatics monitoring plan, yes.

10 Q. And that plan will be submitted to ODNR
11 and Staff to review, for review to confirm compliance
12 with that condition?

13 A. I guess ultimately that would depend on a
14 Board decision.

15 Q. It doesn't say that any signatory party
16 has advisory authority over whether that condition is
17 met, correct?

18 A. Not in this language, no.

19 Q. If you could turn to Condition 18.

20 A. I'm there.

21 Q. And this states that an avian and bat
22 impact mitigation plan is yet to be finalized as
23 well, correct?

24 A. Again, I don't know that it necessarily
25 indicates that, but it does provide for submitting

1 the plan.

2 Q. You would agree it is not finalized
3 currently?

4 A. I'm not sure.

5 Q. And in this condition it states that ODNR
6 and State would review it to confirm compliance with
7 the condition, correct?

8 A. Correct.

9 Q. And it doesn't say, anywhere in this
10 language, that a signatory party would have advisory
11 authority whether the condition was met, correct?

12 A. Not in this condition, no.

13 Q. Okay. If you could turn to Condition 19.
14 This one references the post-construction avian and
15 bat collision monitoring plan, correct?

16 A. Correct.

17 Q. And it doesn't say anywhere in that
18 language that a signatory party would have advisory
19 authority over that condition?

20 A. In this condition, no.

21 Q. If you could turn to Condition 20. This
22 condition references the fisheries and aquatic
23 resources mitigation plan?

24 A. Correct.

25 Q. Okay. And that plan will be submitted to

1 ODNR and Staff for review to confirm compliance with
2 this condition?

3 A. Correct.

4 Q. And like Condition 18, it also explicitly
5 states that "Any proposed modifications to the plans
6 shall be submitted to the ODNR and Staff for review
7 to confirm compliance with this condition," correct?

8 A. Correct.

9 Q. It doesn't say that any signatory party
10 has advisory authority over whether the condition is
11 met, correct?

12 A. Not in this condition, no.

13 Q. If you can turn to Condition 24. And in
14 this condition, Applicant would be developing a
15 mitigation or adaptive management strategy and
16 providing that to Staff and ODNR if the condition is
17 triggered, correct?

18 A. Correct.

19 Q. And it explicitly states in this
20 condition that Staff and ODNR must confirm compliance
21 with this condition?

22 A. Correct.

23 Q. So each of the listed conditions we
24 talked about has a program or plan referenced in
25 it -- strike that. I'm sorry.

1 So each of the conditions we talked about
2 affect either avian and bat or fisheries and aquatic
3 resources monitoring programs and plans?

4 A. That's correct.

5 Q. Does the language, in Condition 35,
6 contain any limitation for any other stakeholders to
7 provide input based on that language?

8 A. I'm sorry. Could you repeat that,
9 please?

10 Q. Sure. If you go to Condition 35, does
11 that contain any limiting language in that, based on
12 that text, for other stakeholders to provide input?

13 A. I don't believe it precludes Staff from
14 consulting with other stakeholders, but there is --
15 other stakeholders wouldn't have to be included in
16 the process, according to this language.

17 Q. And I just want to make sure we agree
18 because it seems to be that there is concern from
19 Staff and ODNR that Condition 35 overrides their
20 authority in some way. So would you agree that
21 advisory, the word "advisory" means having or
22 consisting of an ability to make recommendations but
23 not take action to enforce them?

24 A. I think in our reading of 35, it was not
25 clear what was intended by advisory input through --

1 throughout the discussions.

2 Q. You agree that the word "authority" does
3 not appear anywhere in Condition 35?

4 A. I would agree with that.

5 MS. LEPPLA: No further questions, your
6 Honor.

7 ALJ ADDISON: Thank you, Ms. Leppla.

8 Mr. Jones, redirect?

9 - - -

10 REDIRECT EXAMINATION

11 By Mr. Jones:

12 Q. Mr. Siegfried, on Condition 35, is this
13 the first time you've seen such a condition in your
14 career as working for the Ohio Power Siting Board?

15 A. Yes, sir.

16 MR. JONES: I have no other questions,
17 your Honor.

18 ALJ ADDISON: Thank you, Mr. Jones.

19 Mr. Secrest?

20 MR. SECREST: No further questions.

21 Thank you, your Honor.

22 ALJ ADDISON: Thank you.

23 Mr. Stock?

24 MR. STOCK: No.

25 ALJ ADDISON: Mr. Settineri?

1 MR. SETTINERI: No.

2 ALJ ADDISON: Ms. Leppla?

3 MS. LEPPLA: No, your Honor.

4 ALJ ADDISON: We have no additional
5 questions. Mr. Siegfried, you are excused. Thank
6 you.

7 Mr. Jones?

8 MR. SIMMONS: Mr. Simmons.

9 ALJ ADDISON: Oh, I believe we have
10 Mr. Siegfried's testimony.

11 MR. JONES: Yes. I would like to ask --
12 I move for the admission of Staff Exhibit 4.

13 ALJ ADDISON: Thank you.

14 Any objections?

15 MR. SECREST: No, your Honor.

16 ALJ ADDISON: It will be admitted.

17 (EXHIBIT ADMITTED INTO EVIDENCE.)

18 MR. JONES: Thank you.

19 ALJ ADDISON: At this time, we'll just
20 take a 10-minute break before we bring on the next
21 witness. Come back around 10:35. Thank you.

22 Let's go off the record.

23 (Recess taken.)

24 ALJ ADDISON: Let's go ahead and go back
25 on the record.

1 Staff may call its next witness.

2 MR. SIMMONS: Thank you, your Honor.

3 Staff calls Erin Hazelton.

4 ALJ ADDISON: Good morning, Ms. Hazelton.

5 THE WITNESS: Good morning.

6 ALJ ADDISON: Please raise your right
7 hand.

8 (Witness sworn.)

9 ALJ ADDISON: Thank you. Please be
10 seated. If you could just turn on your microphone.
11 There you go. Thank you.

12 - - -

13 ERIN HAZELTON

14 being first duly sworn, as prescribed by law, was
15 examined and testified as follows:

16 DIRECT EXAMINATION

17 By Mr. Simmons:

18 Q. Good morning, Ms. Hazelton. Could you
19 please state and spell your name for the record.

20 A. Sure. Erin Hazelton, E-r-i-n,
21 H-a-z-e-l-t-o-n.

22 Q. And where are you currently employed?

23 A. I work for the Ohio Department of Natural
24 Resources, Division of Wildlife.

25 Q. And what is your title?

1 A. I am the Wind Energy Administrator.

2 Q. I believe in front of you is your
3 prefiled testimony, Staff Exhibit 3.

4 A. Yes.

5 Q. And is that an accurate copy of your
6 testimony as it is filed in this case?

7 A. It is.

8 Q. And was that testimony prepared by you or
9 at your direction?

10 A. Yes, it was.

11 Q. Are there any changes or corrections to
12 your prefiled testimony?

13 A. No, not at this time.

14 Q. And if I were to ask those questions of
15 you today, would your answers be the same?

16 A. They would.

17 MR. SIMMONS: I'll tender the witness for
18 cross.

19 ALJ ADDISON: Thank you, Mr. Simmons.
20 Mr. Secrest?

21 MR. SECREST: Thank you, your Honor.

22 - - -

23 CROSS-EXAMINATION

24 By Mr. Secrest:

25 Q. Good morning, Ms. Hazelton. How are you?

1 A. Good morning. I am fine. Thank you.

2 Q. My name is Jon Secrest.

3 With respect to the Icebreaker wind
4 project, when did you first begin performing any
5 tasks related to this project?

6 A. I began my position with DNR on May 1 of
7 2017, and essentially I was involved with the project
8 from that date forward.

9 Q. Okay. Thank you.

10 And since May 1, 2017, how many other
11 wind farm projects have you worked on?

12 A. I have reviewed two other projects that
13 are currently undergoing application review now, and
14 those are still in process. And then, in addition,
15 I've also been a part of some amendments to
16 certificates. But this is the project that I've
17 taken from this point through the review process
18 essentially, the only one.

19 Q. Okay. Thank you.

20 So your experience, since 2017, has
21 included both projects in the permitting process as
22 well as operational projects; is that right?

23 A. That's correct.

24 Q. Okay. Thank you.

25 Have you reviewed, other than this

1 project, any pre-construction monitoring protocols
2 related to any other wind projects?

3 A. In the State of Ohio for other projects
4 you mean?

5 Q. Correct.

6 A. Yes, I have.

7 Q. Okay. In your review of those other
8 pre-construction monitoring protocols, do you know --
9 or how many altitudinal density studies were
10 required?

11 A. No. There weren't any.

12 Q. You acknowledge the Icebreaker project is
13 a small project, correct?

14 A. Six wind turbines.

15 Q. Compared to other projects you are
16 familiar with in Ohio, is that small?

17 A. I think the next smallest one is 21
18 turbines.

19 Q. Okay.

20 A. That I am aware of.

21 Q. And you worked with Icebreaker's
22 consultant, WEST, on this project; is that right?

23 A. Yes.

24 Q. Have you worked with WEST on any other
25 projects?

1 A. Yes, I have.

2 Q. How many?

3 A. I believe they are involved in most of
4 the other projects on land in Ohio.

5 Q. Okay. Are you familiar with the risk
6 assessment that was completed related to this
7 project?

8 A. I am.

9 Q. Have you reviewed that document?

10 A. I have.

11 Q. Are you aware that the risk assessment
12 concluded that there was low risk to both migratory
13 birds and bats related to this project?

14 A. Yes, I believe that's what it said.

15 Q. Do you dispute that assessment?

16 A. I believe that's -- that's the assessment
17 of the Applicant. I don't dispute that they made
18 that assessment, no.

19 Q. Okay. Do you contend that this project
20 is anything other than low risk to migratory birds
21 and bats?

22 A. I would say at this point in time,
23 because we don't have the required data concerning
24 pre-construction surveys, it's really difficult to
25 determine that now. So it may be accurate. It's

1 also possible that it's not entirely accurate.

2 Q. Do you have, in front of you, the Staff
3 Report? It's Staff Exhibit 1.

4 A. I do.

5 Q. Will you please refer to page 23.

6 A. Okay.

7 Q. Thank you.

8 Ms. Hazelton, did you author portions of
9 this Staff Report?

10 A. I did.

11 Q. Okay. If you actually turn back one page
12 to 22, where the heading "Wildlife" begins.

13 A. Yes.

14 Q. Do you see where that is?

15 A. Uh-huh.

16 Q. Did you author this portion of the Staff
17 Report?

18 A. I was part of the team that authored it,
19 yes.

20 Q. Okay. And following on page 23 is a
21 heading "Avian and Bats Species."

22 A. I see that.

23 Q. Did you partake in authoring that portion
24 of the Staff Report?

25 A. I did.

1 Q. Okay. Thank you.

2 At the top of page 23, the first full
3 sentence states "Due to the relatively small size of
4 the project and proposed conditions included herein,
5 Staff generally concurs that significant direct
6 impacts are not expected." Did I read that
7 accurately?

8 A. I'm sorry, where is that?

9 Q. Page 23, the first full sentence.

10 A. Oh, yes, I see that.

11 Q. Great.

12 A. Yeah, sorry.

13 Q. That's all right. Do you want me to
14 reread?

15 A. No. I see it now. I was on the front
16 section. I apologize.

17 Q. That's okay. Thank you.

18 The reference to "Staff generally
19 concurs," is that in relation to the risk assessment
20 performed by WEST?

21 A. We certainly took in a lot of different
22 pieces of information, including the information that
23 was used in the risk assessment, as well as other
24 information as well, to -- I think to inform that
25 statement.

1 Q. Okay. Thank you.

2 Are you familiar with the site of the
3 Icebreaker project or proposed site?

4 A. I know that it's 8 to 10 miles offshore
5 from Cleveland.

6 Q. Okay. Are you familiar with ODNR's Wind
7 Turbine Placement Capability Analysis?

8 A. I am aware of it, yes.

9 Q. Okay. Have you reviewed that document?

10 A. I've looked through some of the maps that
11 were in it, yeah.

12 Q. Okay. Are you aware that that was
13 attached to the Application in this case?

14 A. Yes, I believe it was.

15 Q. Okay. And do you know that the current
16 proposed site for the Icebreaker project is located
17 in the zone listed as having minimum limiting
18 factors?

19 A. I do believe that is correct. The
20 factors that were considered were not all inclusive,
21 though, and I believe it focused mostly on aquatic
22 resources and cultural resources, so -- so while that
23 may be true, it wasn't an all-inclusive study for
24 wildlife necessarily.

25 Q. And when you say "wildlife," what are you

1 referring to?

2 A. Uh-huh. Wildlife and wild animals, as I
3 mentioned in my testimony, we understand they have
4 broad definitions. However, for -- for my role, I
5 should say, my role specifically with birds and bats.
6 They can also include, as mentioned, aquatic
7 resources for this project as well, which our
8 fisheries team has overseen.

9 Q. Okay. And there is a Memorandum of
10 Understanding between ODNR and Icebreaker related to
11 avian and bats, correct?

12 A. Correct.

13 Q. And there is also an MOU between
14 Icebreaker and ODNR relating to aquatic resources?

15 A. Correct.

16 Q. Are there any other MOUs between
17 Icebreaker and ODNR related to other species?

18 A. I don't believe so, no. Huh-uh.

19 Q. You were involved in discussions with
20 Icebreaker related to monitoring protocols or you
21 have been, correct?

22 A. Yes, I have.

23 Q. Have you been involved in any discussions
24 with Icebreaker or its consultants related to species
25 other than fish, birds, and bats?

1 A. I don't think so, no, huh-uh.

2 Q. Okay. Ms. Hazelton, do you have the MOU
3 in front of you? It should be on the left-hand side.

4 A. Applicant Exhibit 38?

5 Q. Yes, ma'am. Thank you.

6 A. Yes.

7 Q. The second paragraph on the first page,
8 the first sentence reads "The Parties are entering
9 into this Memorandum of Understanding to set forth
10 the agreements that have been reached on the
11 monitoring protocols on avian and bat resources."
12 It's accurate that Icebreaker and ODNR did reach
13 agreement related to monitoring protocols, correct?

14 A. We reached an agreement on which general
15 studies we would like to have done and the objectives
16 of those, but we didn't necessarily reach an
17 agreement on all of the protocols per se. So, for
18 instance, at the time this MOU was approved, there
19 was some things that were still under discussion that
20 we knew would not be approved until some point in the
21 future, so there are placeholders in this MOU to
22 account for that.

