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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 10:06 a.m. on Tuesday,
August 20, 2019.

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VOLUME VIII

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ARMSTRONG & OKEY, INC.
222 East Town Street, Second Floor
Columbus, Ohio 43215-5201
(614) 224-9481 - (800) 223-9481

- - -

APPEARANCES:

Dickinson Wright PLLC
By Mr. Jonathan R. Secrest
and Ms. Christine M.T. Pirik
150 East Gay Street, Suite 2400
Columbus, Ohio 43215

On behalf of Icebreaker Windpower
Inc.

Benesch, Friedlander, Coplan & Aronoff LLP
By Mr. John F. Stock
41 South High Street, 26th Floor
Columbus, Ohio 43215

On behalf of the Intervenor W. Susan
Dempsey and Robert M. Maloney.

Mike DeWine, Ohio Attorney General
By Mr. John H. Jones,
Section Chief
Mr. Thomas G. Lindgren
Mr. Cameron F. Simmons
Mr. Andrew B. Shaffer,
Assistant Attorneys General
Public Utilities Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215

On behalf of the Staff of the OPSB.

Ohio Environmental Council
By Ms. Miranda Leppla
1145 Chesapeake Avenue, Suite 1
Columbus, Ohio 43212

On behalf of the Ohio Environmental
Council and Sierra Club.

Vorys, Sater, Seymour & Pease, LLP
By Mr. Michael J. Settineri
and Ms. Gretchen L. Petrucci
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43215-1008

On behalf of the Business Network for
Offshore Wind, Inc.

1 APPEARANCES: (Continued)

2 Paul T. Berkowitz & Associates, Ltd.
3 By Mr. Paul T. Berkowitz
4 1909 Arlingate Lane
5 Columbus, Ohio 43228

6 On behalf of the Indiana/Kentucky/Ohio
7 Regional Council of Carpenters.

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1 Tuesday Morning Session,
2 August 20, 2019.

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4 ALJ WALSTRA: The Ohio Power Siting Board
5 has called for hearing at this time and place Case
6 No. 16-1871-EL-BGN being in the Matter of the
7 Application of Icebreaker Windpower, Inc., for a
8 Certificate to Construct a Wind-Powered Electric
9 Generation Facility in Cuyahoga County, Ohio.

10 My name is Nick Walstra, and with me is
11 Megan Addison. We are the Administrative Law Judges
12 assigned by the Board to hear this case. We are
13 reconvening after previously being in hearing. We
14 last adjourned on October 2, 2018. Since then a new
15 Stipulation has been filed, but we will begin by
16 taking appearances of the parties, and we will start
17 with the Applicants.

18 MR. SECREST: Thank you, your Honor. On
19 behalf of Icebreaker Windpower, Inc., as counsel,
20 Jonathan Secrest and Christine Pirik; and with us is
21 David Karpinski.

22 ALJ WALSTRA: We'll just go around the
23 room.

24 MR. BERKOWITZ: Paul Berkowitz on behalf
25 of the Indiana/Kentucky/Ohio Regional Council of

1 Carpenters.

2 MR. SETTINERI: Good morning, your Honor.
3 On behalf of the Business Network for Offshore Wind,
4 Inc., Mike Settineri and Gretchen Petrucci with the
5 law firm of Vorys, Sater, Seymour & Pease, 52 East
6 Gay Street, Columbus, Ohio 43215.

7 MR. STOCK: Good morning, your Honors.
8 John Stock on behalf of Intervenors Susan Dempsey and
9 Robert Maloney with Benesch of 41 South High Street.

10 MR. LINDGREN: On behalf of the Board
11 Staff, Ohio Attorney General Dave Yost by Thomas G.
12 Lindgren, Cameron Simmons, John H. Jones, and Andrew
13 B. Shaffer. My address is 30 East Broad Street, 16th
14 Floor, Columbus, Ohio 43215.

15 MR. SIMMONS: Assistant Attorney General
16 Cameron Simmons on behalf of Staff.

17 MS. LEPLA: Good morning, your Honors.
18 Miranda Leppla on behalf of the Ohio Environmental
19 Council and Sierra Club.

20 ALJ WALSTRA: Thank you. I believe that
21 is everyone. Well, since we do have the new
22 Stipulation filed, I will defer to the Applicants.

23 MR. SECREST: Thank you, your Honor.
24 Applicants call David Karpinski.

25 MR. STOCK: Your Honors.

1 ALJ WALSTRA: Yes.

2 MR. STOCK: As a point of order, I have
3 motions to strike Mr. Karpinski's testimony. Do
4 those get entertained after he gets sworn in?

5 ALJ WALSTRA: We will deal with that in
6 cross-examination.

7 MR. STOCK: Okay.

8 MR. SECREST: May I approach the witness,
9 your Honor?

10 ALJ WALSTRA: You may.

11 MR. SECREST: Thank you. I've handed
12 Mr. Karpinski three documents. May I have marked as
13 Applicants' Exhibit 58 his prefiled testimony.

14 ALJ WALSTRA: So marked.

15 (EXHIBIT MARKED FOR IDENTIFICATION.)

16 MR. SECREST: Sorry. Out of order. I
17 have also handed him the Fifth Supplement which was
18 filed in these proceedings. May I have that marked
19 as Applicants' 57.

20 ALJ WALSTRA: So marked.

21 (EXHIBIT MARKED FOR IDENTIFICATION.)

22 MR. SECREST: Thank you. And I have also
23 handed him the Revised Joint Stipulation and
24 Recommendation. May I have that marked as Joint
25 Exhibit 2, please.

1 ALJ WALSTRA: So marked.

2 (EXHIBIT MARKED FOR IDENTIFICATION.)

3 MR. SECREST: Does the Bench need copies
4 of any of those documents, your Honor?

5 ALJ WALSTRA: I think we're good.

6 (Witness sworn.)

7 ALJ WALSTRA: Thank you.

8 - - -

9 DAVID P. KARPINSKI

10 being first duly sworn, as prescribed by law, was
11 examined and testified as follows:

12 DIRECT EXAMINATION

13 By Mr. Secrest:

14 Q. Mr. Karpinski, for the record could you
15 please identify the documents you have in front of
16 you.

17 A. Yes. I have a copy of my supplemental
18 testimony that was filed in this case. I have a copy
19 of the Supplemental No. 5 -- Fifth Supplement to the
20 Application. This was filed May 14 of this year.
21 And I have a copy of Joint Exhibit 2 which is the
22 Revised Joint Stipulation.

23 Q. Thank you. Your supplemental testimony
24 is marked as Applicants' Exhibit 58. Do you have any
25 amendments or corrections or revisions to that

1 testimony?

2 A. No, I don't.

3 MR. SECREST: Okay. Thank you, your
4 Honors. I tender Mr. Karpinski for
5 cross-examination.

6 ALJ WALSTRA: Thank you.

7 Mr. Stock.

8 MR. STOCK: Yes. I move to strike from
9 Mr. Karpinski's testimony the question on page 7 at
10 line 7 "Does the Application, as agreed to through
11 the Revised Stipulation, enable the Board to
12 determine the nature of the probable environmental
13 impact of the facility," and the answer that follows.
14 At the hearing in the fall, September 23 through
15 October 2, Mr. Karpinski admitted under oath that he
16 is not an expert in the fields of wildlife biology,
17 wildlife ecology, zoology, environmental studies,
18 statistics, avian radar, and the nocturnal migration
19 of birds.

20 He has no degrees in these fields. He
21 has no professional employment in these fields. He's
22 authored no publications in these fields. He has
23 neither designed or implemented any studies in these
24 fields. He is not recognized as an expert in any
25 tribunal in these fields; and, therefore, he is not

1 expected to render opinions regarding the nature of
2 the probable environmental impact of the facility.

3 What's more, the Board is required to
4 make a determination as to the probable environmental
5 impact of a facility and he opines that the record is
6 such and the Revised Stipulation are such to enable
7 the Board to perform its statutory duty.

8 And under Ohio law, a witness may not
9 interpret for the finder of fact what a statute
10 requires. That's the Kraynak case, K-R-A-Y-N-A-K, of
11 the Ohio Supreme Court, 118 Ohio State 3d 400.
12 Expert testimony regarding legal issues is simply not
13 helpful as well. However, an expert's interpretation
14 of law should not be permitted as that is within the
15 sole province of the court.

16 Therefore, a court should strike
17 testimony that offers a legal opinion on the
18 questions of law currently before the court. That's
19 State, ex rel. Parisi, P-A-R-I-S-I, out of the Third
20 District Court of Appeals, 217 Ohio 9394. He is not
21 competent to render these opinions, and he cannot
22 render legal opinions as to whether or not the
23 Stipulation enables the Board to perform its
24 statutory duty under 4906.10.

25 MR. SECREST: Thank you, your Honor.

1 Prior testimony filed in this case filed by
 2 Mr. Karpinski, specifically his prefiled testimony
 3 question 48, was almost verbatim the same question.
 4 There was no objection at the time. He was permitted
 5 to testify to these issues in the record in evidence
 6 already, and Mr. Karpinski's testimony establishes
 7 his lengthy tenure with this project, his duties
 8 related to this project, his familiarity with this
 9 project, all facets of this project that enable him
 10 to state that in his opinion -- without usurping the
 11 ALJs' authority, that in his opinion there's enough
 12 evidence in the record to permit the Board to make
 13 this finding that the facility represents the minimum
 14 adverse impact.

15 ALJ WALSTRA: I am going to deny the
 16 motion to strike. I think obviously previously you
 17 explored his expertise, and the Board can take that
 18 into consideration as -- regarding his testimony. I
 19 will let that stand.

20 MR. STOCK: I also move to strike
 21 question 8 and the response thereto, lines 8 through
 22 15 on page 7, on the same grounds.

23 ALJ WALSTRA: For those same reasons, I
 24 will deny the motion to strike.

25 MR. STOCK: To page 8, I move to strike

1 question 11 and the response to question 11, lines 1
2 through 8, on the same grounds.

3 ALJ WALSTRA: And my ruling will be the
4 same.

5 MR. STOCK: On page 9, I move to strike
6 question 16 and the answer lines 10 through 17.

7 ALJ WALSTRA: Is it question 16?

8 MR. STOCK: Question 16, lines 10 through
9 17, on page 9.

10 ALJ WALSTRA: For the same reasons?

11 MR. STOCK: Yes.

12 ALJ WALSTRA: That will also be denied.

13 MR. STOCK: Question 17, lines 19 through
14 21, move to strike on the same grounds and on the
15 basis that he is not a lawyer and that's a pure legal
16 opinion.

17 ALJ WALSTRA: Denied.

18 MR. STOCK: Okay. And I move to strike
19 question 18 and the answer, lines 23 through 28, on
20 the same grounds.

21 ALJ WALSTRA: And that will also be
22 denied.

23 MR. STOCK: Okay.

24 - - -

25

CROSS-EXAMINATION

By Mr. Stock:

Q. Mr. Karpinski, are you employed by any business or entity at this point in time?

A. Yes, I am.

Q. By whom are you employed?

A. By LEEDCo, the Lake Erie Energy Development Corporation.

Q. Are you compensated by LEEDCo?

A. Yes.

Q. Do you have a salary?

A. Yes.

Q. What is your salary?

MR. SECREST: Objection as to relevance.

MR. STOCK: I am entitled to find out the extent of his economic interest in this proceeding.

MR. SECREST: Your Honors, in the event Mr. Karpinski is required to answer, may we seal this portion of the record?

MR. SETTINERI: Alternatively, your Honor, if he wants to ask if he has an economic interest, he can simply ask that question and that can satisfy the request.

ALJ WALSTRA: I think you've established he is certainly compensated by them. I don't think

1 we need to get into the specifics, so I will sustain
2 the objection.

3 MR. STOCK: I have no further questions.

4 ALJ WALSTRA: Anyone else have any
5 questions?

6 Any redirect?

7 MR. SECREST: No, thank you, your Honor.

8 ALJ WALSTRA: Thank you.

9 Would you like to move your exhibits?

10 MR. SECREST: Yes, your Honor. May we
11 move for the admission of Exhibits 57 and 58. With
12 regard to Joint Exhibit 2, would your Honors prefer
13 moving now or?

14 ALJ WALSTRA: We can wait until after all
15 the witnesses.

16 MR. SECREST: Very well. Thank you.

17 ALJ WALSTRA: Subject to the motions to
18 strike, any objections?

19 MR. STOCK: No. I object to 58 on the
20 grounds already explained. The other two exhibits I
21 have no objection.

22 ALJ WALSTRA: Exhibits 57 and 58 will be
23 admitted.

24 (EXHIBITS ADMITTED INTO EVIDENCE.)

25 MR. SECREST: Thank you.

1 ALJ WALSTRA: Do you have any other
2 witnesses?

3 MR. SECREST: Not here in person, your
4 Honor. We did, as Mr. Stock indicated, and as the
5 Bench is aware, we have an agreement with regard to
6 the testimony of Mr. Wallace Erickson. May we have
7 his prefiled testimony marked as Applicants Exhibit
8 59.

9 ALJ WALSTRA: So marked.

10 (EXHIBIT MARKED FOR IDENTIFICATION.)

11 MR. SECREST: And we would move for the
12 admission of that exhibit as well.

13 MR. STOCK: No objection.

14 ALJ WALSTRA: That will be admitted.

15 (EXHIBIT ADMITTED INTO EVIDENCE.)

16 MR. SECREST: Thank you, your Honor.

17 ALJ WALSTRA: We are on to Staff.

18 MR. LINDGREN: Thank you, your Honor.

19 The Staff would like to call Stuart Siegfried to the
20 stand.

21 MR. STOCK: Excuse me. Does Staff go
22 before Intervenors, or do they go last?

23 ALJ WALSTRA: We will go off the record a
24 second.

25 (Discussion off the record.)

1 ALJ WALSTRA: We'll go back on the
2 record.

3 (Witness sworn.)

4 ALJ WALSTRA: Thank you.

5 MR. LINDGREN: May I approach the
6 witness?

7 ALJ WALSTRA: You may.

8 MR. LINDGREN: Let the record reflect
9 that I have handed the witness what I would ask to be
10 marked as Staff Exhibit 13.

11 ALJ WALSTRA: So marked.

12 (EXHIBIT MARKED FOR IDENTIFICATION.)

13 - - -

14 STUART SIEGFRIED

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

17 DIRECT EXAMINATION

18 By Mr. Lindgren:

19 Q. Good morning, Mr. Siegfried.

20 A. Good morning.

21 Q. Could you please state your full name for
22 the record.

23 A. My name is Stuart Siegfried. Last name
24 is S-I-E-G-F-R-I-E-D.

25 Q. And what is your business address?

1 A. I work for the Public Utilities
2 Commission, 180 East Broad Street, Columbus, Ohio
3 43215.

4 Q. Thank you. And do you have before you a
5 copy of Staff Exhibit 13?

6 A. Yes, sir.

7 Q. And is that your revised prefiled
8 testimony?

9 A. It is, yes.

10 Q. And did you prepare this by yourself?

11 A. Yes, sir.

12 Q. Thank you. Do you have any additions or
13 corrections this morning?

14 A. No, I don't.

15 Q. Thank you. And if I were to ask you all
16 these questions here this morning, would your answers
17 be the same?

18 A. Yes, sir.

19 MR. LINDGREN: Thank you. I have no
20 further questions.

21 ALJ WALSTRA: Thank you.

22 Mr. Stock?

23 MR. STOCK: Yes. I move to strike
24 Mr. Siegfried's testimony on page 5, starting with
25 question 16, line 4, and the response line 11.

1 Mr. Siegfried on this record in this case has not
2 established that he has any professional expertise in
3 the fields of wildlife biology, wildlife ecology,
4 zoology, environmental studies, statistics, avian
5 radar, the nocturnal migration of birds, or any other
6 scientific school of professionalism that would
7 enable him to render this opinion. And for that
8 reason I move to strike it.

9 ALJ WALSTRA: I am going to deny the
10 motion to strike. I think he has established what he
11 is an expert in and what he is involved in, and the
12 Board will give his opinion the proper weight.

13 MR. STOCK: I move to strike question 17
14 and the answer that would be lines 13 through 21 on
15 page 5 of Mr. Siegfried's testimony on the same
16 grounds.

17 ALJ WALSTRA: For the same reasons I'll
18 deny the motion to strike.

19 MR. STOCK: I move to strike question 18,
20 line 1 on page 6, and the response through line 8 on
21 the same grounds and on the basis that it requires
22 his -- requires a legal opinion, and he is not a
23 lawyer.

24 ALJ WALSTRA: Denied.

25 MR. STOCK: Okay. I move to strike

question 21, line 19, and the answer, line 22 of his testimony on page 6, on the same grounds and on the basis that this specifically purports to be a legal opinion as to what the statute at issue, RC 4906.10(A), requires.

ALJ WALSTRA: Denied.

MR. STOCK: Okay.

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CROSS-EXAMINATION

By Mr. Stock:

Q. Good morning, Mr. Siegfried.

A. Good morning.

Q. Turn my microphone on. I'm John Stock.

As you know, I represent the Intervenors Ms. Dempsey and Mr. Maloney. It says on page 2 -- or, excuse me, page 1 of your testimony, line 11, that you have a Bachelor of Science Degree in international business; is that correct?

A. Yes, sir.

Q. Do you have any other collegiate degrees?

A. Nothing that's been completed, no.

Q. All right. Do you have any other postgraduate degrees?

A. No, sir.

Q. All right. Do you hold yourself out as

1 an expert in wildlife biology?

2 A. No, I don't.

3 Q. Okay. Do you hold yourself out as an
4 expert in wildlife ecology?

5 A. No, I don't.

6 Q. Do you hold yourself out as an expert in
7 zoology?

8 A. No.

9 Q. Okay. Do you hold yourself out as an
10 expert in environmental studies?

11 A. No.

12 Q. Okay. Do you hold yourself out as an
13 expert in statistics?

14 A. No, sir.

15 Q. Do you hold yourself out as an expert in
16 the field of avian radar?

17 A. No, sir.

18 Q. Do you hold yourself out as an expert in
19 the study of the nocturnal migration of birds?

20 A. No, sir.

21 Q. All right. Have you ever personally
22 designed or implemented any studies in these fields?

23 A. No.

24 Q. Okay. Have you personally ever published
25 any articles in any scientific or professional

1 publications in these fields?

2 A. No, sir.

3 Q. Okay. Have you ever been recognized as
4 an expert by any tribunal in any of these fields?

5 MR. SETTINERI: I would just object to
6 the extent it calls for a legal conclusion, your
7 Honor, whether he is an expert.