23 Q. Okay. And what are those specifically?

24 A. The items that have placeholders
25 currently in the --

1 Q. That's correct.

2 A. I believe it started out originally with
3 the original MOU, the July MOU, aerial surveys were
4 still in draft form, a radar monitoring section was
5 still in draft, as well as a collision monitoring
6 post-construction was still in draft, and as well as
7 a mitigation section was still in draft. So if I
8 recall, what was not in draft at that point was the
9 bat acoustic survey for pre-construction and
10 generally for post-construction.

11 Q. Currently is the aerial survey still in
12 draft form?

13 A. No. That was finalized a month later and
14 incorporated into the MOU.

15 Q. Okay. And the radar monitoring?

16 A. That has still not been finalized.

17 Q. Is that the same for the collision
18 monitoring?

19 A. That's correct.

20 Q. And mitigation as well, correct?

21 A. Correct.

22 Q. Thank you.

23 Icebreaker has submitted a bird and bat
24 conservation strategy to ODNR; is that right?

25 A. Yes, they have.

1 Q. Okay. Is ODNR undertaking review of that
2 document?

3 A. We have reviewed it.

4 Q. Okay. If you turn to page 2 of the MOU,
5 please. I'm looking at the sentence "By and through
6 this MOU, the Parties hereby agree to the following."
7 And number A is "The Icebreaker Wind Avian and Bat
8 Monitoring Plan attached as Exhibit A, which was
9 prepared by Western EcoSystems Technology Inc. for
10 the Applicant, and modified pursuant to discussion
11 with the ODNR, will serve as the basis for the avian
12 and bat resources pre-, during-, and
13 post-construction monitoring effort by the
14 Applicant...."

15 You understand that the Wind Avian and
16 Bat Monitoring Plan was a product of collaboration
17 between Icebreaker and ODNR, correct?

18 A. That's correct.

19 Q. If you look down to Paragraph C, it
20 states "Prior to the date of construction as
21 identified by the Applicant pursuant to OAC Section
22 4906-3-13(B), post-construction protocols in the Plan
23 will be finalized and approved through written
24 communication with the ODNR." Do you see that?

25 A. I do.

1 Q. What do you understand that to mean?

2 A. I believe it means according to the
3 process for the Power Siting Board, that
4 post-construction protocols need to be finalized and
5 approved, through written communication with ODNR,
6 prior -- prior to construction.

7 Q. What are those post-construction
8 protocols?

9 A. For this project, again, we had a
10 placeholder, an MOU. We hadn't identified
11 everything. Generally we knew acoustics, radar, some
12 sort of collision monitoring, but the details hadn't
13 been decided yet. Typically, on terrestrial
14 projects, it's pretty much already laid out for the
15 applicants, so we needed to leave some latitude for
16 discussions down the road for this project
17 specifically.

18 Q. Is -- is it your understanding of this
19 Paragraph C that pre-construction -- prior to the
20 date of construction, Icebreaker is required to
21 submit a collision monitoring plan?

22 A. This doesn't speak specifically to the
23 contents of the post-construction protocols. It just
24 states "post-construction protocols." So certainly
25 collision monitoring would be underneath that plan.

1 Q. Okay. The following sentence states "In
2 order to effectuate any adjustments, the Parties will
3 review sampling results annually...." Has Icebreaker
4 provided sampling results on an annual basis to your
5 knowledge?

6 A. Yeah, I believe they have.

7 Q. And, Ms. Hazelton, if you please turn to
8 the next page, page 3. Paragraph D states "Annual
9 monitoring reports, including preliminary analyses
10 and summaries of all data collected to date, must be
11 submitted to ODNR at least two weeks prior to the
12 scheduled date of the annual meeting provided for at
13 Paragraph (C) above." Has Icebreaker complied with
14 this requirement?

15 A. We have received annual monitoring
16 reports. I believe there is some confusion about the
17 dates, but generally it was complied with. If they
18 were late, it really wasn't significant.

19 Q. Okay. Thank you.

20 Please turn to page 4. Looking at
21 Paragraph H, it states "ODNR, working cooperatively
22 with the USFWS and with designated technical experts,
23 will review all quarterly, annual, interim, and final
24 reports to ensure they meet the assessment goals as
25 outlined in paragraph two of page one of this

1 document." Is that pre- or post-construction,
2 Ms. Hazelton, or both?

3 A. I believe this was meant to be both.

4 Q. Okay. The next sentence reads "If a
5 finding of significant impact is determined, ODNR
6 shall immediately notify the Applicant and follow up
7 with appropriate agencies and the Applicant to
8 address and/or remediate the impact." Do you see
9 that?

10 A. I do.

11 Q. There is no language within that
12 paragraph 8 stating that ODNR will prescribe any
13 remediation; is that accurate?

14 A. Not within that paragraph of the MOU, no.

15 Q. Ms. Hazelton, if you would please turn to
16 Exhibit A to the MOU which is Icebreaker Wind Avian
17 and Bat Monitoring Plan.

18 A. Yes.

19 Q. Specifically I'm looking at page 2.

20 A. Okay.

21 Q. The last sentence on page 2, it starts
22 out subsequent -- "Subsequent Discussions...." Do
23 you see where I am?

24 A. I do.

25 Q. Thank you.

1 It states "Subsequent discussions have
2 led to a commitment between the ODNR and Applicant to
3 work with the DOE, USFWS, and one or more objective
4 third-party radar experts to design the exact
5 parameters of any pre- and post-construction radar
6 surveys deemed feasible." When it refers to
7 third-party radar expert, did that not mean Robb
8 Diehl?

9 A. I believe it did, yes.

10 Q. And were you involved in the process to
11 engage Robb Diehl as that radar expert?

12 A. No, I wasn't.

13 Q. Okay. You do understand that Robb Diehl
14 was engaged to determine the feasibility --
15 feasibility of pre-construction monitor -- radar
16 monitoring, correct?

17 A. I agree he reviewed the RFIs that were
18 submitted to the Applicant.

19 Q. And when you say "RFIs," what are you
20 referring to?

21 A. The requests for information. Again, I
22 believe all of that happened prior to my tenure when
23 I started, but that's my understanding of what
24 happened before that.

25 Q. And is it your understanding that

1 requests were put out to vendors to submit proposals
2 related to a pre-construction monitoring program?

3 A. Yes.

4 Q. Thank you.

5 Were you copied on communications with
6 Mr. Diehl related to his assessment of those
7 proposals?

8 A. I believe I received a copy of the
9 assessment in probably several e-mails regarding it,
10 yeah.

11 Q. Okay. You -- I'm sorry. You started May
12 1, 2017?

13 A. That's right.

14 Q. Okay. And do you recall that Mr. Diehl
15 issued his report December, I think it's 2017?

16 A. That sounds about right.

17 Q. Thank you.

18 ALJ ADDISON: Let's go off the record.

19 (Off the record.)

20 ALJ ADDISON: We will go ahead and go
21 back on the record.

22 Apologies, Mr. Secrest. Please proceed.

23 MR. SECREST: Quite all right. Thank
24 you.

25 Q. (By Mr. Secrest) Ms. Hazelton, with

1 regard to the engagement of Robert Diehl, did you
2 understand that he was engaged pursuant to an
3 agreement between Icebreaker and U.S. Fish and
4 Wildlife Service?

5 A. I heard there was such an agreement, but
6 I didn't know if it was actually signed. Again, I
7 wasn't really sure of the discussions behind that. I
8 came in and I just knew there was discussion about
9 retaining a third-party expert in order to evaluate
10 the proposals.

11 Q. Okay. And not -- I am not referring to a
12 formal written agreement, but do you understand that
13 there was agreement between U.S. Fish and Wildlife
14 Service and Icebreaker to engage Robb Diehl?

15 A. I believe that that was the idea behind
16 the evaluating the proposals, yes, uh-huh.

17 Q. And did -- are you aware that his role in
18 that engagement to evaluate the proposals was to
19 serve as an arbiter between Icebreaker and U.S. Fish
20 and Wildlife Service related to the protocol?

21 MR. SIMMONS: Objection. I am going to
22 object. She's indicated she didn't have direct
23 knowledge of this potential agreement. So to the
24 extent this is beyond the scope of her previous
25 testimony, I would object for lack of foundation.

1 ALJ ADDISON: Thank you, Mr. Simmons.

2 I will let her answer the question, if
3 she knows, as to her understanding.

4 MR. SECREST: Sure. Thank you, your
5 Honor.

6 ALJ ADDISON: Please proceed.

7 A. Again, just based off of my understanding
8 and conversations and e-mails that I had a chance to
9 look at regarding that, my understanding was that the
10 hope was that this third party could give guidance on
11 the feasibility of a barge-based system specifically
12 because there is a lot of uncertainty regarding a
13 barge-based survey; at least those were the
14 discussions up to that point.

15 And so that was the goal of this
16 third-party expert would be to provide information to
17 determine if a barge-based radar system would be
18 feasible or not for this purpose.

19 Q. Based upon your review of e-mails and the
20 conversations, do you understand that Mr. Diehl --
21 excuse me -- Dr. Diehl's recommendation was going to
22 be binding upon Fish and Wildlife Service and
23 Icebreaker?

24 A. I didn't understand that, no.

25 Q. Okay. Do you have up there, you should,

1 Applicant's Exhibit 37?

2 A. Yes.

3 Q. And do you understand this to be the
4 report that Dr. Diehl issued related to the various
5 vendor proposals for vessel-based radar?

6 A. I do.

7 Q. Thank you.

8 You've previously reviewed this document,
9 correct?

10 A. I have.

11 Q. Okay. Please turn to page 4 of this
12 document.

13 A. Okay.

14 Q. Under "Data collection," D1 states
15 "Automated and continuous operation during the study
16 period with data collection occurring during greater
17 than 80 percent of this study period where
18 precipitation does not obscure data...." Does that
19 indicate that the 80-percent standard does not
20 include times when precipitation is obscuring data?

21 A. I believe it might.

22 Q. Please turn to page 16.

23 A. Okay.

24 Q. Under the heading "Vendor Proposals," I
25 am looking specifically at the second paragraph. It

1 states "The effect of sea clutter and platform
2 stability on data collection remains a lingering
3 concern for all vendors in relation to achieving
4 meaningful data collection..., although there is
5 ample precedent for radar-based scientific data
6 collection on floating platforms at sea..." Have you
7 reviewed any of that prior precedent related to data
8 collection and platforms at sea?

9 A. No, I haven't.

10 MR. SECREST: May I approach, your Honor?

11 ALJ ADDISON: You may.

12 MR. SECREST: Your Honor, may I have
13 this -- move to have this document marked as
14 Applicant's Exhibit 53?

15 ALJ ADDISON: So marked.

16 (EXHIBIT MARKED FOR IDENTIFICATION.)

17 MR. SECREST: Thank you.

18 Q. (By Mr. Secrest) Ms. Hazelton, on the
19 bottom half of what's been marked as Applicant's
20 Exhibit 53, there is an e-mail from Beth Nagusky
21 dated May 23, 2017. Do you see that?

22 A. I do.

23 Q. And you are one of the recipients of this
24 e-mail, correct?

25 A. Correct.

1 Q. It states:

2 "All:

3 "I am sharing the 3 vessel based radar
4 studies we shared with Robb Diehl yesterday and that
5 some of you have requested." Do you see that?

6 A. Uh-huh.

7 Q. Do you recall requesting any studies
8 related to vessel-based radar from the Applicant?

9 A. I believe we had discussions when we were
10 discussing the radar protocol generally about what --
11 what was known about vessel-based radar. As this is
12 certainly a new field for DNR, we don't retain any
13 radar experts or barge experts on staff, so we do
14 rely again on our experts and folks that we reach out
15 to, including the Applicant as well, for information.

16 Q. And when you say you rely on folks and
17 experts you reach out to, who would those be?

18 A. Specifically for radar, as is mentioned
19 here, the U.S. Fish and Wildlife Service radar team.
20 Dr. Jeff Gosse was the team lead at that point, and
21 he has since retired and there is a new team lead,
22 but it's essentially the same function, the group
23 does the same function, as well as Robb Diehl at
24 USGS.

25 Q. Okay. And with regard to these

1 vessel-based radar studies that Ms. Nagusky provided,
2 you didn't review those, correct?

3 A. I believe I did actually open them. Now,
4 I scanned them through very quickly. I really
5 couldn't say I could remember every single detail
6 from them. If I do recall, one of them was specific
7 for waterfowl. And if I remember as well, a lot of
8 the studies in Europe are focused on waterfowl. But
9 I don't recall seeing any information regarding
10 tracking smaller targets that we're interested in
11 here in Ohio, such as bats or small birds.

12 Q. And do you recall discussing these
13 vessel-based radar studies with anyone at Fish and
14 Wildlife Service?

15 A. I'm not sure if we discussed these
16 studies or others, but I think, again, that may be
17 where I got some of the information was just general
18 discussions with the radar experts.

19 Q. Okay. And you are -- you are aware that
20 there is other literature related to vessel-based
21 radar studies, correct?

22 A. I imagine there probably is.

23 Q. Okay. And when Dr. Diehl refers to ample
24 precedent for radar-based scientific data, you have
25 no reason to dispute that statement?

1 A. Not radar-based scientific data. Are you
2 referring, again, to the evaluation?

3 Q. Correct. I am referring specifically to
4 Dr. Diehl's statement on page 16 in the second
5 paragraph that "although there is ample precedent for
6 radar-based scientific data collection on floating
7 platforms at sea...."

8 A. It does appear he states that. Although,
9 he does also indicate that he has concerns about the
10 vendors achieving the goals of collecting the data.

11 Q. Sure. So, if you please, Ms. Hazelton,
12 turn to page 24 of Applicant 37.

13 A. I'm sorry, which page?

14 Q. 24, please.

15 A. Okay.

16 Q. I may have said 34.

17 The first full sentence on this page
18 states "Arguably, the most important data criteria
19 for a radar system in relation to the Icebreaker Wind
20 project concern the ability to gather data on
21 altitude-specific MTR or density and behavioral
22 responses to turbine presence (pre- versus
23 post-construction comparison to attempt to assess
24 avoidance/attraction), and the ability to do so with
25 high reliability (greater than 80 percent of

1 available time) while avoiding contamination by
2 clutter, primarily from insects and the lake
3 surface." Do you have an understanding of what
4 "greater than 80 percent of available time" means?