8 ALJ WALSTRA: If he knows, he can answer.

9 MR. SETTINERI: Good enough.

10 A. Not to my recollection.

11 Q. All right. Thank you. Now, I want to
12 make sure I understand your testimony on page 3,
13 question 11, line 15. "Are other Staff witnesses
14 addressing specific conditions in the Stipulation?"
15 And then you say "Yes. Staff Witnesses," I guess
16 that should be a singular, "Hazelton will address
17 modified conditions pertaining to birds and bats
18 (i.e. Conditions 15, 18, 20, 21, 22, and 23)." Well,
19 I guess, I'm sorry, that should be plural witnesses.
20 And "while Staff Witness Hartman will address
21 modified conditions pertaining to fisheries and
22 aquatic resources." Do I understand you to be
23 saying, with respect to birds and bats, that your
24 testimony does not purport to render opinions with
25 respect to those Conditions 15, 18, 20, 21, 22, and

1 23?

2 A. I'm sorry. Could I have that repeated.

3 Q. Yes. Do I understand your testimony to
4 be this language to mean when it says Ms. Hazelton
5 "will address modified conditions pertaining to birds
6 and bats (Conditions 15, 18, 20, 21, 22, and 23),"
7 that your opinions in your testimony are not
8 purporting to pertain to or address those conditions?

9 A. My testimony relies on conclusions
10 related to those conditions, but -- my testimony does
11 not go into detail on the individual conditions
12 themselves.

13 Q. And the conclusions made concerning those
14 conditions are conclusions made by Ms. Hazelton; is
15 that what you are referencing?

16 A. To birds and bats, yes, sir.

17 Q. So you are relying on her conclusions for
18 your testimony with respect to those conditions; is
19 that what you are telling us here?

20 A. Yes, sir.

21 Q. Okay. They are not your own conclusions.
22 They are Ms. Hazelton's; is that correct?

23 A. For the most part, yes. I mean,
24 certainly this was a team effort but we recognize
25 the -- the expertise of ODNR on wildlife matters.

1 Q. Okay. Question 15 on page 4, line 18,
2 "Does the Revised Stipulation represent the product
3 of serious bargaining among capable, knowledgeable
4 parties?" And your answer is "Yes. The capability
5 and knowledge of the parties and their counsel is
6 apparent." Apparent to whom?

7 A. Apparent to me.

8 Q. Okay. Are you -- well, you've already
9 testified you are not an expert in avian radar,
10 correct?

11 A. Correct.

12 Q. All right. And it's your understanding
13 that Ms. Hazelton is not an expert in avian radar,
14 correct?

15 A. I don't believe I've said that.

16 Q. I am asking you that. You understand --
17 were you here for her testimony at the last hearing?

18 MR. LINDGREN: Objection. He will have
19 an opportunity to cross-examine Ms. Hazelton when she
20 gets on the stand. She can address her own
21 qualifications.

22 MR. STOCK: I am asking about his
23 understanding. He said here that the capability and
24 knowledge of the parties and their counsel was
25 apparent, and he said apparent to himself. I am

1 exploring the basis upon which it is apparent to him,
2 and I am allowed to do that.

3 Q. (By Mr. Stock) To your knowledge,
4 Ms. Hazelton is not an expert in avian radar,
5 correct?

6 A. I am not sure about expert. I know she
7 has knowledge and familiarity with the issues
8 relevant to this case. And, you know, that was the
9 context I guess in which I used this phrase here.

10 Q. When you used that phrase, were you aware
11 she testified at the first hearing that she's not an
12 expert in avian radar?

13 A. I don't recall that specifically.

14 Q. All right. Now, what expertise does
15 anyone on staff at ODNR have with respect to the
16 implementation of avian radar equipment on a floating
17 platform?

18 A. Could you repeat that? I'm sorry.

19 MR. STOCK: Could you repeat that for
20 him, please.

21 (Record read.)

22 MR. LINDGREN: Again, I am going to
23 object. There will be a witness from ODNR that
24 could -- would be the appropriate witness to ask
25 these questions.

1 ALJ WALSTRA: He can answer if he knows.

2 A. I don't believe that they have any
3 experience with prior implementation of such
4 technology, but certainly they were very involved
5 with the discussions on this topic throughout the
6 proceeding.

7 Q. Discussions with whom?

8 A. Any number of parties.

9 Q. Okay. Can you identify them.

10 A. I believe the Applicant was involved,
11 perhaps the Department of Energy, perhaps Fish and
12 Wildlife Service, I believe any of the other parties
13 who may have contributed to this -- to discussion on
14 this particular topic. I can't remember all the
15 discussions but.

16 Q. Okay. Question 18 on page 6, line 1,
17 "Does the Revised Stipulation violate any important
18 regulatory principle or practice," and you answered
19 "No." Are you a licensed lawyer?

20 A. No.

21 Q. Did you ever go to law school?

22 A. No, sir.

23 Q. Okay. What provisions of the Ohio
24 Revised Code did you review in connection with
25 responding to that question?

1 A. This was in the context of 4906.10,
2 statutory criteria for -- for the Board to grant the
3 certificate.

4 Q. So did you look at the Statute 4906.10
5 when -- at or about the time you responded to this
6 question?

7 A. And prior to that point, yes, sir.

8 Q. Okay. This says "any important
9 regulatory principle or practice." Did you review
10 any other provision of the Ohio Revised Code?

11 A. No.

12 Q. Okay. How about the Ohio Administrative
13 Code? Did you review any provision of the Ohio
14 Administrative Code at or about the time that you
15 answered this question?

16 A. Not at that time, no.

17 MR. STOCK: Okay. I have no further
18 questions. Thank you, Mr. Siegfried.

19 ALJ WALSTRA: Thank you.

20 Any redirect?

21 MR. LINDGREN: Could we have a few
22 minutes to confer, please?

23 ALJ WALSTRA: Sure. We will go off the
24 record.

25 (Discussion off the record.)

1 ALJ WALSTRA: We'll go back on the
2 record.

3 MR. LINDGREN: Thank you, your Honor.
4 The Staff has no redirect.

5 ALJ WALSTRA: Thank you. You're all set.
6 Move your exhibit?

7 MR. LINDGREN: Yes, your Honor. I would
8 move for the admission of Staff Exhibit 13.

9 ALJ WALSTRA: Any objections?

10 MR. STOCK: I have my objections on the
11 record.

12 ALJ WALSTRA: Thank you. It will be
13 admitted.

14 (EXHIBIT ADMITTED INTO EVIDENCE.)

15 MR. STOCK: What's the number on that?

16 MR. LINDGREN: 13.

17 MR. STOCK: Thank you. I didn't hear it.

18 ALJ ADDISON: Mr. Lindgren, would you
19 like to call your witness.

20 MR. LINDGREN: Thank you, your Honor.
21 That will be for Mr. Cameron Simmons.

22 MR. SIMMONS: Thank you. Your Honor, the
23 Staff would call Erin Hazelton.

24 ALJ ADDISON: Welcome back, Ms. Hazelton.
25 (Witness sworn.)

1 ALJ ADDISON: Thank you.

2 Please proceed, Mr. Simmons.

3 MR. SIMMONS: Thank you, your Honor.

4 - - -

5 ERIN HAZELTON

6 being first duly sworn, as prescribed by law, was
7 examined and testified as follows:

8 DIRECT EXAMINATION

9 By Mr. Simmons:

10 Q. Ms. Hazelton, could you please state and
11 spell your name for the record.

12 A. Yes. Erin Hazelton, E-R-I-N
13 H-A-Z-E-L-T-O-N.

14 Q. And where are you employed?

15 A. I'm employed at the Ohio Department of
16 Natural Resources Division of Wildlife.

17 MR. SIMMONS: May I approach?

18 ALJ ADDISON: You may.

19 MR. SIMMONS: This is going to be Staff
20 Exhibit 14, Ms. Hazelton's revised testimony.

21 (EXHIBIT MARKED FOR IDENTIFICATION.)

22 Q. (By Mr. Simmons) Ms. Hazelton, I've
23 handed you what's been marked as Staff Exhibit 14.
24 Is that your revised prefiled testimony filed in this
25 matter?

1 A. It is.

2 Q. And is that a true and accurate copy of
3 that testimony?

4 A. It is.

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

7 A. I would.

8 Q. And do you have any changes or
9 corrections to your prefiled testimony?

10 A. Not at this time.

11 MR. SIMMONS: I tender the witness for
12 cross.

13 ALJ ADDISON: Thank you, Mr. Simmons.

14 And just so the record is clear,
15 Ms. Hazelton's prefiled testimony has been marked as
16 Staff Exhibit 14.

17 Any motions to strike, Mr. Stock, that
18 you would like to make at this time?

19 MR. STOCK: Yes. On page 2, question 3,
20 line 9, in the response I move to strike the response
21 for these reasons: Stipulation Condition 15 is
22 protective of wildlife and ensures minimum adverse
23 environmental impact on the bases that the record has
24 not established that Ms. Hazelton possesses expertise
25 to render that opinion.

1 ALJ ADDISON: Mr. Simmons.

2 MR. SIMMONS: Yes, your Honor.

3 Ms. Hazelton's qualifications were previously
4 outlined in her prior testimony, including her prior
5 prefiled testimony, including her educational
6 background and her relevant degrees as well as her
7 employment history including her employment with the
8 Ohio Department of Natural Resources Division of
9 Wildlife.

10 ALJ ADDISON: Thank you, Mr. Simmons. I
11 tend to agree; but, of course, I will provide you
12 some leeway, Mr. Stock, to explore Ms. Hazelton's
13 credentials on cross-examination.

14 MR. STOCK: Thank you. For the same
15 reason I move to strike her testimony at lines 16 and
16 17 on page 3.

17 ALJ ADDISON: Mr. Stock, that was just
18 lines 16 and 17?

19 MR. STOCK: Yes. I am looking for the
20 language where she opines as to whether or not the
21 Stipulation ensures minimum adverse impact to
22 wildlife. That is the opinion that I assert she does
23 not have any expertise to render.

24 ALJ ADDISON: Thank you. And for the
25 same reasons, I will deny the motion to strike.

1 MR. STOCK: Sure. In addition, same sort
2 of testimony and same basis on page 6, lines 4 and 5.

3 ALJ ADDISON: Consistent with my other
4 rulings, I will deny the motion to strike.

5 MR. STOCK: Same objection to the
6 testimony on lines 4 and 5 on page 7.

7 ALJ ADDISON: Motion to strike will be
8 denied.

9 MR. STOCK: Page 10, lines 6 and 7, move
10 to strike the testimony for the same reason --
11 reasons.

12 ALJ ADDISON: Thank you. I will be
13 denying for the same reasons.

14 MR. STOCK: Lines 15 and 16 on page 10,
15 move to strike for the same reasons.

16 ALJ ADDISON: Thank you. That will be
17 denied.

18 MR. STOCK: Those are the references I
19 see. I will say -- I do see on page 12, lines 5 and
20 6, another opinion rendered that the -- a detailed
21 protocol that ensures minimum adverse impact to
22 wildlife will be maintained. Move to strike for the
23 same reason.

24 ALJ ADDISON: Thank you. I will be
25 denying that motion to strike as well.

1 MR. STOCK: And I will state for the
2 record I do want to move this along. If there are
3 other portions of the testimony, prefiled testimony,
4 that purport to render an opinion that any aspect of
5 the Stipulation, Revised Stipulation I will call it,
6 ensures minimal adverse impact to wildlife, I would
7 move to strike on the basis that she does not possess
8 the expertise to render that opinion.

9 ALJ ADDISON: Thank you. And it is noted
10 in the record.

11 MR. STOCK: Thank you.

12 Good morning, Ms. Hazelton.

13 ALJ ADDISON: Oh, Mr. Stock, before we
14 continue with cross, I am going to go around and ask
15 the stipulating parties if they have any questions
16 before we get back to you --

17 MR. STOCK: Oh, okay.

18 ALJ ADDISON: -- just really briefly.

19 Mr. Secrest, any questions?

20 MR. SECREST: No, thank you, your Honor.

21 ALJ ADDISON: Thank you.

22 Mr. Berkowitz?

23 MR. BERKOWITZ: No questions, your Honor.

24 ALJ ADDISON: Thank you.

25 Ms. Leppla?

1 MS. LEPPLA: No questions.

2 ALJ ADDISON: Mr. Stock, you're up.

3 MR. STOCK: It feels like dating in high
4 school. Party of one.

5 - - -

6 CROSS-EXAMINATION

7 By Mr. Stock:

8 Q. Good morning, Ms. Hazelton.

9 A. Good morning, Mr. Stock.

10 Q. The last time we met our relative
11 positions were a bit different, were they not? Yes?

12 A. Probably so, yes.

13 Q. Last time you testified you were
14 testifying in opposition to a certificate being
15 granted by the Power Siting Board for this project.

16 MR. SIMMONS: Objection to the
17 clarification of that question.

18 ALJ ADDISON: What was your objection,
19 Mr. Simmons?

20 MR. SIMMONS: To the clarification she
21 was testifying against the granting of a certificate.

22 MR. STOCK: He didn't let me finish my
23 question.

24 ALJ ADDISON: Well, let Mr. Stock finish
25 his question --

1 MR. SIMMONS: I apologize.

2 ALJ ADDISON: -- and then you can. Thank
3 you.

4 Move things along.

5 Q. (By Mr. Stock) At the hearing last fall,
6 and I believe the dates were September 24 through
7 October 2, were you not -- you were testifying, were
8 you not, for the purpose of recommending that the
9 Board deny a certificate to the Applicant pursuant to
10 the conditions of the proffered Stipulation that the
11 Applicant had filed with the Board; is that correct?

12 A. I was testifying in support of the Staff
13 Report and not in support of the Applicants'
14 stipulations at that time.

15 Q. Okay. So by not in support of the
16 Stipulation, you in your -- the recommendation of
17 ODNR, was it not, that this Board not issue a
18 certificate pursuant to the terms and conditions of
19 the Stipulation?

20 A. Correct.

21 Q. All right. Now, I want to clarify
22 something. You don't claim to be an expert in avian
23 radar, do you?

24 A. No, I don't.

25 Q. Okay. And you testified at the last

1 hearing that you were not aware of anyone on staff at
2 ODNR who is an expert in avian radar.

3 A. That's correct. We don't have anyone on
4 staff who is an expert in avian radar.

5 Q. Okay. That's still the case?

6 A. That's still the case.

7 Q. All right. So clearly there is no one on
8 staff at ODNR that possesses expertise in the
9 mounting and operation of an avian radar unit from a
10 floating platform; is that correct?

11 A. That's correct.

12 Q. All right. Now, I was a little puzzled
13 by your prefiled testimony. The first time around --
14 excuse me.

15 MR. STOCK: May I approach the witness?
16 I am going to give her one of my infamous binders and
17 pass those around if I might?

18 ALJ ADDISON: You may. Just go off the
19 record.

20 (Discussion off the record.)

21 ALJ ADDISON: Let's go back on the
22 record.

23 MR. STOCK: Thank you.

24 Q. (By Mr. Stock) Ms. Hazelton, if you take
25 a look at tab 28 in my beautiful binder, this is

1 your -- if you can take a look at it for a minute,
2 that's Staff Exhibit 3. It was admitted in -- or in
3 evidence. Take a look at it quickly and would you
4 please confirm that's your prior prefiled testimony?

5 A. Yes. It appears to be.

6 Q. All right. Let's take a look at page 2.
7 The second question asks you after you give your name
8 and address -- and that's a business address you
9 gave, right?

10 A. Yes, the Department of Natural Resources.

11 Q. All right. "By whom are you employed?"

12 "Ohio Department of Natural Resources
13 Division of Wildlife."

14 It asks "What is your present position
15 and duties with respect to the Ohio Power Siting
16 Board?"

17 And you say "I am a Wildlife
18 Administrator and specifically work as the ODNR Wind
19 Energy Administrator." Do you see that?

20 A. I do.

21 Q. Now, if you take a look at Staff Exhibit
22 14, the new testimony, you give your name and
23 business address, again asked "By whom are you
24 employed." But this time you are not asked "What is
25 your present position and duties with respect to the

1 Ohio Power Siting Board." Do you know why that's
2 left out?

3 A. I believe we are focusing on information
4 that was new in my testimony, not necessarily
5 something restated from my previous testimony. I
6 don't think there was a reason that it was left out.
7 That has not changed. My position and my title are
8 still the same.

9 Q. Oh, okay. That's what I was wondering
10 because if you look at the first page, it lists you
11 as under the "Fisheries Management Section." Is that
12 something different? Is that wrong?

13 A. I'm sorry. Where is this?

14 Q. On the first page -- or the title page of
15 Exhibit -- Staff Exhibit 14.

16 A. Oh. Yes, actually that is -- that is not
17 correct. I'm with the Research and Management Team
18 so that part is not correct. I am not with the
19 Fisheries Team. We are all under the same umbrella
20 with wildlife, but I don't have any expertise in
21 fisheries.

22 Q. Again, that's why I was confused when I
23 read that.

24 A. I understand.

25 Q. And then when there wasn't any indication

1 of --

2 A. Fair enough.

3 Q. -- what your current position is. Thank
4 you.

5 Now, as we sit here today, does ODNR know
6 how many birds and bats migrate through what would be
7 the rotor-swept zone of this proposed project?

8 A. No, we don't. We don't have any
9 information.

10 Q. All right. If birds -- do you believe
11 that it likely that birds and bats do migrate through
12 the rotor-swept zone of where this project is
13 proposed to be located?

14 A. We are aware that birds and bats migrate
15 over Lake Erie and there is no reason to think they
16 wouldn't migrate through areas in or round the
17 rotor-swept zone when the turbines aren't there.
18 Again, we are not sure of the effect when the
19 turbines are constructed.

20 Q. Okay. Now, if, in fact, birds and bats
21 migrate through the rotor-swept zone when the
22 turbines are operating -- and at this point you don't
23 know whether or not that will be the case, correct?

24 A. Correct.

25 Q. But assuming they do, you would agree,

1 would you not, that birds and bats would then be at
2 risk of mortality from the turbines, correct?

3 MR. SECREST: Your Honor, I note an
4 objection to the extent this is not new territory
5 that has arisen since October 4, 2018. This is
6 territory that was covered rather extensively at the
7 prior hearing during which Mr. Stock had the ability
8 to cross-examine and pose questions to Ms. Hazelton
9 related to these topics and did not do so.

10 MR. SIMMONS: Same objection from the
11 Staff.

12 ALJ ADDISON: Thank you.

13 MR. STOCK: No, no. She was not an
14 adverse witness last time.

15 ALJ ADDISON: Thank you, Mr. Stock. I
16 will provide a little leeway, but I will also note
17 our entry prescribing the scope of this hearing.

18 MR. STOCK: But she has now opined about
19 minimum risk, and I am allowed to determine --

20 ALJ ADDISON: I am allowing the question.

21 MR. STOCK: Thank you.

22 ALJ ADDISON: Yes. Thank you.

23 Do you need that question read back?

24 THE WITNESS: I think I can answer that,
25 if that's all right.

1 Q. Okay.

2 A. So we have identified that the nature of
3 the probable risk in the rotor-swept zone will be to
4 birds and bats, yes.