5 A. I -- I didn't actually get to read the
6 RFI or the information that Dr. Diehl was using when
7 he was reviewing these, so I don't know if he was
8 given some additional constraints in his review. So,
9 no, unfortunately, I really don't feel I can say.

10 Q. Okay. You indicated earlier that ODNR
11 consults with certain experts, and one specifically
12 you mentioned was Robb Diehl, correct?

13 A. Yes. I've spoken with him twice.

14 Q. Okay. In those two conversations, did
15 you ever discuss the 80-percent standard related to
16 radar?

17 A. We did.

18 Q. Okay. When were those discussions?

19 A. It was right when his draft report was
20 issued, I believe, or right after the final report
21 was issued regarding what we are talking about. I
22 had questions about the 80 percent because I did want
23 to verify that it was appropriate, so we had
24 discussions around that.

25 Q. Okay. And did those discussions include

1 permitting rain or heavy precipitation not to be
2 counted in the 80 percent?

3 A. Not necessarily, but the questions had to
4 do with typically how radar works, and what
5 percentage of time -- if the radar system is
6 operating, what percentage of time it's able to
7 operate without any downtime, without any technical
8 failures, and what that would look like with
9 precipitation as well.

10 And his answer, of course, was that
11 typically on land, when you don't have uncertainty
12 of -- of a barge or necessarily wave clutter, radar
13 systems work in the high 90s, 95, 98 percent of the
14 time. And that includes precipitation events. And
15 he also mentioned though that every radar system is
16 different. It is a give and a take with each system.
17 So you really have to -- which is what he did, you
18 have to look at each system and kind of weigh out the
19 pros and the cons of each system to understand what
20 you may be getting with it.

21 MR. SECREST: Your Honor, may I approach?

22 ALJ ADDISON: You may.

23 MR. SECREST: Your Honor, may I move to
24 have this document marked as Applicant's 54?

25 ALJ ADDISON: So marked.

1 (EXHIBIT MARKED FOR IDENTIFICATION.)

2 MR. SECREST: Thank you.

3 Q. (By Mr. Secrest) Ms. Hazelton, I have
4 handed you what's been marked as Applicant's 54. And
5 at the top of the page, there is an e-mail from
6 Ms. Nagusky to you dated June 13, 2017. Do you see
7 that?

8 A. I do.

9 Q. In the middle of the page is an e-mail
10 from Ms. Nagusky to you. Do you see that --

11 A. I do.

12 Q. -- e-mail?

13 A. Uh-huh.

14 Q. At the bottom of the page there is an
15 e-mail from Dr. Diehl. You are not one of the
16 recipients though, correct?

17 A. No, I am not.

18 Q. Do you believe this e-mail was forwarded
19 to you, though, given Ms. Nagusky's addressing in
20 the -- including you as a recipient in the e-mail
21 dated June 7, 2017, 1:45 p.m.?

22 A. Yes. It looks like it was included as
23 the forward.

24 Q. Okay. In Dr. Diehl's e-mail, he states
25 "A few questions below that arise from documents and

1 discussion (and answers may be in documents I've not
2 yet reviewed)."

3 In the next sentence, he states "ODNR
4 mentioned by contrast a 'reasonable amount of data.'"
5 Do you recall ODNR suggesting the standard of a,
6 quote, reasonable amount of data?

7 A. I'm sorry, this is just a month into my
8 start of this position and I don't recall that
9 conversation specifically.

10 Q. Okay. Dr. Diehl then asked "What is
11 meant by reasonable amount?" Do you see that?

12 A. I do, uh-huh.

13 Q. And if you look at Ms. Nagusky's e-mail
14 from June 7, 2017, this does include you as a
15 recipient, correct?

16 A. It does.

17 Q. And she says,

18 "Hi:

19 "Please see the question Robb Diehl asks
20 below on the standard that ODNR is using for radar
21 data collection." Do you recall ever providing a
22 response to this e-mail? Either Ms. Nagusky's or
23 Dr. Diehl's?

24 A. I don't believe that I provided a
25 response. Again, we have a team at ODNR, and

1 especially during the transition, that we were able
2 to work together. I don't -- I don't remember if a
3 response was given. We knew that Dr. Diehl would be
4 giving us, and all of us collectively, guidance on
5 this subject, so I am not really sure where that
6 went.

7 Q. Okay. Thank you.

8 A. You're welcome.

9 Q. Ms. Hazelton, I am looking back at the
10 Memorandum of Understanding which is Applicant's 38,
11 and specifically the Bird and Bat Monitoring Plan
12 which is Exhibit A to that document.

13 A. Give me just one minute.

14 Q. Sure.

15 A. Okay.

16 Q. Looking at page 3 of the Bird and Bat
17 Monitoring Plan.

18 A. Okay.

19 Q. In the second paragraph, about the middle
20 of the paragraph, the sentence starts "As a pilot
21 project,..."

22 A. Yes.

23 Q. And continues "...it may be necessary to
24 explore the use of experimental technologies or
25 methods to collect the data necessary to assess

1 behavioral impacts and mortality." Does that include
2 vessel-based radar?

3 A. I believe it would.

4 Q. Okay. And ODNR and Icebreaker have
5 engaged in -- well, would you classify it as
6 extensive discussions related to vessel-based radar?

7 A. We have been speaking about it for quite
8 some time, yes.

9 Q. And when you say "quite some time,"
10 that's been since your tenure, correct?

11 A. Before my tenure is my understanding,
12 yes.

13 Q. Right. Okay. Has ODNR ever taken the
14 position, to your knowledge, that vessel-based radar
15 is not an acceptable platform to use for collecting
16 data at the project site?

17 A. To my knowledge, ODNR generally didn't
18 take a specific position on the radar protocol. We
19 feel that it's up to the Applicant to determine which
20 methodology and technology they choose to answer the
21 questions that have been put forth. So I don't
22 believe that it was ever our intention to be
23 prescriptive in any way.

24 I do know there were discussions about
25 platform versus barge, and generally the platform

1 is -- my understanding of platform was thought to be
2 more reliable because it took out the question about
3 the barge moving and the tolerance to a radar -- a
4 radar unit on a barge, and being able to see those
5 smaller targets that we were interested in in Ohio.

6 Q. And when you say "platform," there's been
7 testimony already related to a couple different
8 versions of platforms. When you say "platform," are
9 you referring to a platform at the project site or
10 using a separate platform such as the water intake
11 crib?

12 A. I believe that radar was already
13 attempted at the water intake crib, and it was not
14 successful for reasons I don't fully understand;
15 interference of some sort. I don't think, again,
16 that we were specific on where the platform had to
17 be, just as long as the radar could reach into the
18 project area. So if the radar had a 2 mile, let's
19 say a reach of 2 miles, it had to somehow be 2 miles
20 away from the project area so it could reach into the
21 project area and assess the use of the project site
22 by birds and bats.

23 Q. Ms. Hazelton, will you please prefer to
24 Applicant's Exhibit 40. It's ODNR's Bird and Bat --
25 thank you.

1 A. I have it. Thank you.

2 Q. You are familiar with this document, I
3 assume?

4 A. I am.

5 Q. It opens by stating "The following
6 protocols are meant to establish a standardized
7 framework in which pre- and post-construction
8 surveying should be conducted at proposed commercial
9 wind turbine facilities within the state of Ohio."
10 Did I read that correctly?

11 A. Yes, you did.

12 Q. And is it accurate that the type of
13 surveying is dependent upon the classification of the
14 project?

15 A. Yes. There are generally three
16 classifications of survey effort, so the survey
17 effort is classified.

18 Q. And it's classified as minimum, moderate,
19 or extensive, right?

20 A. That's correct.

21 Q. And it's cumulative. So if you're in
22 moderate, you have to do the minimum as well,
23 correct?

24 A. Yes.

25 Q. If you are in extensive, you have to do

1 the moderate and minimum, correct?

2 A. Yes.

3 Q. Okay. Has the Icebreaker project
4 received classification?

5 A. No. This protocol was, as it says, it's
6 for terrestrial wind energy facilities, and
7 Icebreaker would be located in an aquatic facility,
8 so we don't necessarily have any established
9 protocols or any sort of survey effort designation
10 for Lake Erie at this time.

11 Q. Do you know if any portion of these
12 protocols has been applied to the Icebreaker project?

13 A. Yes, the idea was to actually use these
14 protocols as a model for -- because we are looking
15 for the same information on land versus offshore. So
16 we used these as a guideline for the objectives in
17 the MOU and the objectives for what type of
18 information ODNR would be looking for.

19 Q. So what are the objectives and what type
20 of information is ODNR looking for? And you can feel
21 free to refer back to the MOU.

22 A. Thank you.

23 If we go back to the MOU, let's see here.
24 It's in the second paragraph. There are five of
25 them. And essentially these are the overarching

1 objectives for the entire MOU, and all of the -- all
2 of the surveys in Attachment A, each survey would
3 have individual objectives.

4 Q. And when you refer to paragraph 2, there
5 is one, two, three, four, five enumerated goals,
6 correct?

7 A. Yes.

8 Q. Okay. If you would, please,
9 Ms. Hazelton, turn to page 8 of Applicant's 40.

10 A. Okay.

11 Q. With regard to the "Extensive" category
12 for these guidelines and the radar monitoring
13 associated with that category, it states "Marine
14 radar should be used to monitor nightly passage
15 rates, 5 nights a week from 15 April to 31 May, and
16 15 August to 31 October." Do you see that?

17 A. I do.

18 Q. Five nights a week is approximately
19 70 percent of the time; is that correct?

20 A. That sounds about right.

21 Q. Do you know why the dates April 5 to
22 May 31 are set forth?

23 A. I believe that those are generally -- the
24 idea is that there would be migration during that
25 time of songbirds.

1 Q. Okay. So do you understand those dates
2 to be the time when peak migration occurs for
3 songbirds?

4 A. Peak migration can occur a lot of
5 different times, but perhaps if it was an average of
6 an average of an average, those dates may come out to
7 be about right, yes.

8 Q. Okay. And is that the same for August 15
9 through October 31?

10 A. I believe so, yes.

11 Q. Thank you.

12 If you turn to the next page, page 9, the
13 last full sentence in the indented paragraph. It
14 states "Due to reduced detectability, monitoring
15 should not be conducted on nights of heavy rain or
16 fog." Do you see that?

17 A. I do.

18 Q. So ODNR recommends that radar monitoring
19 not be conducted on nights of heavy rain; is that
20 accurate?

21 MR. SIMMONS: Your Honor, I am just going
22 to note a continuing objection to this line of
23 questioning to the extent that it does refer to the
24 terrestrial protocol, and Ms. Hazelton has already
25 made the distinction that this is an aquatic project.

1 ALJ ADDISON: Thank you. I think she's
2 also testified that these were to be used as somewhat
3 of a guideline for this project, so I'll allow her to
4 answer, but please provide any clarification you feel
5 is necessary.

6 THE WITNESS: Okay. Thank you.

7 Q. Thank you.

8 A. I do see that sentence.

9 Q. Okay. And ODNR does not recommend
10 gathering radar monitoring data during nights of
11 heavy rain, correct?

12 A. At the time this was written in 2009, for
13 terrestrial projects, that looks like that was the
14 recommendation, yes.

15 Q. Okay. Do you know, has there been an
16 update to these guidelines?

17 A. No, there has not.

18 Q. Okay. Thank you.

19 If you would please turn to page 13.

20 A. Okay.

21 Q. There is a heading titled "Mitigation
22 measures" which continues on to the next page.

23 A. Yes.

24 Q. The second sentence of the first
25 paragraph -- this is a long one, I apologize -- "When

1 mortality rates are within 1 standard deviation above
2 the regional average, mitigation measures should be
3 employed to curtail impacts to Ohio's wildlife
4 resources and bring the mortality rate for the
5 facility to the regional average or below. While the
6 DOW" -- does that mean Division of Wildlife?

7 A. Yes, it does.

8 Q. Thank you. -- "will require the facility
9 to take action and monitor the results, specific
10 mitigation measures will not be mandated." Did I
11 read that correctly?

12 A. I believe you did, but I think I've lost
13 track of where you were unfortunately. Page 13 --
14 not that I am asking you to reread it, I am familiar
15 with the language, so.

16 Q. Sure. Page 14.

17 A. Page 14. Okay. And you said first
18 paragraph?

19 Q. Correct. The second sentence, second and
20 third sentence.

21 A. Uh-huh.

22 Q. Is it accurate that for land-based wind
23 projects, Division of Wildlife and ODNR will not
24 mandate specific mitigation measures?

25 A. Right. It says it won't mandate specific

1 mitigation measures, but it doesn't say mitigation
2 will be mandated. So, again, it will be up to the
3 Applicant to determine what may be appropriate at
4 that point. That's always been the goal of these
5 protocols and, again, what we use as our basis for
6 this project as well.

7 Q. Okay. To have the Applicant determine
8 what may be appropriate as far as mitigation
9 measures, is that what you stated?

10 A. Yes.

11 Q. The following sentence states "Rather,
12 the DOW will work collaboratively with the facility
13 operators to develop an economically tenable
14 mitigation strategy with reasonable likelihood of
15 reducing mortality rates to the regional average or
16 below." Do you know what that means, "economically
17 tenable mitigation strategy"?

18 A. Again, it means balancing the
19 responsibilities of ODNR in regard to public trust of
20 animals, so protection of wildlife, and also
21 balancing it with the needs of the company which is
22 to produce power and make a profit essentially.

23 Q. And if you turn to the next page, please,
24 Ms. Hazelton, the last sentence. It looks like that
25 goal is reiterated. It states "Where possible, the

1 goal is to find a workable solution for minimizing
2 mortality to wildlife while having as small an impact
3 on the site's economic viability as possible." Is
4 that essentially a rereading of the sentence we just
5 read on page 14, just stated a different way?

6 A. Yes, our goal is always to work with the
7 Applicant.

8 Q. Ms. Hazelton, do you have the Joint
9 Stipulation, which is Joint Exhibit 1, in front of
10 you? It looks like this.

11 A. Yes.

12 Q. Do you also have the Staff Report?

13 A. I do.

14 Q. Will you please start by referring to
15 page 47, I believe it is in the Staff Report. Thank
16 you.

17 A. Okay.

18 Q. I am looking specifically at Condition
19 18.

20 A. Yes.

21 Q. It states "At least 60 days prior to
22 commencement of construction, the Applicant shall
23 submit an avian and bat impact mitigation plan which
24 incorporates the most current survey results and
25 post-construction avian and bat monitoring plan to

1 the ODNR and Staff for review and acceptance that
2 implementation of the plans would be effective in
3 avoiding significant impacts to avian and bat
4 species." Do you interpret that as requiring
5 submission of a post-collision monitoring plan prior
6 to commencement of construction?