5 Q. Okay. And the risk is a risk of
6 mortality, right?

7 A. It could definitely be mortality. It
8 could also be impact to birds and bats due to
9 avoidance or attraction. There are other -- there
10 are other impacts other than just mortality.

11 Q. Right. And as we sit here today, you
12 cannot quantify those risks, correct?

13 A. That's correct.

14 Q. All right. Now, at the hearing last
15 fall, as we've established and everyone in the room
16 knows, the Power -- the Staff was not agreeable to
17 the proposed September 4, 2018, Stipulation; is that
18 correct?

19 A. That's correct.

20 Q. All right. The Staff now supports what
21 I'll call the Revised Stipulation, the May 15, 2019,
22 Stipulation, correct?

23 A. As a package, we support the Revised
24 Stipulations.

25 Q. Okay. Now, the hearing ended I believe

1 the date was October 2 of last year. Since October 2
2 of last year, were you contacted by anyone from
3 Icebreaker or representing Icebreaker regarding
4 negotiations for a new Stipulation?

5 A. Not directly. As part of the
6 negotiations, our legal counsel was always involved
7 and there was e-mails in that communication from that
8 point on where it was forwarded on to our legal
9 counsel and the AG, of course.

10 Q. Did you personally have any direct e-mail
11 contact with anyone representing Icebreaker or
12 LEEDCo?

13 A. Regarding the negotiations or in general?

14 Q. In general, any aspect of the project.

15 A. Yes. During that time as part of the
16 MOU, there is a requirement to have an annual meeting
17 to discuss the surveys that were done previous as
18 well as upcoming surveys. So there was contact, and
19 I believe it came from their administrative
20 assistant, to set up that meeting. However, we were
21 very specific, both parties were, that we would not
22 be discussing anything that had to do with the radar
23 system or any of the items that we are currently
24 discussing as part of the Stipulations. So it was
25 specifically just surveys that had been performed.

1 Q. Are you aware of anyone else at ODNR who
2 had e-mail contact or other communications directly
3 with Icebreaker since October 2 of last year?

4 A. It's my recollection that, again, after
5 the hearing, the e-mails were directed to our legal
6 counsel and then taken from there. I may have been
7 copied on a few of those, but they were handled by
8 legal counsel.

9 Q. Okay. Now, if you take a look at tab 32,
10 do you have -- otherwise have a copy of the Revised
11 Stipulation before you? You can go to tab 32. There
12 is a copy there.

13 A. Yes. It appears to be the Revised Joint
14 Stipulation.

15 Q. Okay.

16 ALJ ADDISON: And, Mr. Stock, it may just
17 help clarify the record if you could refer to the
18 Revised Stipulation as Joint Exhibit 2.

19 MR. STOCK: That will help. Thank you.

20 ALJ ADDISON: Thank you.

21 Q. (By Mr. Stock) When I use the term
22 "Revised Stipulation," I will be referring to the May
23 15, 2019, Stipulation that was filed that is Joint
24 Exhibit 2, okay?

25 A. Okay.

1 Q. And while you have that, if you can also
2 pull or have available your testimony, prefiled
3 testimony, July 26. Do you have that as well?

4 A. Yes, I do.

5 Q. All right. Let's turn to page 2 of your
6 prefiled testimony and look at on Exhibit 2, Joint
7 Exhibit 2, Section 15, Condition 15 on page 5.

8 A. Okay.

9 Q. Now, you say in your prefiled testimony,
10 Staff Exhibit 14, on page 2, down at the bottom
11 regarding Stipulation Condition 15 "My testimony is
12 hereby revised in support of Stipulation Condition 15
13 which serves to ensure minimal adverse impact to
14 wildlife." Do you see that?

15 A. Yes.

16 Q. Okay. Then let's turn over to the next
17 page, page 3. And I want to go about halfway down in
18 your answer, line 6.

19 A. Okay.

20 Q. "Stipulation Condition 15 maintains that
21 original language," referring to the Staff Report
22 condition, "and it further states these documents and
23 monitoring protocols must be accepted by ODNR prior
24 to the commencement of construction. This
25 significant addition provides additional

1 clarification as to the timing of the protocol
2 approval and establishing MOU approval as a
3 prerequisite for construction. This new language was
4 not part of the Staff Report Condition 15 and
5 provides additional protection for wildlife via this
6 oversight. For these reasons, Stipulation 15 --
7 Stipulation Condition 15 is protective of wildlife
8 and ensures minimum adverse environmental impact of
9 the Project." Do you see that?

10 A. I do.

11 Q. Is the requirement that ODNR approve the
12 monitoring protocols necessary for this Condition 15
13 to ensure the minimum adverse environmental impact of
14 the project?

15 A. As a package, yes. Joint Exhibit 2 took
16 a different approach than the original Staff Report
17 and so this is one piece of that, the revised 15.
18 But it is integral that ODNR and Staff approve the
19 protocols prior to construction.

20 Q. Without the right of ODNR to approve the
21 monitoring protocols -- and does monitoring protocols
22 include collision testing?

23 A. It does.

24 Q. All right. So without -- if ODNR did not
25 have the right under the revised Stipulation to give

1 approval, if you will, before those protocols are
2 implemented, after -- and do that approval before
3 construction, would you agree with me that the
4 revised Stipulation would not ensure that the project
5 has the minimum adverse environmental impact?

6 A. As written and, again, as the new
7 package, if that part was missing from this, then I
8 would agree it wouldn't be as protective as it is in
9 this current form.

10 Q. Okay. And without that right of approval
11 by ODNR, you would not opine that the Revised
12 Stipulation ensures minimum adverse environmental
13 impact of the project, correct?

14 A. I think --

15 MR. SIMMONS: I think I am going to
16 object. Calls for speculation.

17 ALJ ADDISON: Thank you.

18 MR. STOCK: She's rendered opinions and
19 I'm allowed to explore the bases of those opinions
20 and if they might change if the condition changes.

21 ALJ ADDISON: Thank you. I will allow
22 the witness to answer the question but will provide
23 her some latitude if she needs to explain why she
24 can't answer the question that you have posed.

25 MR. STOCK: Sure.

1 A. Okay. So the question is if DNR didn't
2 have the ability to approve the protocols, would it
3 be protective of wildlife?

4 Q. Would you opine, if ODNR did not have the
5 ability to say, no, that protocol is not sufficient,
6 if it didn't have that right, you would not opine
7 that the Stipulation, Revised Stipulation, ensures
8 minimum adverse environmental impact of the project,
9 correct?

10 A. Again, it's difficult to tease them all
11 apart because they are a package together, and they
12 work in conjunction with each other. And DNR and
13 Staff approval of the monitoring plan and the
14 protocols therein are integral to ensuring minimum
15 adverse impact to wildlife barring -- I would say
16 barring the changes that are not represented
17 currently in the Staff Report such as the curtailment
18 language.

19 Q. And written approval prior to
20 construction was something that ODNR was requiring as
21 part of the Revised Stipulation to agree to support
22 it, correct?

23 A. We agreed to support it because we will
24 have written approval prior to construction.

25 Q. And that was -- that was a requirement

1 that ODNR was seeking for its approval of the Revised
2 Stipulation, correct?

3 MR. SIMMONS: I am going to object again
4 to the extent this gets into settlement discussions
5 pursuant to Evidence Rule 408 as well as any internal
6 discussions between ODNR and Staff and counsel.

7 ALJ ADDISON: Thank you.

8 Mr. Stock, response?

9 MR. STOCK: Yeah. This is a document
10 that is now of record in this case and is to be the
11 basis for conditions of the issuance of a
12 certificate. I'm allowed to explore what the
13 significance of the various elements are and how --
14 what role they play with respect to these opinions
15 that this Revised Stipulation now ensures minimum
16 adverse environmental impact when the last one
17 didn't.

18 ALJ ADDISON: Well, thank you. But I
19 think Mr. Simmons' concern is the fact that by
20 answering that question the witness might disclose
21 settlement discussions and that is something we do
22 not allow during the hearing. So if -- unless the
23 witness can answer the question without disclosing
24 settlement discussions, then I am going to have to
25 sustain the objection.

1 MR. STOCK: Well, let me rephrase it.

2 ALJ ADDISON: Thank you.

3 Q. (By Mr. Stock) The requirement -- there
4 is a requirement in the Revised Stipulation that ODNR
5 before construction approves the protocols before the
6 project proceeds to construction, right?

7 A. Correct.

8 Q. All right. That is a condition precedent
9 to proceeding with construction, correct?

10 A. Yes.

11 Q. All right. And if approval is not given
12 by ODNR for the protocols including collision
13 monitoring, the project cannot proceed to
14 construction under the Revised Stipulation; is that
15 correct?

16 A. Correct.

17 Q. All right. Let's turn to -- there was
18 something I wanted to ask you about, your answer to
19 question 3. Question 3, line 9, "What is the purpose
20 of your revised testimony in this case?

21 "Answer: I am testifying in support of
22 the Revised Joint Stipulation and Recommendation
23 (Stipulation) filed May 15, 2019, by Icebreaker
24 Windpower Inc., Business Network for Offshore Wind,
25 Inc., The Sierra Club," et cetera, "and the Ohio

1 Power Siting Board Staff (Signatory Parties) in
2 particular those conditions related to birds and
3 bats. The conditions in the Joint Stipulation, when
4 taken together as a package, help to ensure minimum
5 adverse impact to wildlife." Do you see that?

6 A. I do.

7 Q. Why the language "help to" instead of
8 saying it "ensures minimum adverse impact to
9 wildlife"? Why is the qualification "help to
10 ensure"?