7 A. The post-collision monitoring plan is
8 part of this. However, I believe in my testimony,
9 and later in Condition 19, it's clarified to indicate
10 that the collision monitoring technology we recognize
11 is still under review and has not been established
12 yet. It hasn't been decided upon by the Applicant
13 which technology they would like to pursue. So,
14 again, we would like to use Condition 19 as a
15 placeholder for that until that's determined.

16 And Condition 18 would include the
17 collision monitoring plan as part of the
18 post-construction survey, again as a placeholder, it
19 would be part of it.

20 Q. And the reference, in 18, to "significant
21 impacts to avian and bat species," is there a
22 definition associated with "significant impacts"?

23 A. No, not at this time. The reason we
24 haven't defined it is twofold. The first reason is
25 that significant impact could be different depending

1 on which species you are referring to. For instance,
2 killing one Indiana Bat may be a little different
3 than killing one Big Brown Bat which is a little bit
4 more common.

5 And the other reason is that, again, not
6 understanding how collision monitoring or a lot of
7 post-construction methods will be performed and what
8 information will be provided, we don't really know
9 how to make that determination because we don't know
10 what data we will have in hand to review to make that
11 determination; so, again, it hasn't been defined for
12 those reasons.

13 Q. When you say you don't know what data
14 you'll have in hand, so is it possible for the
15 Applicant to provide you any post-construction
16 collision monitoring data before the project is
17 operational?

18 A. I don't understand how that's possible if
19 post-construction is after it's constructed. I'm
20 sorry, could you rephrase? Maybe I misunderstood.

21 Q. Is there a method by which the Applicant
22 can demonstrate the post-collision technology prior
23 to the operational phase?

24 A. It is possible. And, again, in my
25 testimony, I clarify that. Specifically what we

1 would be looking for, which is pretty much a standard
2 for any technology that you are exploring, would be
3 to test it in a lab and then test it in a real world
4 situation where you know the answer, meaning you know
5 how many targets you should be expecting to get
6 results from, and then you look at the information
7 and determine whether it's accurate or not. So
8 that's the type of information we would be looking
9 for, and I do think it's possible that the Applicant
10 could demonstrate that prior to construction.

11 Q. Let's look at Staff Report Condition 19,
12 please.

13 A. Okay.

14 Q. It starts off "Turbines shall be
15 feathered completely from dusk to dawn from March 1
16 through January 1...." Obviously turbines cannot be
17 feathered if the project is not operational, correct?

18 A. The project can be built and operational,
19 but they would need to be feathered during a portion
20 of the operational time.

21 Q. But this assumes that the project is
22 operational, correct, if you are requiring
23 feathering?

24 A. It's required until the condition is met,
25 so I would say it's assuming that the condition has

1 not been met and the project has been constructed.

2 Q. "Turbines shall be feathered completely
3 from dusk to dawn from March 1 through January 1
4 until the Applicant has demonstrated that the
5 post-construction avian and bat collision monitoring
6 plan is sufficient, as determined by the ODNR in
7 consultation with Staff. The ODNR may approve
8 modifications to turbine operations for testing
9 purposes."

10 With regard to "modifications to turbine
11 operations," obviously this assumes that the project
12 is operational and that ODNR is going to permit
13 modifications to test the collision monitoring,
14 correct?

15 A. Yes, that's the option that's given in
16 there, yes.

17 Q. Okay. Condition 19 does not specifically
18 in its wording, and as stated here, provide a path
19 for the Applicant to demonstrate its
20 post-construction avian and bat collision monitoring
21 prior to operation, does it?

22 A. It doesn't mean that they can't. It just
23 says if the -- if the project is operational without
24 an approved collision monitoring technology, then
25 this is what will be required in order to ensure

1 minimum adverse environmental impacts. It doesn't
2 state it one way or the other. It's meant to be open
3 so that it's up to the Applicant to determine the
4 timeline and when they comply with what.

5 Q. Is it your testimony that the Applicant
6 can, through lab testing, demonstrate that a
7 post-collision monitoring -- post-construction avian
8 and bat collision monitoring plan is sufficient?

9 MR. SIMMONS: Objection. I think he has
10 mischaracterized the testimony.

11 Q. Feel free to clarify.

12 ALJ ADDISON: I will allow her sufficient
13 latitude in her answer.

14 THE WITNESS: Could you repeat the
15 question, please?

16 Q. Maybe.

17 Is it your testimony that Icebreaker can
18 demonstrate its post-construction avian and bat
19 collision monitoring plan is sufficient through lab
20 testing?

21 A. A portion of what they could do is
22 demonstrate it through lab testing. That would be
23 one of the options. It doesn't mean it's limited to
24 just that. It's -- it's an example of what we would
25 expect any technology to undergo as part of

1 best-faith efforts in proving it.

2 Q. Do you have the Joint Stipulation in
3 front of you?

4 A. I am sure I do.

5 Q. Specifically page 6 has the stipulation
6 conditions.

7 A. Yes.

8 Q. It states "The Applicant shall submit a
9 post-construction avian and bat collision monitoring
10 plan and shall demonstrate that, considering the
11 state of available technology, the plan is sufficient
12 either prior to construction through the lab and
13 field testing, or during operation."

14 The inclusion of "prior to construction
15 through lab and field testing," that's not
16 inconsistent with your testimony related to Staff
17 Condition 19 and its requirements; is that accurate?

18 A. No, that was one of the options in the
19 Staff investigation.

20 Q. Okay. And Staff Condition 19, are you
21 aware that for the songbird taxa, most fatalities
22 occur in spring and fall?

23 A. For what area? What's the scale that you
24 are referencing and where?

25 Q. Totals throughout the United States.

1 A. Oh, that's very broad. I'm not aware of
2 that.

3 Q. Well, are you aware of when most songbird
4 fatalities related to wind turbines occur in Ohio?

5 A. Generally speaking, again, we only have
6 let's say two projects that we have post-construction
7 data from currently, so it's a very limited scope,
8 and all of those projects are in agricultural land in
9 western Ohio. Again, that we currently have data
10 for. So based on those projects generally, the
11 passerine fatalities tend to occur in spring and in
12 fall during migration.

13 Q. And do most bat fatalities occur during
14 the fall migration?

15 A. Again, most fatalities occur during all
16 times of the year that we've surveyed, spring,
17 summer, and fall. Generally, we see an increase in
18 the fatalities in midsummer through fall, that would
19 be the highest time of the year that we see numbers
20 of fatalities for bats, yes.

21 Q. The risk assessment completed for this
22 project indicated that other than migration,
23 songbirds are not expected to use this project site.
24 Do you dispute that conclusion?

25 A. I don't dispute it. I don't imagine that

1 a songbird would use the middle of the Lake if they
2 weren't migrating, so I think the highest risk would
3 be during migration.

4 Q. So the highest risk to songbirds related
5 to this project is going to be spring and fall; is
6 that correct?

7 A. Yes, I would imagine so.

8 Q. Staff Condition 19 requires feathering
9 from March 1 through January 1.

10 A. Uh-huh.

11 Q. Based upon your experience with wind
12 farms in Ohio and knowledge of wind farms in Ohio,
13 are you aware of such curtailment being applied to
14 any other project?

15 A. No. This curtailment scheme hasn't been
16 applied to any other project. Most other projects
17 are -- have -- have decided to get a U.S. Fish and
18 Wildlife Service habitat conservation plan or
19 incidental take permit which does require curtailing
20 of 6.9 meters per second during migratory periods of
21 spring and fall. This project, to the best of my
22 knowledge, hasn't decided to do that.

23 Additionally, other projects in Ohio
24 provide pre-construction surveys and have established
25 methods for post-construction prior to applying for

1 the Power Siting Board certificate.

2 Q. Are you familiar with wind projects and
3 regulations related to wind projects in any other
4 states other than Ohio?

5 A. To the best of my knowledge, many other
6 states other than Ohio, New York, and maybe one up
7 north, do not have standardized protocols or
8 regulations regarding wildlife.

9 Q. Okay. Why, in Staff Condition 19, is the
10 curtailment required for March 1 through January 1?

11 A. We feel that there is a risk to wildlife
12 that would be using the project site, and wildlife
13 would be using the project site from those time
14 periods for various reasons. Again, we can't -- we
15 understand that the nature of the risk is to likely
16 birds and bats primarily. However, we don't have the
17 data yet to quantify that risk and that's what we are
18 looking for with the pre-construction surveys, as
19 well as the post-construction surveys, so we can
20 verify if that prediction is correct.

21 Q. What wildlife is at risk from March 1
22 through, say, April 30?

23 A. Bats are known to migrate into April, so,
24 again, they may be coming through in March, but we
25 know for sure they're usually at their homesites

1 around beginning of April, as well as waterfowl. We
2 have specific hunting seasons for a reason and that's
3 because the birds are migrating through, and usually
4 waterfowl are at the very earliest part of the spring
5 and very latest part of the fall or well into early
6 part of winter.

7 Q. If -- are you aware of ODNR's two-year
8 aerial waterfowl survey?

9 A. I am.

10 Q. And are you aware that that concluded
11 that only six species of waterfowl regularly occurred
12 at the project site?

13 A. I'm aware that it was a snapshot of one
14 day a week for a certain period of time. And I do --
15 I do -- I don't disagree with what you just stated.
16 It was low diversity. But again, that was during the
17 daytime, and so I don't think the scope is
18 necessarily broad enough to answer the questions that
19 we're trying to answer here with this project at the
20 project site.

21 Q. With regard to the curtailment through
22 January 1, what wildlife is ODNR seeking to protect
23 in November and December?

24 A. Typically, it is my understanding again
25 that waterfowl will be migrating south and also, you

1 know, using the Lake. Waterfowl use water. So
2 waterfowl will be on Lake Erie and using it at that
3 time, so we are concerned about that and
4 understanding their use, especially coming through at
5 nighttime and during the day. Also Sandhill Cranes
6 tend to migrate later. I'm not really sure. That's
7 the best of my knowledge.

8 Q. Thank you.

9 A. You're welcome.

10 Q. Were you here for Mr. Karpinski's
11 testimony?

12 A. No, I wasn't.

13 Q. Have you reviewed Mr. Karpinski's
14 prefiled testimony?

15 A. I have.

16 Q. You are aware that he has -- his
17 testimony indicates that specifically this Staff
18 Condition 19 makes this project unfinanceable?

19 A. I am aware of that, yes.

20 Q. Do you have any finance background?

21 A. Nothing official, no.

22 Q. Okay. Have you ever attempted to seek
23 financing for the construction of any project?

24 A. Other than house renovations, no.

25 Q. Do you have any reason to dispute

1 Mr. Karpinski's testimony that Condition 19 makes
2 this project unfinanceable?

3 A. I believe that's his position, so no, I
4 don't refute his position.

5 Q. Okay. And generally with regard to
6 ODNR's land-based wind guidelines, the stated goal,
7 in at least two places, was to reduce risk to
8 wildlife, while not imposing an economic burden upon
9 the operator. Would you agree with that?

10 A. I would say it's meant to strike a
11 balance between regulatory requirements as well as
12 the Applicant's needs.

13 Q. If Mr. Karpinski's testimony is accurate
14 that Condition 19 -- Staff Condition 19 makes this
15 project unfinanceable, that doesn't strike a balance,
16 does it?

17 A. I would argue that it does strike a
18 balance. Again, the idea is that Staff Condition 19
19 does not necessarily even apply to this project if
20 the Applicant is able to demonstrate that they have a
21 reliable collision monitoring technology essentially
22 prior to operating the turbines.

23 Q. Will you please refer to the Joint
24 Stipulation Condition 19.

25 A. Yes.

1 Q. I'm reading the sentence that starts with
2 "Because this project...."

3 A. Uh-huh.

4 Q. "... is the first of its kind in Lake
5 Erie, if the ODNR and Staff find that the plan is not
6 sufficient, the ODNR and Staff may require turbines
7 be feathered up to 30 minutes prior to sunset to 30
8 minutes after sunrise during peak spring and fall
9 migration periods when cloud ceilings are low." You
10 understand that that condition, that proposed
11 language, provides ODNR the discretion to require the
12 turbines to be feathered, correct?

13 A. It allows for turbines to be feathered
14 during a specific time period. It is not all
15 inclusive of the dates that we feel wildlife would be
16 at risk.

17 Q. Are songbirds most at risk during
18 nighttime? Do you know?

19 A. During migration, I believe so, yes.

20 Q. Okay. And do you know why "cloud
21 ceiling," why that provision was included?

22 A. I believe there are some studies that
23 indicate that birds tend to fly lower, clouds hold
24 them down, and that's certainly one perspective but,
25 you know, there are -- there are a lot of other

1 perspectives, as well, that birds use all of the
2 strati when they are flying and it just depends on
3 conditions. So they are able, certainly, to fly
4 through the clouds to get above that cloud level.
5 So, really, it's weather-dependent. And just to put
6 a general clause about cloud ceilings, again, we
7 don't feel it's protective of wildlife.

8 Q. Okay. Would you agree with me, related
9 to the Icebreaker project, songbirds are at most risk
10 when migrating at night?

11 A. Migrating at night, at night or in early
12 morning, whenever they leave, wherever they -- yeah,
13 when they are going across the Lake, yes.

14 Q. And the proposed Stipulation Condition 19
15 covers that time period, evenings, correct?

16 A. It includes nighttime.

17 Q. Specifically during peak spring and fall
18 migration periods, correct?

19 A. Again, that is not a defined term, but it
20 includes those words, yes.

21 Q. It's not a defined term here, but are you
22 aware that in the draft BBCS peak spring migration
23 and fall migration periods are defined?

24 A. I think it may be defined a lot of
25 different ways in different documents. I know ODNR

1 hasn't defined it. And not that that isn't
2 appropriate, the way it's defined in the BBCS, it's
3 just, again, we don't feel the wording of the
4 Stipulated Condition 19 is protective of wildlife.

5 Q. With regard to the BBCS, is it a
6 requirement that it is finalized pre-construction?

7 A. No. The BBCS technically isn't a
8 required document as part of this process by that
9 name. The goal would be that it would be included in
10 the post-construction monitoring plan. It would have
11 another -- it would have another name. And the
12 reason for that was to avoid any confusion
13 surrounding a BBCS which is a federally-required
14 document when you intend to get an incidental take
15 permit, which this project is not doing, and it
16 doesn't really have any involvement with the State.

17 So we felt that since this was between
18 the State agencies and the Applicant, that we should
19 still use the information, call it something else,
20 and have it be active at a different point in time in
21 the project, which would be prior to construction,
22 with the information that we had gathered at that
23 time, understanding it would still be flexible as the
24 nature of it is.

25 Q. And that other name, is that an adaptive

1 management plan?

2 A. That sounds about right.

3 Q. All right. Do you know what the
4 difference is between a BBS and an adaptive
5 management plan? BBCS, excuse me.

6 A. That's okay. I understood what you
7 meant.

8 No. This is the first time we've used an
9 adaptive management plan generally, but it's the
10 same. I think the intent is the same. My
11 understanding is a BBCS is a voluntary document up to
12 the point that the incidental take permit is approved
13 as part of that application process.

14 But, again, since the -- this is between
15 State agencies and the Applicant, we wanted to have a
16 different process and a different document to
17 represent that relationship.

18 Q. Thank you.

19 Are you familiar with studies that have
20 shown risk to waterfowl and cranes with relation to
21 wind turbines has been shown to be very low?

22 A. Again, I have reviewed some studies. My
23 job is not to be a technical expert, so I really
24 don't feel that I could say with any confidence that
25 I could refer to one or another as being low or high.

1 Q. Are you aware of studies that have shown
2 that for offshore wind projects, waterfowl actually
3 demonstrate an avoidance trait, they actually fly
4 around or avoid the turbines?

5 A. I think there was a study in Europe that
6 had -- it was radar-based and I believe it was trying
7 to show geese moving through a wind project. And I'm
8 not sure that the conclusion was they avoided it or
9 not. It seemed like the targets just kind of
10 disappeared. It wasn't very clear if they were
11 actually moving around it. So, again, I am not a
12 radar expert, so I wouldn't want to make that
13 conclusion.

14 Q. Ms. Hazelton, the Staff Report, Staff
15 Exhibit 1, will you please flip to page 48 and
16 specifically Condition 22.

17 A. Yes.

18 Q. And it's accurate that with regard to
19 Condition 22 in the Staff Report, Stipulation
20 Condition 22, the difference is, or disagreement is
21 with regard to (c) and (d)?

22 A. I believe that's right.

23 Q. All right. Thank you.

24 The Staff Report states "The Applicant
25 shall implement a radar monitoring program...." Does

1 "a radar monitoring program" refer to both pre- and
2 post-construction radar monitoring?

3 A. It does.

4 Q. Okay. In 22(c), "Radar must suppress
5 false detections from insects, wave clutter, and
6 weather and without downtime bias with respect to
7 biological periods (dawn, dusk, night) (80 percent or
8 greater of survey time producing viable data,
9 including during heavy precipitation events)."

10 A. Uh-huh.

11 Q. We've read from ODNR's land-based
12 guidelines which specifically recommend not engaging
13 in radar monitoring during heavy precipitation,
14 correct?

15 A. Correct.

16 Q. Okay. With regard to Staff Condition
17 22(c), is there any allotment for heavy precipitation
18 events with regard to the 80-percent standard?

19 A. Yes. It's built into the 80 percent
20 meaning there is 20 percent flexibility built into
21 the 80-percent standard for whatever reason the
22 Applicant deems necessary.

23 Q. Is there any scientific basis, that you
24 are aware, for this 80-percent standard?

25 A. No. Again, the 80 percent was referenced

1 in discussions before I started this position.

2 Again, through discussions, I think, that precluded
3 the Diehl Study, which is why it was included in some
4 form in that -- in that -- his report.

5 And also, like I said, before the Staff
6 Report was -- was finalized, through discussions with
7 experts at U.S. Fish and Wildlife and at USGS, we
8 confirmed that 80 percent was -- was a viable
9 percentage based on land-based radar and generally
10 how often they are able to operate and use full data
11 that's gotten from land-based systems.

12 Q. In these discussions -- well, first off,
13 Dr. Diehl, in his report, stated the 80-percent
14 standard was weather permitting, correct?

15 A. I think, in the beginning, it was weather
16 permitting. Again, I didn't see the RFI or the
17 guidelines that he was given for his review. I don't
18 know what guidelines he was given for his review.

19 Q. Okay. Do you still have Applicant 37 in
20 front of you?

21 A. I do.

22 Q. On page 24 there is a reference to
23 greater than 80 percent of available time. Do you
24 understand "available time" to mean to not -- to mean
25 that there is an allotment for heavy-precipitation

1 events?

2 A. Again, I can't say for sure what that's
3 in reference to. It's possible. "Available time"
4 could also just mean when it's operating, so the
5 entire time it's operating would be available time.
6 Again, I can't say for sure. I don't know.

7 Q. With regard to the conversations with
8 U.S. Fish and Wildlife and USGS related to the
9 80 percent, did any of the individuals you spoke with
10 indicate to you that there was a scientific basis for
11 this 80 percent?

12 A. That wasn't the question I asked them. I
13 asked them specifically what the capabilities of a
14 radar system are generally, and what they are able to
15 track, when they are able to track it. And I wanted
16 to understand the give and take, meaning the pros and
17 the cons of the systems because, again, I am not a
18 radar expert, so I needed to know some information.

19 My other understanding is that the other
20 reason for the 80 percent is that it's an
21 understanding specifically of this environment
22 because, unfortunately, we know so little offshore.
23 It's a bit of a black box biologically because it is
24 inherently difficult to study. So the more
25 information that we have, the better off we are going

1 to be in making informed decisions for this project.

2 Q. So is it accurate to state that you are
3 not aware of any scientific basis for the 80-percent
4 standard?

5 A. Do you mean published papers? What do
6 you mean by "scientific basis"? I'm just trying to
7 understand.

8 Q. You've indicated that in conversations
9 with USGS and U.S. Fish and Wildlife Service that the
10 80-percent standard was derived at based upon prior
11 studies and data that had been collected; is that
12 accurate?

13 A. I asked them questions about the
14 performance of their radar systems on land.

15 Q. Right. So is the 80 percent based upon
16 the performance of land-based radars and how much of
17 the time data, viable data, was collected?

18 A. Yes. It was based on that, meaning that
19 I was informed that typically a radar system can
20 perform and collect viable data 95 to 98 percent of
21 the time on land; so, therefore, we thought it was
22 appropriate and responsible to, of course, give
23 leeway for that because there are uncertainties
24 around this project and putting a radar system on a
25 barge to track birds and bats, which has not been

1 done to the best of my knowledge, which is why we
2 built in an extra 15 or so percent to give that
3 leeway.

4 Q. Staff Condition 22(a) states "Radar must
5 be able to detect and track directional movement and
6 altitude of individual 10-gram and larger
7 vertebrates." That standard is not affected or
8 requires the 80-percent standard, does it?

9 A. I would say that, together, the viable
10 data requires that 80 percent. So, in general, the
11 radar system needs to be capable of tracking this,
12 but no, there is not a specific amount of time. But
13 I wouldn't think that if it does it once, that would
14 be acceptable. It would have to be generally
15 operable.

16 Q. But not necessarily 80 percent of the
17 time, correct?

18 A. Well, if that's the information that the
19 Applicant provides, then certainly we would take that
20 into consideration.

21 Q. Well, is it possible that the study
22 questions and the goals set forth in Staff Condition
23 22 could be answered or achieved if the radar
24 produces viable data less than 80 percent of the
25 time?

1 A. We would have to look at that data and
2 look at the timing. As the Staff Report and the
3 condition in the Staff Report, No. 22, indicates,
4 80 percent is the threshold.

5 Q. But the goal -- the purpose of the radar
6 is to meet the goals set forth in 22(a), correct?

7 A. Generally, yes. Those are the
8 overarching guidelines.

9 Q. Can those goals be met if the radar
10 produces data less than 80 percent, viable data less
11 than 80 percent of the time?

12 MR. SIMMONS: I am going to note an
13 objection. Counsel referenced goals in the intro
14 language of 22. And I don't know if that term
15 specifically included "goals" specifically.

16 MR. SECREST: Goals, requirements, I
17 don't have a preference.

18 ALJ ADDISON: As long as you understand
19 Mr. Secrest's question, I believe -- and she can
20 provide any clarification that she finds necessary,
21 but do you understand these objectives or goals or
22 requirements to be -- or do you view those words to
23 be used interchangeably, or is there a specific
24 terminology that we should all use from this point
25 forward?

1 THE WITNESS: I don't think there is a
2 specific terminology as long as we understand that
3 what's in the Staff Report condition is not -- those
4 are the overarching directions for moving forward
5 with the radar protocol.

6 As far as if we could track individuals,
7 10 grams or larger, 80 percent of the time or less, I
8 think yes, the system could track at 80 percent of
9 the time or less. It wouldn't be a reliable system,
10 but it could do it. Would it have the ability to
11 collect data continuously less than 80 percent of the
12 time? Again, that's semantics. I guess it could be
13 continuous when it's not working. Again, that's not
14 the idea of the -- of this condition.

15 Really what's meant is that we feel that
16 if we have 80 percent of the data during those survey
17 periods, so 80 percent of the time we feel we will
18 have a good understanding of what the usage of birds
19 and bats is at the project site which is still what
20 we don't understand.

21 Q. So the goal is determine usage of the
22 project site by birds and bats?

23 A. That's one of it, yes, one of them.

24 Q. What other goals are there?

25 A. To document that so that it can be

1 compared to post-construction. We are talking about
2 radar specifically, right?

3 Q. Correct.

4 A. Okay.

5 Q. Ms. Hazelton, would you please refer to
6 Joint Stipulation 22. It's on page -- it starts on
7 page 6, carries over to 7.

8 A. Yes.

9 Q. We are looking at (c) again obviously.
10 The Applicant has proposed "80 percent or greater of
11 survey time producing viable data, unless precluded
12 by heavy precipitation or high sea events." Do you
13 see that?

14 A. I do.

15 Q. And you said you did read Mr. Karpinski's
16 prefiled testimony, correct?

17 A. I did.

18 Q. Do you understand what "high sea events"
19 means?

20 A. I believe he defined it or at least
21 referenced it in his testimony as 6 feet or higher,
22 waves of 6 feet or higher.

23 Q. Correct.

24 A. Okay.

25 Q. Are you aware that even if the unit

1 remained at the site during high sea events, it would
2 not be able to collect data?

3 A. I'm really not aware of that. I am not a
4 radar expert or barge expert, so I couldn't speak to
5 that.

6 Q. Okay. Do you understand that when the
7 Applicant is asking for an allowance for high sea
8 events, that is only an allowance for when the barge
9 has to be pulled from the site, not if the rocking
10 motion results in the inability to obtain sufficient
11 data?

12 A. Certainly our goal is not to create an
13 unsafe condition with this barge. That would be
14 unreasonable. However, it's unclear exactly the time
15 that it would take to move the barge and how often
16 those events necessarily would occur.

17 And specifically the issue that the ODNR
18 and Power Siting Board Staff have with the stipulated
19 condition is that there isn't necessarily a floor to
20 a requirement that must be met. So the way it's
21 written in the stipulated condition, if we have a
22 terrible year and we get 10 percent of the survey
23 time, according to this that could be allowable if it
24 was due to high sea events, and then we have to move
25 forward, and I don't think that's the intention of

1 the Staff Report nor would it fulfill the obligations
2 of the agencies.

3 Q. Well, if you had a floor of, say,
4 50 percent, would that fulfill the obligations?

5 A. The way the Staff Report reads,
6 80 percent is the floor. I really couldn't speculate
7 on a certain amount without looking at the quality of
8 the data.

9 Again, we are looking for specific time
10 periods specifically understanding -- just the things
11 we've been discussing -- migration. So if -- if we
12 didn't have any information about migration, but we
13 still had 50 percent or 80 percent or 79 percent,
14 let's say, those again would be -- would -- may be
15 issues because we don't understand what's going on
16 during those peak times that we see as being
17 inherently more risky than others.

18 Q. So you can't speculate on 50 percent, but
19 isn't ODNR speculating that 80 percent is a
20 requirement to produce viable data?

21 A. That's what we feel comfortable with,
22 yes.

23 Q. And, again, did you hear or read
24 Mr. Karpinski's testimony related to Condition 22(c)
25 making the project unfinanceable?

1 A. I believe he made that statement, yes.

2 Q. Do you have any reason to dispute that
3 statement?

4 A. No, I don't have reason to dispute his
5 statement.

6 Q. With regard to the allotment requested by
7 the Applicant, in Joint Stipulation 22(c), for heavy
8 rain, are you aware that birds typically don't
9 migrate in heavy rain?

10 A. I understand they wouldn't take off in
11 heavy rain, but certainly if a storm comes up and
12 they are over Lake Erie, they will be there. They
13 don't have anywhere to go.

14 Q. Do you understand that if the Applicant
15 has to pull the barge from the project site, that it
16 is going to be collecting NEXRAD data during the time
17 the barge is off the site?

18 A. I believe I was aware of that idea when
19 we first heard that the barge would have to be pulled
20 from the site, which was sometime in early September,
21 late August perhaps. And I was aware of a proposal
22 to use NEXRAD to supplement that information.

23 Q. And, I'm sorry, did you say you first
24 learned the barge would have to be pulled from the
25 site in late August or early September?

1 A. Uh-huh.

2 Q. So do you not recall conversations, in or
3 around May of this year, related to the barge
4 potentially having to come off the project site
5 during high sea events?

6 A. No, I'm sorry, I don't recall discussing
7 removal of the barge. I recall our conversations
8 just around the potential of using a barge.

9 Q. With regard to Stipulation Condition
10 22(g), it states "Radar must collect data for at
11 least two spring/fall migratory seasons
12 post-construction. If the Applicant demonstrates to
13 the ODNR's satisfaction that a second spring and/or
14 fall post-construction radar survey is unlikely to
15 result in the collection of additional data to inform
16 the question of avoidance/attraction effects, the
17 ODNR may, in its sole discretion, determine that the
18 Applicant does not need to conduct a second spring
19 and/or fall post-construction radar survey."

20 The Joint Stipulation differs from Staff
21 Condition 22(g) in that the Stipulation provides the
22 ability to forgo that second year of
23 post-construction monitoring; is that accurate?