11 A. I think it was just meant to mean that
12 each condition on its own helps to ensure, and as a
13 package, it ensures.

14 Q. Okay. Thank you.

15 A. Yes.

16 Q. On page 3 regarding Stipulation Condition
17 18, line 15, "My testimony is hereby revised in
18 support of Stipulation Condition 18 which serves to
19 ensure minimum adverse impact to wildlife." Do you
20 see that?

21 A. Yes.

22 Q. Okay. Excuse me a moment. I am just
23 looking at my notes.

24 Before we get there, I skipped something.
25 Staff Exhibit 1 is at tab 27 of your binder. Do you

1 see that?

2 A. Yes.

3 Q. Can you please turn to page 23.

4 A. Yes.

5 Q. "Avian and Bat Species."

6 A. I'm there.

7 Q. All right. "Avian and Bat Species"
8 begins a quarter of the way down on the page,
9 continues on page 24, and carries over to about
10 halfway down on page 25. Do you see that?

11 A. I do.

12 Q. Did you write this section?

13 A. Not solely. Again, part of a team to --
14 I contributed to the Staff report.

15 Q. All right. Were you a primary
16 contributor to this section?

17 A. Again, the DNR team, the Division of
18 Wildlife team contributed. I did help with sections,
19 yes, but it was reviewed by our team.

20 Q. Did you write sections of it?

21 A. Again, I think I helped -- I helped
22 author it. I drafted it. I drafted portions
23 perhaps, but I wouldn't say that this is 100 percent
24 my contribution.

25 Q. No, I understand. But I am trying to

1 parse out exactly what your role is or was with the
2 team that was addressing this. You actually drafted
3 some of the -- some language for this section; is
4 that correct?

5 MR. SECREST: Objection, your Honor.
6 This is not new territory. This certainly would have
7 been asked of Ms. Hazelton during the prior
8 proceeding.

9 ALJ ADDISON: Thank you. While I agree,
10 I think Mr. Stock is just trying to lay some context,
11 so I'll allow him a little bit of leeway again.

12 MR. STOCK: Thank you.

13 A. Again, I couldn't recall exactly which
14 sections, which language is particularly mine or
15 sentences are mine, but I did have input in this as
16 well as Staff did, Power Siting Board, and our DNR
17 team. It really truly was a joint effort.

18 Q. Who else at ODNR on the team, if you
19 will, would have been involved in reviewing and
20 making any changes to this section?

21 A. Internal with DNR it was our wildlife --

22 MR. SIMMONS: I am going to note an
23 objection before she goes any further to the extent
24 there was legal review of this document and instruct
25 her not to disclose any attorney-client

1 communications.

2 ALJ ADDISON: Thank you. With that
3 instruction, you may answer the question.

4 A. Again, just internally at DNR it was our
5 wildlife team; it was in-house legal counsel, of
6 course, as was just mentioned; and, of course, our AG
7 legal counsel.

8 Q. Who is the wildlife team?

9 A. We have myself and my supervisor Kate
10 Parsons. And at the time for this Staff Report this
11 would have been our in-house DNR legal counsel, which
12 I think may have been a little bit different. I can
13 perhaps remember names if -- no, okay.

14 Q. That's fine. I just want your best
15 recollection --

16 A. Okay.

17 Q. -- as we sit here today. Please go down
18 to paragraph 2 under "Avian and Bat Species."

19 A. Okay.

20 Q. "The primary purpose of the avian and bat
21 MOU is to establish a monitoring plan to assess the
22 impact of construction and operation to avian and bat
23 species and resources. The goals of these
24 assessments relative to this project are to, one,
25 document existing conditions and patterns of use of

1 species of concern at the project site." Do you see
2 that?

3 A. I do.

4 Q. The first goal.

5 A. Uh-huh.

6 Q. Has that been done?

7 A. I would say it's been done in part.

8 Q. What part has been done?

9 A. The Applicant has provided --

10 MR. SECREST: Objection, your Honor.

11 Again, this is covering territory that would have
12 been covered during the prior proceedings. If he
13 wants to ask what has been done since October 2,
14 that's fine but I think the record establishes what's
15 been done with the previous construction studies and
16 monitoring.

17 ALJ ADDISON: Thank you, Mr. Secrest.

18 Mr. Stock?

19 MR. STOCK: I am allowed to determine
20 what the status is as of this date with their
21 recommendation and which of these -- as of this date
22 which of these goals has been fulfilled.

23 ALJ ADDISON: Then perhaps you can craft
24 your question to see what -- what goals mentioned in
25 this paragraph have been fulfilled since October 2,

1 2018.

2 MR. STOCK: I want to know if they are
3 now fulfilled, what the current status is, if they
4 are now fulfilled. I am allowed to find that out.
5 They are rendering opinions as to this being the
6 minimum adverse environmental impact.

7 ALJ ADDISON: And you were allowed to ask
8 that question at the latest round of hearing, if they
9 had been fulfilled as of the date of the hearing.
10 But we are here. We have set the scope of this
11 hearing. You may ask the questions if they have been
12 fulfilled since the date of that hearing.

13 MR. STOCK: I am going to ask, and if you
14 strike my question, you can strike it. I am allowed
15 to find out what the current status is without
16 playing games.

17 ALJ ADDISON: And I agree. I think it's
18 just a matter of how you are asking the question.
19 That is all I am saying.

20 Q. (By Mr. Stock) Current status, as we sit
21 here today, "Document existing conditions and
22 patterns of use of species of concern at the project
23 site," what is the current status of that as we speak
24 today?

25 A. Partially fulfilled.

1 Q. All right. What is not fulfilled?

2 A. The amount of data in the specific -- the
3 specific type of data that we are looking for.
4 Again, the radar surveys, or I should say a method to
5 document nighttime activity at the site, migration
6 activities at the site by birds and bats.

7 Q. So is there -- have there -- has there
8 been any avian radar study done at the project site?

9 A. The radar studies that have been done to
10 date to the best of my knowledge encompass near the
11 project site but not specifically in the rotor-swept
12 zone.

13 Q. Has any radar device been placed on a
14 floating platform at the project site?

15 A. No.

16 Q. All right. Has any radar device mounted
17 by any nature been put at the project site?

18 A. There has not been a radar system
19 deployed at the project site that I am aware of.

20 Q. Okay. Has Icebreaker submitted to ODNR
21 for review a proposed avian radar technology or
22 system as of today's date to provide avian radar data
23 for the rotor-swept zone of the project site?

24 A. No. I believe the Applicant is still
25 reviewing that technology.

1 Q. Okay. Has Icebreaker submitted to ODNR
2 for review a proposed collision monitoring technology
3 or plan for use at the project site to date?

4 A. No.

5 Q. Okay. Let's go down to goal No. 3.
6 "Develop and implement effective mitigation and
7 adaptive management strategies to minimize avian and
8 bat resource impacts." Has Icebreaker submitted to
9 ODNR for review final mitigation and adaptive
10 management strategies to minimize avian and bat
11 resource impacts?

12 A. No, not -- not to date. As part of this
13 process, that will occur at a later date.

14 Q. Okay. No. 4, "Evaluate the feasibility
15 of various monitoring protocols in an offshore
16 setting." Has Icebreaker submitted to ODNR for
17 approval as to feasibility a monitoring protocol in
18 an offshore setting?

19 MR. SECREST: I am going to note an
20 objection just to the extent the prior hearing
21 covered rather extensive documents such as the ODNR
22 report spoke to the feasibility studies in an
23 offshore setting.

24 ALJ ADDISON: Thank you. You can answer
25 the question.

1 A. I do think that they have explored
2 monitoring -- or feasibility of various monitoring
3 protocols in an offshore environment in part. For
4 instance, the bat acoustic studies that have been
5 completed and, well, offshore bird, or I should say
6 waterfowl studies that have also been completed.
7 However, not all of those studies are done yet as
8 we've mentioned so there is still more that needs to
9 be evaluated.

10 Q. Do the bat acoustic studies and the data
11 that you've received with respect to them encompass
12 the entire rotor-swept zone of the project?

13 A. No.

14 Q. Okay. On page -- still on page 23, third
15 full paragraph under "Avian and Bat Species," last
16 sentence, "However, the radar monitoring and
17 collision monitoring are still in development." As
18 we sit here today, is that still a true statement?

19 A. They are being explored, yes.

20 Q. Okay. Go down to the next paragraph
21 about two-thirds of the way down. "Dr. Diehl
22 identified the strengths and weaknesses of the three
23 proposals and offered suggestions to improve results
24 but that was not able -- but was not able to confirm
25 definitively that any of the three proposals would be

1 successful." Do you see that?

2 A. I do.

3 Q. Is that to this date still ODNR's
4 assessment of the Diehl Report?

5 A. Our interpretation of the Diehl Report
6 there are unknowns and that was his statement. We're
7 not refuting that he said that so, no, that sentence
8 was part of his report.

9 Q. And you haven't changed your view of
10 that; is that correct?

11 A. We're not sure if the radar will be
12 successful which was part of why we had these
13 conditions, the revised conditions, but, again,
14 setting the goals of the radar survey so that it's up
15 to the Applicant to determine the technology and the
16 approach to meet those goals.

17 Q. Okay. Three more lines down -- two more
18 lines down, it still appears at this point that the
19 movement of a barge may introduce errors to the radar
20 data. As we sit here today, is that still ODNR's
21 belief?

22 A. We're not aware of a radar system that's
23 been deployed on a moving platform, so movement is a
24 concern. Again, it's up to the Applicant to figure
25 out the solution to minimize those errors and produce

1 quality, reliable data.