24 A. That's correct.

25 Q. Okay. And the Joint Stipulation only

1 provides the possibility of forgoing that second year
2 if ODNR decides the second year is not necessary,
3 correct?

4 A. Correct, with the qualifier that it
5 would -- we would only be able to ask for that if
6 we -- you know, if we thought avoidance and
7 attraction effects had already been satisfied,
8 meaning the first year, the answer to that question.

9 I think generally, again, given the
10 nature of this project and where it's located and how
11 few studies have actually occurred at the project
12 site, ODNR likely would not be satisfied with a
13 single year of radar studies, knowing the information
14 that could be learned from it.

15 Q. Okay. So given that Stipulation
16 Condition 22(g) provides ODNR with sole discretion as
17 to whether to forgo that second year, how is that
18 materially different from Staff Report Condition
19 22(g)?

20 A. Staff Report Condition 22(g) is
21 transparent in the intended recommendations of Staff
22 and ODNR, meaning that we intend to have two years of
23 data in order to really understand avoidance and
24 attraction effects as well as the impacts of the
25 project once it's operating.

1 One year, as perhaps it's been mentioned
2 up here, I wasn't here for all the testimony, but
3 seasonal usage of the Lake for birds and bats
4 varies -- can vary greatly depending on weather and
5 season; so we really feel, at a minimum, two years is
6 reasonable.

7 Q. And when you say "we feel, at a minimum,"
8 I know your testimony with regard to the 80-percent
9 standard was based upon conversations and input from
10 USGS and U.S. Fish and Wildlife Service, is that the
11 same for the two years of spring and fall migratory
12 studies?

13 A. I'm sure that we discussed that at some
14 point with our -- with our -- with USGS and --
15 probably U.S. Fish and Wildlife, not USGS, but, in
16 general, it would have been their wildlife experts,
17 not -- perhaps not necessarily their radar teams. In
18 addition, we do have expert biologists, within the
19 Division, for different birds, bats, previously; so
20 also, I did ask them their opinions as biologists.

21 Q. Thank you.

22 A. Uh-huh.

23 Q. And if you'll please refer to page 49 of
24 the Staff Report.

25 A. Okay.

1 Q. Looking at Condition 24.

2 A. Yes.

3 Q. It states "If Staff and the ODNR, in
4 consultation with the USFWS, determine the project
5 results in significant adverse impact to wild
6 animals, adaptive management shall be prescribed to
7 the Applicant" and your testimony revises that,
8 correct?

9 A. It expands upon it.

10 Q. What do you mean by "expands upon it"?

11 A. I would say it clarifies it. I don't
12 think it necessarily changes the original meaning of
13 Staff Condition 24. I think it just clarifies that
14 the Applicant certainly would be able to submit
15 mitigation ideas and plans to DNR. It doesn't say
16 they can or they can't here. I wanted to make sure
17 it was clarified that it's the intention of the
18 agencies, as I mentioned, to work with the Applicant
19 throughout this process.

20 Q. Your testimony is Staff Exhibit 3 and
21 specifically page 14, lines 3 through 13, contain the
22 proposed revision to Staff Report Condition 24,
23 correct?

24 A. Uh-huh, yes.

25 Q. With regard to the statement about

1 working with the Applicant or operator, this
2 specifically states, starting in the second sentence,
3 "Within 30 days of receiving notification of the
4 significant adverse impact, Applicant will develop
5 and submit a mitigation plan or adaptive management
6 strategy to OPSB Staff and the ODNR for review to
7 confirm compliance with this condition. Temporary
8 adaptive management may be prescribed until the
9 mutually agreed upon plan is implemented."

10 "Prescribed" doesn't suggest a
11 collaborative effort, does it?

12 A. No. This sentence that you are referring
13 to, "Temporary adaptive management may be
14 prescribed," refers to a situation where the impact
15 is considered severe, and DNR, and potentially in
16 consultation with U.S. Fish and Wildlife, need to see
17 an immediate action taken and don't feel that it's
18 in -- it's not responsible of us to wait for 30 days
19 for the Applicant to respond.

20 Again, the idea is that's temporary, and
21 once we receive the Application, the idea is from the
22 Applicant, that mitigation could be replaced with the
23 Applicant's mitigation at that point.

24 Q. Well, is there any time limit for ODNR to
25 review the proposed mitigation while the temporary --

1 excuse me -- while the temporary adaptive management
2 is in place?

3 A. No. I don't believe it specifically
4 indicates there is a time period in this revision.

5 Q. Okay. So there's no time period as to
6 how long this temporary adaptive management may be
7 prescribed for, correct?

8 A. Not in this language. It certainly isn't
9 in our working practice to draw out something where
10 we feel we can come to an agreement and we're having
11 productive conversations.

12 Q. And with regard to "significant adverse
13 impact," how do you define that?

14 A. Again, it is vague here and it is not
15 defined for the reasons being that significant
16 adverse impact could be different for different
17 wildlife species. Again, I use the -- I use the
18 example of the bat. Indiana Bats are listed. One
19 take of an Indiana Bat would be considered different
20 compared to a take of perhaps the more common Big
21 Brown Bat.

22 Another reason is that we still don't
23 understand how collisions will be monitored, so the
24 effect -- what technology will be used, how it will
25 be able to -- what information it will be able to

1 provide. So, will we have information on species
2 that are colliding with the turbines? Maybe, maybe
3 not. Will we have information regarding if it's a
4 bird or a bat? Maybe not. Maybe we won't even have
5 that level of detail. So it's premature to define
6 this without understanding how it would be measured
7 first.

8 Q. And the revised Condition 24 is triggered
9 by a significant adverse impact to wild animals. And
10 in your testimony, on page 14, line 24, you
11 acknowledge and state "While the definition of wild
12 animals is broad...."

13 So with regard to Staff Condition 24, as
14 revised by your testimony, a "significant adverse
15 impact" is vague, and "wild animals" is broad,
16 correct?

17 A. Yes. It is, again, a statutory
18 responsibility of ODNR to act in the public trust for
19 wild animals and that is a DNR definition. And that
20 would apply to any wind energy facility.

21 Q. Are you aware of any other wind project
22 in Ohio that has this prescribed language associated
23 with it?

24 A. That was No. 24 specifically?

25 Q. Yes.

1 A. There are other -- yes, there are other
2 wind energy projects in Ohio that have similar
3 language prescribed based on the species that were of
4 concern at the time the review occurred.

5 Specifically, there's some conditions
6 that say Applicant shall avoid impacts to mollusks
7 or -- I am trying to think -- amphibians or something
8 like that and, should impact occur, then mitigation
9 will be prescribed. So this is not the first time
10 that similar language has been used.

11 Q. Is it the first time it's been used with
12 regard to the broad definition of wild animals?

13 A. I would say that it's still in line with
14 how it's been used in the past and that our concerns
15 with this project are board, birds and bats and
16 aquatic resources. And while we certainly can't
17 predict the future, conditions do change as far as
18 what's considered common and rare, so this is
19 intending to, again, be very transparent and clear on
20 the responsibility of the Applicant as well as the
21 expectations of the agencies.

22 Q. If the Applicant does not agree with the
23 temporary -- temporary adaptive management that's
24 been prescribed, what is its recourse?

25 A. At this time, I don't know that there

1 would be a recourse. Again, the idea is it's
2 temporary until they come up with something that
3 satisfies all parties. So it's up to them, the time
4 period and how long it takes to get to that process.

5 Q. Well, it's not really up to them because
6 they say -- may submit a proposed mitigation plan,
7 but it's then upon ODNR to act and confirm compliance
8 with that plan, correct?

9 A. As is DNR's responsibility, yes.

10 Q. And the temporary adaptive management may
11 be in place while ODNR reviews.

12 A. That's correct, that's correct.

13 Q. And if the proposal does not work, "If
14 the significant adverse impact persists, Applicant
15 shall be prescribed adaptive management." So
16 temporary adaptive management may be prescribed while
17 ODNR considers the Applicant's response, correct?

18 A. Correct.

19 Q. And whenever that process is resolved,
20 the Applicant shall submit a plan, and if the
21 significant adverse impact persists, then adaptive
22 management is again prescribed, correct?

23 A. That is a possibility. Again, it
24 would -- it would -- it's a cyclical process. At no
25 time does it say the Applicant can't propose another

1 idea. It's meant to be a back and forth between the
2 agencies that are responsible for regulating projects
3 and the Applicant which operates the projects.

4 But, again, it's looking at the
5 responsibilities, specifically ODNR's, since that's
6 who I'm representing, to maintain the wildlife.
7 There is minimum adverse impact to wildlife.

8 Q. Were you aware that the statute and rules
9 for OPSB give OPSB and the Chair the authority to
10 immediately require any activity be suspended for the
11 duration of OPSB's consideration --

12 MR. SIMMONS: I apologize for cutting you
13 off. I would just note an objection. Beyond the
14 scope of her testimony.

15 ALJ ADDISON: Thank you. I will allow
16 the question.

17 A. And I was just going to say I don't have
18 a legal background, so I'm not familiar with all of
19 the statutes for the Ohio Power Siting Board.

20 Q. So you aren't aware that if there is an
21 adverse impact to wildlife associated with this
22 project, that OPSB and Staff have enforcement
23 mechanisms available to them?

24 A. Having gone through this process not even
25 one time yet, I would like to think there would be

1 something in place, but I'm not familiar with it.

2 Q. Fair enough.

3 With regard to that second step, we have
4 the significant adverse impact; we have the temporary
5 adaptive management; we have a plan implemented; if
6 the plan doesn't work, adaptive management is again
7 prescribed. If the Applicant does not agree with
8 that second step of adaptive management being
9 prescribed, what is its recourse?

10 A. Again, I'm not familiar with -- with
11 recourse as far as legal recourse, if that's what you
12 are referring to. According to the condition though,
13 again, they would always have the option of providing
14 an alternative, meaning an adaptive management
15 strategy that would meet -- that would eliminate the
16 adverse impact.

17 Q. Okay. The condition doesn't say that
18 though. It just states that if significant adverse
19 impact persists, the Applicant shall be prescribed
20 adaptive management. It doesn't state they are
21 welcome to review or submit an additional plan, does
22 it?

23 A. No. I don't think we were trying to
24 indicate all the possibilities necessarily or the
25 cycles ad nauseam. It was rather that this is the

1 process that we intend to follow.

2 MR. SECREST: Your Honor, may I approach
3 the witness?

4 ALJ ADDISON: You may.

5 MR. SECREST: Thank you.

6 Your Honor, may I move to have marked the
7 document I just handed Ms. Hazelton as Applicant's
8 Exhibit 55?

9 ALJ ADDISON: So marked.

10 (EXHIBIT MARKED FOR IDENTIFICATION.)

11 MR. SECREST: Thank you.

12 Q. (By Mr. Secrest) Ms. Hazelton, are you
13 familiar with this regulation?

14 A. Yes. I believe it's the Ohio Power
15 Siting Board regulations associated with wind farms.

16 Q. Okay. Thank you.

17 If you please turn to page 5 of 9.

18 A. Yes.

19 Q. (D) is titled "Wildlife Protection,"
20 correct?

21 A. Correct.

22 Q. And No. (4) states "The applicant shall
23 submit a post-construction avian and bat monitoring
24 plan to the board. During operation of the facility,
25 if significant mortality occurs to birds or bats, the

1 applicant will develop a mitigation plan." Do you
2 see that?

3 A. I do.

4 Q. It doesn't state that any adaptive
5 management will be prescribed, does it?

6 A. No, not specifically.

7 Q. And No. (6) states "If construction
8 activities result in significant adverse impact to
9 federal or state listed and protected species, the
10 applicant will develop a mitigation plan or adaptive
11 management strategy." So even if construction
12 results in significant adverse impact to federal or
13 state listed protected species, there is no language
14 relating to prescribing adaptive management, is
15 there?

16 A. Not for construction.

17 Q. Okay.

18 ALJ ADDISON: Can we go off the record
19 for a minute?

20 (Discussion off the record.)

21 ALJ ADDISON: Let's go back on the
22 record.

23 Mr. Secrest.

24 MR. SECREST: Thank you, your Honor.

25 Q. (By Mr. Secrest) Ms. Hazelton, just

1 briefly with regard to your testimony and the
2 revision to Staff Condition 29, I believe you
3 testified before that you don't recall discussions
4 with Icebreaker related to any species other than
5 birds, bats, and fish; is that correct?

6 MR. SIMMONS: I am going to object. I
7 think you said 29.

8 Q. Oh, I'm sorry. 24.

9 ALJ ADDISON: Thank you, Mr. Simmons.

10 MR. SECREST: Thank you.

11 A. Yes, I believe that our discussions were
12 around aquatic, maybe not fish, but aquatic resources
13 which, again, my colleague, Travis Hartman, was
14 overseeing. But specifically for my role, the
15 primary concern was birds and bats.

16 Q. Okay. And with regard to your prior
17 testimony related to the word "prescribing" used for
18 impacts to mollusks; other than that instance, are
19 you aware of any other instances where that term has
20 been used related to a wind project?

21 A. Again, I think it was used in several
22 other wind energy certificates where there was an
23 elevated concern of a specific species, so mollusks
24 being one in one project. Another project, I believe
25 it was the Northern Harrier. Those are the two I can

1 think of, but I'm not familiar with all of them.

2 Q. Okay. Thank you.

3 Ms. Hazelton, do you have in front of you
4 what is Bratenahl Residents 6? I don't know that you
5 do. It is in Mr. Gordon's binder. May I approach
6 the witness, your Honor?

7 ALJ ADDISON: You may.

8 MR. SECREST: Thank you.

9 Q. Ms. Hazelton, do you have in front of you
10 the March 12, 2018, letter from Fish and Wildlife
11 Service?

12 A. I do.

13 Q. The second paragraph states "Regarding
14 potential take of federally listed species, DOE has
15 determined that LEEDCo's Project Icebreaker is not
16 likely to adversely affect Indiana bat, northern
17 long-eared bat, piping plover, rufa red knot, and
18 Kirtland's warbler. The Service concurred with these
19 determinations." Does ODNR concur with those
20 determinations as well?

21 A. I would say, at this point, ODNR does not
22 necessarily concur because, again, we don't have the
23 site specific information that we -- that we are
24 looking for. So we're still holding our judgment on
25 that.

1 Q. The third paragraph addresses
2 pre-construction radar monitoring and references
3 Dr. Diehl's report. And starting in the second
4 sentence, it states "Based on Dr. Diehl's report,
5 LEEDCo subsequently worked with the preferred vendor
6 (Accipiter Radar) to address specific concerns and
7 recommendations. We appreciate that LEEDCo is
8 working with the vendor to address concerns and
9 incorporate recommendations from Dr. Diehl and the
10 Service to increase the reliability of the monitoring
11 program. Accipiter provided LEEDCo with a second
12 proposal that would include placing the radar on a
13 fixed platform, at a water intake crib a few miles
14 offshore. The Service believes both proposals have
15 trade-offs (i.e. vessel based at the project site
16 versus fixed platform several miles away) and
17 uncertainties unrelated to data collection and
18 interpretation. However, both proposals have the
19 potential to contribute meaningfully to migratory
20 bird and bat exposure data for the project."

21 Do you agree that both vessel-based radar
22 at the project site and fixed platform at the intake
23 crib have the potential to contribute meaningfully to
24 migratory bird and bat data related to this project?

25 A. Since we have very little information, I

1 would agree that any information can contribute
2 meaningfully; whether or not it can answer the
3 questions that we are trying to ask here is another
4 question entirely.

5 Q. So do you agree that both of those
6 proposals have the ability to contribute
7 meaningfully?

8 A. They have the potential to contribute to
9 our knowledge base, yes.

10 Q. On the second page, the second paragraph,
11 it states "The Service acknowledges that Icebreaker
12 is a relatively small" demonstration -- "small-scale
13 demonstration project consisting of six turbines and
14 as such has limited direct risk to migratory birds
15 and bats." Do you agree with the Service's
16 statement?

17 A. Generally that may be true but, again, we
18 don't really have the information -- site-specific
19 information. So if "limited" means low, I don't
20 really think we can answer that question. Again, we
21 don't have the information yet.

22 Q. The pre-construction radar monitoring is
23 to inform as to avoidance and displacement, correct?

24 A. That's one of the goals, yes.

25 Q. Right. You will not have avoidance and

1 displacement information until after the project is
2 constructed, correct?

3 A. Correct.

4 Q. Okay.

5 MR. SECREST: May I approach the witness,
6 your Honor?

7 ALJ ADDISON: You may.

8 MR. SECREST: Your Honor, may I move to
9 have this document marked as Applicant's Exhibit 56?

10 ALJ ADDISON: So marked.

11 (EXHIBIT MARKED FOR IDENTIFICATION.)

12 MR. SECREST: Thank you.

13 Q. (By Mr. Secrest) Ms. Hazelton, if you
14 turn to the second page, it's actually numbered the
15 third page of Applicant's Exhibit 56.

16 A. Uh-huh.

17 Q. If you look at the bottom of the page,
18 there is an e-mail from Ms. Nagusky to you, among
19 others, dated June 26, 2018. It says:

20 "Dear Erin and Kate:

21 "Attached please find another version of
22 the radar monitoring protocol, with Todd's margin
23 notes showing what he has done and why. We accepted
24 the earlier paragraph I inserted."

25 If you turn past the e-mails, there is a

1 document titled "Radar Monitoring Protocol for the
2 Icebreaker Project." You've seen that document
3 before, correct?

4 A. Yes, I have.

5 Q. And was that document, to your
6 recollection, attached to this e-mail to you from
7 Ms. Nagusky?

8 A. Likely a draft was attached, yes.

9 Q. Okay. And you replied:

10 "Hi, everyone,

11 "The changes look good - thank you.

12 However, we still need a reference to 'non-biased
13 biological paragraphs -- periods' in that paragraph
14 we are tweaking under "Performance Criteria." It is
15 important to be able to demonstrate how the animals
16 are behaving in the project area during those three
17 time periods."

18 Other than stating the changes look good
19 and a reference to the non-biased biological periods,
20 do you recall suggesting any other revisions to the
21 radar monitoring protocol?

22 A. Prior -- previous to this, there were
23 other drafts and, yes, we had extensive discussions
24 with the Applicant regarding the radar protocol.

25 Q. And were those previous comments or

1 suggested revisions incorporated into what you have
2 before you as a radar monitoring protocol?

3 A. Generally, yes, I believe they were.

4 Q. Okay. Other than -- as of June 29, 2018,
5 other than a reference to non-biased biological
6 periods, are you aware of any other revisions ODNR
7 was requesting to the radar monitoring protocol?

8 A. At the time we had this, we will call it
9 a "generally final draft," it still needed to undergo
10 internal approval, so that would mean ODNR leadership
11 as well as legal counsel, and so that is where it
12 would have gone from there.

13 Q. So where is it right now?

14 A. Right now, I believe we've put this on
15 hold until we can get through this hearing, until we
16 move forward with finalizing the radar protocol.

17 Q. Based upon your recollection though and
18 what you see in front of you as radar monitoring
19 protocol for the Icebreaker project, are there any
20 revisions or suggestions of ODNR's that have not been
21 incorporated into this document?

22 MR. SIMMONS: I am going to object to
23 this line of questioning in that Ms. Hazelton has
24 expressed that this under management and legal
25 review. I would also object to the extent that

1 previous drafts and comments weren't -- weren't
2 attached to this exhibit regarding possible changes
3 that had been recommended by Ms. Hazelton or other
4 staff at ODNR.

5 ALJ ADDISON: Thank you, Mr. Simmons.

6 Mr. Secrest.

7 MR. SECREST: I'm not interested in any
8 legal changes to the document, but Ms. Hazelton has
9 indicated there are extensive drafts and discussions.
10 I am interested in whether or not the technical
11 revisions or requirements or criteria that ODNR has
12 requested be added to this document have, in fact,
13 been added.

14 ALJ ADDISON: I will allow the question.

15 A. So generally a lot of the technical
16 details were added. However, it is the process to
17 send documents again through -- through our -- our
18 leadership as well as our legal counsel to ensure
19 that technical requirements are interpreted
20 correctly. So that's where it is now and that's all
21 I can say about that.

22 Q. Who, from ODNR, took the lead in
23 negotiating the radar monitoring protocols with
24 Icebreaker?

25 A. It was again a collaborative effort just

1 as everything has been, but generally it was the same
2 team. At least on the bird and bat side, it would
3 have been Kate Parsons and myself.

4 Q. The individuals copied on the e-mail?

5 A. Probably so, yes. Yes.

6 Q. Ms. Hazelton, you should have in front of
7 you the testimony of Rhett Good. I'm sorry. You
8 have in front of you the Bird and Bat Conservation
9 Strategy, correct?

10 A. Yes. Yes, I do.

11 Q. Which was Attachment No. 1 to Mr. Good's
12 testimony. Excuse me, Attachment No. 2 to Mr. Good's
13 testimony. Are we all on the same page?
14 Ms. Hazelton, will you please refer to page 7 of the
15 Bird and Bat Conservation Strategy.

16 A. Yes.

17 Q. This section is titled "Summary of Agency
18 Consultations." And on pages 8 and 9, 10 and 11, it
19 lists various interactions between Icebreaker and
20 agencies including ODNR. Do you see that?

21 A. I do.

22 Q. Okay. And I assume, given your start
23 date of May 1, 2017, you weren't involved in some of
24 these directly. However, after your start date,
25 starting on June 9, 2017, there was a discussion that

1 included ODNR. After that date, did the remainder of
2 the entries, to the best of your recollection,
3 capture interactive or collaborative meetings or
4 discussions between Icebreaker and agencies?

5 A. I have no reason to say that they don't.
6 I'm unfamiliar with the January 9, 2018, meeting in
7 Bloomington, Minnesota.

8 Q. You weren't in attendance?

9 A. No, I was not.

10 Q. And ODNR has a draft of this BBCS; is
11 that correct?

12 A. Yes, we do.

13 Q. Okay. And you are aware that this will
14 be finalized prior to construction; is that accurate?

15 A. I know that it won't be called the "BBCS"
16 but something similar. It would be required for the
17 post-construction monitoring plan, to be included in
18 the post-construction monitoring plan, which would be
19 required to be finalized before construction, yes.

20 Q. Thank you.

21 Ms. Hazelton, are you aware that
22 Icebreaker has committed to feathering the blades of
23 the turbines during late fall and -- late summer and
24 fall migration related to bats?

25 A. I believe in the BBCS, it mentions

1 feathering at the manufacturer's recommended cut-in
2 speed which is, I forget the actual number, 5.3
3 meters per second, or I may be misquoting. That's
4 typically lower than the feathering that's done on
5 land during those time periods.

6 Q. Okay. And you are aware Icebreaker is
7 committed to that feathering, correct?

8 A. Yes.

9 Q. And are you aware that measurement has
10 been recommended by the American Wind Energy
11 Association to reduce bat mortalities?

12 A. That was one of the recommendations, yes.

13 Q. Okay. Do you have any knowledge as to
14 communications between Icebreaker and U.S. Fish and
15 Wildlife Service related to any take permit?

16 A. No, I'm sorry, I don't.

17 Q. And ODNR approved Icebreaker's aerial
18 waterbird survey protocol, correct?

19 A. Correct.

20 Q. I think you had indicated that earlier,
21 right?

22 A. Yes.

23 Q. With regard to the pre-construction radar
24 monitoring, are you aware that the radar cannot be
25 used to determine if protected species are present?

1 A. I'm aware of that, yes.

2 Q. Thank you.

3 In the discussions with U.S. Fish and
4 Wildlife Service and/or USGS related to the
5 80-percent radar, was it discussed as a goal as
6 opposed to a hard requirement?

7 A. That wasn't discussed with USGS or U.S.
8 Fish and Wildlife Service. That wasn't my question
9 to them.

10 Q. So did they recommend it to you as a goal
11 or as a requirement that should be included in the
12 Staff Report or any conditions related to the
13 permitting process?

14 A. Can you define the difference between
15 goal and requirement?

16 Q. Well, goal is aspirational. We would
17 like to achieve 80 percent, but if we don't achieve
18 80 percent, we are not going to invalidate the study
19 and require you to do another year of the study.

20 Requirement would be if you don't meet
21 the 80 percent, you are doing a second year of the
22 study.

23 A. Again, that wasn't discussed with U.S.
24 Fish and Wildlife radar experts or USGS radar
25 experts.

1 MR. SECREST: Okay. Thank you.

2 Thank you, your Honor.

3 Thank you, Ms. Hazelton. Nothing more at
4 this time.

5 ALJ ADDISON: Thank you, Mr. Secrest.

6 Mr. Stock?

7 MR. STOCK: Yes, thank you.

8 - - -

9 CROSS-EXAMINATION

10 By Mr. Stock:

11 Q. Good afternoon.

12 A. Good afternoon.

13 Q. Ms. Hazelton, we have not spoken before.

14 A. No, we haven't.

15 Q. Probably if you have been sitting in
16 here, you know who I am. I represent -- I'm John
17 Stock. I represent the Bratenahl Resident
18 Intervenors. I would like you, if you would, to
19 take -- find the Staff Report and turn to page 48.

20 A. Okay.

21 Q. Mr. Secrest, in cross-examination, asked
22 you some questions relating to the purpose for which
23 pre-construction radar is to be performed. Do you
24 recall that?

25 A. I do.

1 Q. All right. I want to direct your
2 attention to the condition on page 48, 22(d).

3 A. Yes.

4 Q. Would you please read 22(d) into the
5 record.

6 A. "Radar must be able to determine flight
7 altitude of migrants at altitudes near and entirely
8 within the rotor-swept zone at the project site to
9 quantify collision risk."

10 Q. Is it the position of ODNR that one of
11 the purposes of pre-construction radar is, as
12 indicated in Condition 22(d), to provide flight
13 altitude of migrants at or near the -- near and
14 entirely within the rotor-swept zone at the project
15 to quantify collision risk?

16 A. It is. The goal of that would be, again,
17 to quantify the risk. We understand generally what
18 the risk would be, but we are unable to quantify that
19 at this time with the information that we have.
20 That's all.

21 Q. Okay. Thank you.

22 Now, if you have Caleb Gordon's binder,
23 it should be in the lower -- the last -- the bottom
24 line on the top of it should indicate the witness.

25 MR. SECREST: I think that's the one you

1 have up here.

2 A. Do I already have it?

3 Q. Is it the one that's up there?

4 THE WITNESS: Oh, I'm sorry.

5 ALJ ADDISON: No. You're fine.

6 Q. Tab G which is Bratenahl Residents
7 Exhibit 7. This is a document titled "LEEDCo
8 Icebreaker Pre-construction/Post-construction
9 Monitoring Survey Protocol U.S. Fish and Wildlife
10 Service and Ohio Department of Natural Resources
11 Division of Wildlife, Comments, February 28, 2017."
12 So that would have been approximately two months
13 before you began with ODNR?

14 A. Correct.

15 Q. Have you seen this document before?

16 A. I have.

17 Q. Okay. Now, I believe, in
18 cross-examination, Mr. Secrest asked you some
19 questions relating to ODNR's position with respect to
20 whether or not a radar unit would actually have to be
21 placed on a platform at the project site. Do you
22 recall that?

23 A. I do.

24 MR. SECREST: Your Honor, may I just note
25 an objection? Is this redirect or direct of my

1 cross?

2 ALJ ADDISON: Well, I think he is just
3 referencing some questions that you asked. I don't
4 believe there is anything other than that --

5 MR. SECREST: Okay.

6 ALJ ADDISON: -- of the reference.

7 MR. STOCK: I thought we could bring in
8 new exhibits, I could cross-examine on what he said.

9 ALJ ADDISON: That's not necessary,
10 Mr. Stock. Just proceed.

11 MR. STOCK: I apologize.

12 ALJ ADDISON: Thank you.

13 MR. STOCK: I will get over my upset
14 regarding that.

15 Q. Page 2, Section 3, "Radar." I am going
16 to go down to subparagraph b. "Pre-construction."
17 Roman numeral small ii, i-i. Do you see that?

18 A. I do.

19 Q. It says "Preferred is radar data from
20 project area." You understand that to mean that the
21 radar unit would be out at the project area?

22 A. I don't believe it would need to be that
23 specific, but the data would have to encompass the
24 project area completely.

25 Q. Okay. And we'll continue to read "Fish

1 and Wildlife Service and ODNR have been requesting
2 this information since 2008." We -- do you have any
3 reason to assert that that is not accurate, that ODNR
4 and Fish and Wildlife Service had been requesting
5 that information since 2008?

6 A. No. I have no reason.

7 Q. Okay. And then it reads "We still
8 advocate for a single radar, on its own platform,
9 within project area...." You understand that to mean
10 that the platform is to be within the project area?