2 Q. Okay. Let's go over to page 24, top of
3 the page, "The Applicant's conclusions that impacts
4 would be low was based, in part, on the assumption
5 that migratory species would remain close to the
6 shore and not cross over the Lake." Do you see that?

7 A. I do.

8 Q. Okay. Is that still ODNR's view as to
9 one of the bases for Applicant's conclusions that
10 impacts would be low?

11 MR. SECREST: Objection to the extent it
12 misstates evidence or mischaracterizes and calls for
13 speculation.

14 ALJ ADDISON: Mr. Stock?

15 MR. STOCK: This is a conclusion or an
16 assessment of ODNR and the Staff Report filed in this
17 proceeding. I want to know if these opinions,
18 analyses, and/or assessments still hold true despite
19 the fact that they now are in support of the Revised
20 Stipulation, and I am allowed to explore that.

21 ALJ ADDISON: Thank you. Perhaps if you
22 just rephrase the question. I believe I got a little
23 lost in that myself.

24 MR. STOCK: Okay. That's fine. And I've
25 been known to get lost down the path.

1 Q. (By Mr. Stock) The statement reads "The
2 Applicant's conclusion that impacts would be low was
3 based, in part, on the assumption that migratory
4 species would remain close to the shore and not cross
5 over the Lake." I'm reading that correctly, right?
6 That was a statement that ODNR made in a Staff
7 Report, correct?

8 A. It's -- it's part of the Staff Report and
9 that's the sentence that's in there, yes, yep.

10 Q. All right. Does ODNR still believe that
11 statement to be true?

12 A. I -- if I do recall correctly, at the
13 previous hearing I believe one of the witnesses for
14 the Applicant mentioned that they are not refuting
15 that birds and bats cross over the lake. So at the
16 time this was written, that was the information we
17 had, and I think it was later corrected during the
18 hearing.

19 Q. Okay. If that's your understanding.

20 A. Yes.

21 Q. So let me ask you, does ODNR, as we sit
22 here today, believe there is significant migration of
23 birds across Lake Erie?

24 A. We know that there are hundreds of
25 thousands of birds that regularly cross Lake Erie.

1 Q. Okay. Page 24, if you go down after the
2 bullet points that -- well, let me first go to the
3 next paragraph. "Staff recommends that the
4 certificate be conditioned to require the radar
5 monitoring program to include the following" and then
6 there are all these bullet points. Do you see that?

7 A. I do.

8 Q. It then reads "At this time it is unclear
9 if a moving platform would be able to meet these
10 criteria.

11 A. I see that.

12 Q. Is that still a true statement?

13 A. Yes. I believe so.

14 Q. All right. And it then reads "A stable
15 platform appears to be the most viable option to
16 collect this data." Is that still a true statement?

17 A. Again, at this time with the little
18 information that we have, it would make sense that
19 reducing the variables, meaning movement, would
20 probably yield -- would be easier to collect data.
21 But that is not to say there isn't a technology that
22 would be available that could also eliminate that
23 variable of movement. We just really don't know that
24 yet because we haven't seen the proposal.

25 Q. I am not sure I understood your answer

1 with respect to this statement. Is this statement
2 still true, "A stable platform appears to be the most
3 viable option to collect this data"?

4 A. I would say the time the Staff Report was
5 written that was true. Right now, I don't have any
6 additional information regarding the technology; so,
7 again, I'm not a radar expert, so I really don't know
8 the scope of what's available but.

9 Q. But this -- this was the Staff Report
10 that was filed, correct?

11 A. Yes, yes.

12 Q. Okay. Now, the next paragraph "There are
13 currently no proven post-construction collision
14 monitoring technologies or methodologies available
15 for the offshore wind setting." Do you see that?

16 A. I do.

17 Q. Is that still true?

18 A. As far as I know.

19 Q. Okay. I think we are done with that for
20 the time being. Thank you. Let's go to your -- your
21 testimony, your current testimony.

22 A. Okay.

23 Q. Staff Exhibit 14, page 4, at the top of
24 the page it reads "The Applicant has not identified a
25 collision detection technology as several potential

1 options are still under development." True
2 statement, correct?

3 A. As far as I know, yes.

4 Q. Yeah. "Stipulation Condition 18 is
5 protective of wildlife because it can be applied to
6 any technology, and the Applicant must demonstrate
7 its collision technology is sufficient to ODNR's
8 satisfaction before construction may begin." Do you
9 see that?

10 A. I do.

11 Q. How's ODNR going to determine whether or
12 not the collision technology is sufficient?

13 A. Well, we envision that the Applicant
14 will -- will test the technology and provide the data
15 about its operation and what it is capable of doing
16 to DNR to review prior to DNR's approval as it's laid
17 out in Joint Exhibit 2, the Revised Stipulations.

18 Q. Well, ODNR does not have on staff any
19 experts regarding this collision technology which it
20 must determine is sufficient, correct?

21 A. No, ODNR doesn't have anyone on staff.
22 We are not even sure what the technology is, so I
23 don't know -- I don't want to say we don't have
24 experts. We don't know what the technology is.
25 Likely whatever this is will be brand new so we'll

1 have to seek a third party for assistance with this
2 which is what we plan on doing.

3 Q. Where in the Stipulation does it require
4 ODNR to engage some expert with respect to the
5 proposed technology to review it and sign off on it
6 before ODNR signs off on it?

7 A. There's not a requirement but there is an
8 allowance written into the Joint Stipulation No. 18
9 where it says the operation of the collision
10 detection technology is subject to audits or
11 third-party consultant. And, again, we also -- we
12 also regularly consult with Fish and Wildlife Service
13 as part of this.

14 And I -- I imagine that through this
15 process of developing -- of developing the impact
16 mitigation plan and post-construction monitoring
17 plan, those details will be in that. There will be
18 details that are not in the Joint Stipulations that
19 will be in the plans as a standard in most -- most
20 plans.

21 Q. But as the Stipulations exist, there's no
22 requirement that ODNR retain an independent expert
23 with respect to the particular technology, which
24 expert must sign off on the technology, and that it
25 is working properly before ODNR gets its approval; is

1 that correct?

2 A. No. On the Joint Stipulations, ODNR is
3 not requiring ODNR to have a third-party review.

4 Q. Okay. Now, with respect to ODNR's
5 approval of this technology, which we don't even know
6 what it is as we sit here today, ODNR's not required
7 to come back to the Power Siting Board and have the
8 Power Siting Board decide whether or not it is
9 appropriate for ODNR to approve the technology,
10 correct?

11 A. Again, through Joint Stipulation, Revised
12 Joint Stipulation 18, the plan and the data will be
13 submitted to both ODNR and Staff for review.
14 Although ODNR would give the approval, we work with
15 Staff as -- as is the relationship. So I -- they
16 would have input into that.

17 Q. I guess I didn't understand your answer.
18 We are here in a proceeding for the Board approval of
19 this Stipulation, correct?

20 A. Correct.

21 Q. All right. Pursuant to this Revised
22 Stipulation, if and when Icebreaker comes to ODNR
23 with this new technology for collision detection,
24 there's no requirement that the proposal be submitted
25 to the Board so that it can be subject to an

1 adjudicatory hearing and analysis by experts, for
2 instance, retained by the Bratenahl Residents for
3 another expert to render his or her opinion as to
4 whether or not the technology works; is that correct?

5 A. No. The Board -- the way this is
6 proposed, the Board -- it would be approved as is
7 currently. If the Board does not approve it, they
8 have the option to modify it when it goes before them
9 for approval if they don't agree to the way this is
10 written.

11 Q. But if they agree to the way it is
12 written, there is no requirement that the technology
13 be brought back to the Board for the Board's
14 approval.

15 A. True, correct.

16 Q. All right. And there's no requirement
17 that an independent expert with respect to the
18 knowledge -- technology be retained by ODNR before it
19 gives its sign-off, right?

20 A. No. That detail is not part of the
21 Stipulation.

22 Q. All right. And we've agreed that to your
23 knowledge, ODNR does not possess on staff any experts
24 with respect to collision technology for turbines,
25 correct?

1 A. No. We partner with other entities in
2 order to gain that expertise as part of our regular
3 practice.

4 Q. Okay. Now, did ODNR submit the proposed
5 Revised Stipulation to any independent expert in
6 radar technology to review it to get that expert's
7 opinion as to whether or not the Revised Stipulation
8 would represent the minimum adverse environmental
9 impact to birds and bats?

10 A. It was based off of guidance before the
11 previous hearing from U.S. Fish and Wildlife and from
12 USGS, but the Revised Stipulation was not reviewed by
13 a third party.

14 Q. Okay. Now, you've mentioned Fish and
15 Wildlife Service a couple times. Did you submit the
16 Revised Stipulation to the Fish and Wildlife Service
17 to have them review the Revised Stipulation and
18 render an opinion as to whether or not it ensures the
19 adverse minimum environmental impact to birds and
20 bats?

21 MR. SECREST: Let me note an objection,
22 please, your Honor. That would go to the
23 deliberative process.

24 ALJ ADDISON: Thank you.

25 Mr. Stock?

1 MR. STOCK: I'm allowed to find out if
2 anyone who has any expertise with respect to what
3 they are proposing has reviewed it.

4 ALJ ADDISON: Thank you. I'll allow the
5 question.

6 A. The -- the original Staff Report had
7 input from U.S. Fish and Wildlife radar experts as
8 well as USGS radar experts. It was not their role
9 necessarily to determine if it was -- if it
10 maintained minimum adverse impact to wildlife. The
11 Revised Stipulation is mostly based on that original
12 recommendation. There were some changes that were
13 made and those changes were not -- to the best of my
14 knowledge were not reviewed with U.S. Fish and
15 Wildlife Service at that time.