11 A. That would mean so that it could collect
12 data from the project area, depending on the scope of
13 the radar, yes.

14 Q. But does it not read "on its own
15 platform, within project area"?

16 A. It does.

17 MR. STOCK: Thank you. No further
18 questions.

19 ALJ ADDISON: Thank you, Mr. Stock.

20 Ms. Leppla?

21 MS. LEPPLA: Just a few questions.

22 - - -

23 CROSS-EXAMINATION

24 By Ms. Leppla:

25 Q. Hi, Ms. Hazelton. My name is Miranda

1 Leppla. I am with Ohio Environmental Council and
2 Sierra Club.

3 A. Hi.

4 Q. If you can look at Condition 35 of the
5 Stipulation for me.

6 A. Yes.

7 Q. And in your testimony you note the
8 conditions don't lend themselves to advisory input
9 from outside groups because they are specific
10 benchmarks needed to be achieved by the Applicant; is
11 that right?

12 A. Correct.

13 Q. And Condition 35 specifically notes, that
14 you have in front of you, the input would be provided
15 throughout discussions with the identified agencies
16 and Staff during efforts to finalize programs and
17 plans referenced in those listed conditions, correct?

18 A. Correct.

19 Q. You heard me go through this list with
20 Mr. Siegfried, I believe, so I won't belabor the
21 point.

22 A. Yes.

23 Q. You would agree that each of those listed
24 conditions is related to either avian and bat or
25 fishery and aquatic?

1 A. Correct.

2 Q. And you've been involved in many of the
3 conversations related to these different types of
4 programs and plans as we've talked about throughout
5 your testimony, correct?

6 A. Yes.

7 Q. Okay. And there's been other stakeholder
8 input involvement in those, correct?

9 A. I believe DNR reached out to Fish and
10 Wildlife Service and the USGS, as well as internally
11 our own biologists. I don't believe that DNR sought
12 any other information at that time necessarily.

13 Q. Okay. But you do understand it's
14 permitted for additional stakeholders to participate
15 if they so choose, I suppose?

16 A. Oh, DNR always welcomes comments and
17 suggestions at any time; so, no, we never would say
18 someone is not allowed or not encouraged to respond.

19 Q. And to go on with that point, the
20 language in Condition 35 doesn't contain any
21 limitation on other stakeholders to participate and
22 provide input, does it?

23 A. No. It just mentions the signatory
24 parties shall be invited, so specifically them, but
25 it doesn't mention any other parties.

1 Q. And I think there was a little confusion
2 over just the definition of "advisory," and I asked
3 Mr. Siegfried the same question, would you agree that
4 "advisory" means having or consisting of an ability
5 to make recommendations but not to take action to
6 enforce them?

7 A. I think it would be helpful if it were
8 able to be defined, but I think, as written, it is
9 slightly vague and can cause confusion.

10 Q. Would you agree with that definition of
11 "advisory"?

12 A. That's likely a definition.

13 Q. And then you had mentioned earlier, I am
14 looking at your response to Question 23 on page 16 of
15 your testimony, you mentioned a couple of things in
16 here related to unnecessary litigation and unlawful
17 situations, but you testified earlier you are not a
18 lawyer, correct?

19 A. No, I am not.

20 Q. So this is not a legal opinion of yours?

21 A. No, it certainly isn't.

22 Q. And based on your reading of Condition
23 35, that doesn't give any of the signatory parties
24 authority to overrule a decision by ODNR and Staff,
25 correct?

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1 A. No.

2 MS. LEPPLA: No further questions.

3 ALJ ADDISON: Thank you very much. Now I
4 think it is an appropriate time to take our lunch
5 break. We'll reconvene around 2:00 p.m. Thank you,
6 all.

7 (Thereupon, at 12:59 p.m., a lunch recess
8 was taken.)

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1 Tuesday Morning Session,
2 October 2, 2018.

3 - - -

4 ALJ ADDISON: All right. Let's go back
5 on the record.

6 Ms. Hazelton, I will remind you you are
7 still under oath.

8 THE WITNESS: Yes.

9 EXAMINER ADDISON: Mr. Simmons, redirect?

10 MR. SIMMONS: Yes, your Honor. Thank
11 you.

12 - - -

13 REDIRECT EXAMINATION

14 By Mr. Simmons:

15 Q. Ms. Hazelton, in regard to Staff
16 Condition 19, why is it important to be protective
17 for the entire period from March 1 through January 1?

18 A. Again, given that we have very little
19 pre-construction data for this project and this site
20 at this time, that period -- let me start back.

21 Different animals have different
22 migration periods and so that period encompasses the
23 time that we feel is a heightened risk for not just
24 songbirds but waterfowl, songbirds, and bats
25 specifically. So just to run through it quickly,

1 originally, so in the spring, early spring, starting
2 off March, for instance, is when the time the
3 waterfowl would be migrating north generally. And
4 that's followed shortly there by, in April, the bats,
5 and then, of course, we mentioned before the songbird
6 migration around May.

7 And then certainly some of those animals
8 do stay around during those times, again because
9 there are different patterns of migration, but then
10 we have summer residency and so we have waterfowl
11 that certainly use Lake Erie during the summertime,
12 as well as bats. The Applicant demonstrated, through
13 their acoustic survey, there were bats present and
14 using the project site 8 to 10 miles offshore.

15 And the activity level was similar to
16 that that we find in western Ohio over agricultural
17 land which was actually quite surprising. So -- so
18 again, that summer period is critical to also include
19 during that curtailment period.

20 And then in the fall, it just reverses
21 itself, where again we have our songbirds leaving the
22 north and heading south, and then we have songbirds
23 and bats and then followed by waterfowl in the end of
24 the year.

25 Q. And would that go all the way through

1 November and December?

2 A. Yes. There are certain species that do
3 migrate, like I said, very early and very late,
4 specifically grebes, coots, I mentioned the cranes as
5 well. Those are the ones that I'm aware of.

6 MR. SIMMONS: No further questions.

7 ALJ ADDISON: Thank you, Mr. Simmons.

8 Mr. Secrest?

9 MR. SECREST: Just very briefly, your
10 Honor. Thank you.

11 - - -

12 RECROSS-EXAMINATION

13 By Mr. Secrest:

14 Q. Ms. Hazelton, you just said you have
15 "very little pre-construction data." You do have bat
16 acoustic data, correct?

17 A. We do. We have bat acoustic data from
18 the project site, but unfortunately not in the
19 rotor-swept zone at this time.

20 Q. Okay. You do have waterfowl studies.

21 A. Yes, we do.

22 Q. The results of a waterfowl study.

23 A. Yes.

24 Q. Thank you.

25 And the results of the waterfowl study

1 have been accepted by ODNR, correct?

2 A. Yes.

3 MR. SECREST: Okay. May I have a moment?

4 ALJ ADDISON: You may.

5 Q. Ms. Hazelton, with regard to the bat
6 acoustic monitoring, are you aware that the actual
7 monitoring devices used by Icebreaker are more
8 sensitive than those typically used for land-based
9 projects?

10 A. I understand that that may -- that may be
11 one of the reasons that we possibly got a higher
12 amount of bat activity, but I also understand that
13 there are other studies that refute that that
14 specific instrument actually collects a higher number
15 of bats. So we really can't say at this time if we
16 actually were getting a higher level due to the
17 equipment, only because there are studies that
18 contradict each other regarding that at this time.

19 Q. Just for the record, the device we are
20 talking about is Anabat, correct?

21 A. Anabat versus SM3 or 4.

22 Q. Correct.

23 A. Those are the two that we were using
24 generally in our wind projects here in Ohio.

25 MR. SECREST: Okay. Nothing further.

1 Thank you again, Ms. Hazelton.

2 ALJ ADDISON: Thank you, Mr. Secrest.

3 Mr. Stock?

4 MR. STOCK: Nothing further.

5 ALJ ADDISON: Mr. Settineri?

6 MR. SETTINERI: Thank you, your Honor.

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8 CROSS-EXAMINATION

9 By Mr. Settineri:

10 Q. Ms. Hazelton, you mentioned, in response
11 to a question on redirect, I believe you said there
12 was a heightened risk during the period of March 1 to
13 January 1; is that correct?

14 A. Generally because we believe there are
15 more animals present on the landscape.

16 Q. And Condition 19 would take that risk to
17 zero during that period, correct?

18 A. No, it wouldn't take it to zero, but it
19 would significantly reduce it to an acceptable level
20 for Ohio Department of Natural Resources and Power
21 Siting Board Staff.

22 Q. And the turbines would not be operating
23 during that time period, correct?

24 A. At nighttime, during that time period,
25 that's what's been proposed.

1 Q. Okay. So during the nighttime, under
2 that condition, between that period, that risk would
3 be zero at nighttime, correct?

4 A. At nighttime we believe so, yes.

5 Q. And that's for 10 months of the year,
6 correct?

7 A. Correct.

8 MR. SETTINERI: Okay. No further
9 questions. Thank you.

10 ALJ ADDISON: Thank you, Mr. Settineri.

11 Ms. Leppla?

12 MS. LEPPLA: No questions.

13 ALJ ADDISON: Thank you.

14 We have no additional questions,
15 Ms. Hazelton. You are excused.

16 Mr. Simmons.

17 MR. SIMMONS: Your Honor, at this time we
18 would move for the admission of Ms. Hazelton's
19 testimony which has been marked as Staff Exhibit 3.

20 ALJ ADDISON: Any objections to the
21 admission of Staff Exhibit 3?

22 Hearing none, it will be admitted.

23 (EXHIBIT ADMITTED INTO EVIDENCE.)

24 ALJ ADDISON: Mr. Secrest.

25 MR. SECREST: Your Honor, may we move for

1 the admission of Applicant's 53 through 56. 53 was
2 an e-mail dated 5-23-17; 54 was the 6-13-17 e-mail;
3 55 was Ohio Administrative Code 4906-4-09; and 56 was
4 an e-mail that attached the Radar Monitoring Protocol
5 dated June 29, 2018.

6 ALJ ADDISON: Thank you. And I will just
7 note it's typical Board practice that we don't admit
8 our rules into the record, but the parties are more
9 than free to cite to the rules as they need -- as
10 they need to in their briefs.

11 MR. SECREST: Thank you, your Honor.

12 ALJ ADDISON: Thank you.

13 Are there any objections to the admission
14 of Applicant Exhibit Nos. 53, 54, or 56?

15 Hearing none, they will be admitted.

16 (EXHIBITS ADMITTED INTO EVIDENCE.)

17 MR. JONES: Your Honor, there is also the
18 other Staff testimony we would like to move for
19 admission into the record since there was a waiver of
20 cross-examination on the other Staff witnesses. So
21 we would like to have marked and admitted those other
22 Staff testimonies.

23 ALJ ADDISON: Are you prepared to do that
24 at this time?

25 MR. JONES: No. I just couldn't find my

1 list here.

2 ALJ ADDISON: Let's go off the record for
3 a moment.

4 (Discussion off the record.)

5 ALJ ADDISON: Let's go back on the
6 record.

7 Mr. Jones.

8 MR. JONES: Thank you, your Honor. At
9 this time, your Honor, Staff would like to move --
10 mark for -- mark the exhibits of the testimony of
11 Mark -- Andrew Conway as Staff Exhibit 5, the
12 testimony of Mark Bellamy as Staff Exhibit 6.

13 MR. STOCK: John, if you could let me get
14 the names down.

15 MR. JONES: I'm sorry.

16 MR. STOCK: Who was 6?

17 MR. JONES: Mark Bellamy.

18 MR. STOCK: Okay. Thank you.

19 MR. JONES: Staff testimony of Travis
20 Hartman as Staff Exhibit 7.

21 MR. STOCK: Okay.

22 MR. JONES: Staff Witness Jon Pawley as
23 Staff Exhibit 8.

24 MR. STOCK: All right.

25 MR. JONES: And Staff Witness Derek

1 Collins whose testimony is Staff Exhibit 9.

2 MR. STOCK: Okay.

3 MR. JONES: And Staff Witness Jason Cross
4 as Staff Exhibit 10.

5 MR. STOCK: All right.

6 MR. JONES: Staff Witness Matt Butler as
7 Staff Exhibit 11.

8 MR. STOCK: Okay.

9 MR. JONES: And Staff Witness Ray Strom
10 as Staff Exhibit 12.

11 ALJ ADDISON: And they will be so marked.

12 (EXHIBITS MARKED FOR IDENTIFICATION.)

13 MR. JONES: Thank you, your Honor. I
14 move for the admission of those Exhibits 5 through
15 12.

16 ALJ ADDISON: And based on the previous
17 statement by Mr. Jones, it appears that other parties
18 have waived cross-examination. Are there any
19 objections from the other parties as to the admission
20 of Staff Exhibit Nos. 5, 6, 7, 8, 9, 10, 11, or 12?

21 MR. SECREST: No, your Honor.

22 ALJ ADDISON: Then those exhibits will be
23 admitted.

24 (EXHIBITS ADMITTED INTO EVIDENCE.)

25 MR. JONES: Thank you, your Honor.

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1 ALJ ADDISON: Thank you.

2 Let's go off the record for a moment.

3 (Discussion off the record.)

4 ALJ ADDISON: Let's go ahead and go back
5 on the record.

6 After a brief discussion with the parties
7 off the record, we discussed potential briefing
8 schedules and the parties have agreed to the
9 following dates: November 30 is when we will expect
10 initial briefs to be submitted for this proceeding,
11 followed by reply briefs due by January 8.

12 Anything further before we adjourn?

13 MR. SECREST: No, your Honor. Thank you.

14 ALJ ADDISON: Thank you.

15 MR. JONES: No, your Honor.

16 ALJ ADDISON: Thank you, all. We are
17 adjourned.

18 (Thereupon, at 2:23 p.m., the hearing was
19 concluded.)

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1 CERTIFICATE

2 I do hereby certify that the foregoing is
3 a true and correct transcript of the proceedings
4 taken by me in this matter on Tuesday, October 2,
5 2018, and carefully compared with my original
6 stenographic notes.

7
8
9 Karen Sue Gibson, Registered
10 Merit Reporter.

11 Carolyn M. Burke, Registered
12 Professional Reporter.

13 (KSG-6624)

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Case No(s). 16-1871-EL-BGN

Summary: Transcript in the matter of the Icebreaker Windpower, Inc. hearing held on 10/02/18 - Volume VII electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Gibson, Karen Sue Mrs.