16 Q. Okay. Now, during your work with respect
17 to this project, you would occasionally interact with
18 the Fish and Wildlife radar team, correct?

19 A. Occasionally, yes.

20 Q. All right. Was Jeff Gosse a member of
21 that radar team?

22 A. He was a member from -- for about six
23 months.

24 Q. Until March of 2018, correct?

25 A. Until March, yep. It would have been

1 right around six months with my involvement with the
2 project.

3 Q. Dr. Gosse was one of the people you
4 consulted with with respect to this project, correct?

5 A. Yes.

6 Q. And you're aware he has filed testimony
7 in this case where he opines that the Revised
8 Stipulation does not represent the minimum adverse
9 environmental impact to birds and bats, correct?

10 A. I've reviewed his testimony, and I read
11 what he -- what he said.

12 Q. Thank you.

13 MR. SETTINERI: Your Honor, I would move
14 to strike that answer. That testimony is not in the
15 record as of today.

16 ALJ ADDISON: Thank you.

17 Mr. Stock, would you like to mark
18 Dr. Gosse's testimony at this time?

19 MR. STOCK: I will, and we have a
20 stipulation on its admission. I will mark it as
21 we're Exhibit 24.

22 ALJ ADDISON: I believe that's correct.

23 MR. STOCK: I don't think I am going to
24 give Mr. Settineri a copy.

25 MR. SETTINERI: You should have gone

1 before Staff.

2 ALJ ADDISON: It will be so marked.

3 (EXHIBIT MARKED FOR IDENTIFICATION.)

4 Q. (By Mr. Stock) Bratenahl Residents
5 Exhibit 24, this was the -- this was the Dr. Gosse's
6 testimony you reviewed, correct?

7 A. Yes. I believe it is, yes.

8 Q. Okay. Thanks. Now, let's go back to the
9 Revised Stipulation, Joint Exhibit 2. I'm sorry.
10 I'm jumping around too much. Let's stay -- stick
11 with page 4 of your testimony. We'll get to the
12 Revised Stipulation in a minute. Your answer on page
13 4 continues, we asked about the second sentence,
14 "Stipulation Condition 18 also states that the
15 technology must be installed and fully functioning at
16 the time the turbines first commence operation." Do
17 you see that?

18 A. I do.

19 Q. How is ODNR going to determine that the
20 technology is fully functioning?

21 A. Again, not knowing what the technology
22 would be, I can't get into specifics but whatever
23 that would be in part of that approval process again
24 would understand the capabilities of the technology,
25 how it should be fully functioning, so that if

1 something isn't right with that information, we'll
2 know that it's malfunctioning. It could be how the
3 data is transferred. It could be the tolerances. So
4 all of those things need to be in line with what DNR
5 approves in order for the project to begin
6 operations.

7 Q. Well, let's assume that the project is
8 built, the technology is out there, and it's running
9 and it's producing data, okay? I'm speaking
10 specifically of avian radar.

11 A. Oh, okay.

12 Q. Okay?

13 A. Okay.

14 Q. How is ODNR going to determine whether or
15 not that radar is failing to pick up, detect birds or
16 bats flying through the project area?

17 A. Again, I will preface this with I am not
18 a radar expert, but my general understanding is that
19 all radars have tolerances and there will be
20 information that's missed and there will be
21 information that's collected. So ODNR will collect
22 people -- will collect the data from the Applicant,
23 and there will be reports that are associated with
24 that, along with our -- our third-party review of
25 that information will be able to determine if the

1 system is collecting information that's needed.

2 Q. This system -- an avian radar system on a
3 moving vessel you have no knowledge of having been
4 used before, correct?

5 A. Right. Right.

6 Q. So how do you know -- how is ODNR going
7 to determine what that system is missing if the data
8 simply isn't -- doesn't appear?

9 MR. SIMMONS: I am going to note an
10 objection just for clarification that I believe the
11 testimony on page 18 is referring to the collision
12 detection technology as opposed -- as to the radar
13 monitoring technology. I would just note that
14 objection for the record.

15 ALJ ADDISON: Thank you, Mr. Simmons.

16 MR. STOCK: That's fine. I am asking her
17 right now about avian radar. We can talk about the
18 detection in a minute.

19 A. So with avian radar, again, we understand
20 that there are going to be a lot of -- this is going
21 to be trial and error. The system will know the
22 system's tolerances upfront. It should be tested on
23 land to understand those tolerances or test it so we
24 understand the tolerances and that will be part of
25 the information that needs to be submitted

1 regarding -- regarding the system. Can it track the
2 10 gram and larger targets, for instance? So all of
3 the things that are in the Joint Stipulation 21, can
4 the system perform in this manner?

5 Q. But if the data is not there, that is --
6 let's assume hypothetically it shows 10 birds flying
7 through but in actuality there were 15. How are you
8 going to know -- how is ODNR going to determine that
9 five of them were missed?

10 A. So, again, I'm not -- I am not a radar
11 expert, and I don't understand how those analyses are
12 normally done. But that would mean having that
13 confidence in the system before it's deployed on the
14 project site. There --

15 ALJ ADDISON: Oh, Mr. Stock, let her...
16 You may finish your answer.

17 A. We've also had discussions regarding
18 acoustics on the vessel which is one of the reasons
19 why there's an additional season added into the Radar
20 Monitoring Protocol and that would also help inform
21 the density of animals, for instance, as would the
22 NEXRAD data that would be supplied. Now, it wouldn't
23 be able -- the NEXRAD data specifically wouldn't be
24 able to give us information from the project site
25 itself, but it could be used relative to the

1 information we're getting, relative for the
2 information that we are getting at the project site
3 and the radar.

4 Q. So the project is built and there is a
5 radar unit on a floating vessel out there and it is
6 producing whatever data it's producing. Is ODNR
7 going to set up some competing or complimentary
8 system to determine whether or not the Icebreaker
9 system is missing anything?

10 MR. SECREST: Objection to the extent
11 mischaracterizes evidence with regard to after it's
12 built and radar being placed on vessel-based radar as
13 opposed to turbine platform.

14 ALJ ADDISON: Thank you.

15 Would you like to rephrase, Mr. Stock?

16 MR. STOCK: Sure, sure. Then we will
17 with respect to collision monitoring.

18 Q. (By Mr. Stock) The vessel-based avian
19 radar, that radar testing is going to be done prior
20 to construction; is that correct?

21 A. The information will be -- will be
22 provided regarding the radar system and the
23 tolerances prior to construction because it will be
24 included in the monitoring plans that ODNR has to
25 approve, yes.

1 Q. Well, I am responding to Mr. Secrest's
2 objection. Will there be radar on a floating vessel
3 out at the project site when the project is built and
4 operating?

5 A. So according to the Stipulation, there
6 are options. We haven't identified exactly where it
7 will -- where it will be. One of the options we are
8 discussing is a floating system. The Applicant also
9 has the option of putting it on platform at the
10 project site to collect data. At the project site, I
11 should say. There may be other options at that time
12 that I am not aware of. But those are the two that
13 have been part of conversations so far.

14 Q. I'm sorry. Can you give me the last
15 portion? What was the second option?

16 A. On a platform, on a stable platform.

17 Q. Okay. Was that -- the stable platform
18 alternative, was that on the base of a turbine?

19 A. It could be.

20 Q. Would that not present additional issues
21 regarding interference with the radar technology?

22 A. So with radar there are always -- are you
23 referring to blind spots, I am assuming, and that
24 type of thing?

25 Q. Yes, and interference with the radar.

1 A. There would always be a chance for blind
2 spots. And, again, that would be part of the
3 analysis. It doesn't necessarily mean that the data
4 that's collected wouldn't be valuable and
5 characterize what's going on at the project site
6 post-construction.

7 Q. And a radar unit was put on the water
8 intake crib in Lake Erie, right, the one closest to
9 the project site?

10 A. I recall reading something about that,
11 but I'm not really familiar with the details. I just
12 know that it wasn't successful for some reason.

13 Q. Right. The data wasn't usable; isn't
14 that correct?

15 A. For some reason but I'm not familiar with
16 why that was.

17 Q. Okay.

18 A. I don't know what happened to the system.

19 Q. Now, again, on page 4 moving down it says
20 "This technology is subject to audits by ODNR." Do
21 you see that?

22 A. Yes, I do.

23 Q. How is ODNR going to audit the
24 technology?

25 A. Again, with -- in using our partners and

1 their expertise and once we know what the technology
2 is, I think we have more information about that. But
3 we wanted to be clear that DNR will do everything we
4 can to ensure that it's operating correctly and the
5 data that we are getting is quality data.

6 Q. But as we sit here today, you can't tell
7 us -- you can't tell the Board what that auditing
8 would consist of, right?

9 MR. SECREST: Objection, asked and
10 answered multiple times.

11 ALJ ADDISON: Thank you. Sustained.

12 Q. (By Mr. Stock) Now, let's go to Joint
13 Exhibit 2, Revised Stipulation, that's at tab 32 but
14 you may have a separate copy there, page 7.

15 A. Yes.

16 Q. Condition 20, "If state or federally
17 listed endangered or threatened species are
18 encountered during construction, operation, or
19 monitoring activities, the Applicant shall contact
20 Staff, the ODNR, and the U.S. Fish and Wildlife
21 Service, as applicable, and modify operation
22 activities that could adversely impact the identified
23 animals to minimize risk within 24 hours." Do you
24 see that?

25 A. I do.

1 Q. How will ODNR determine whether -- that
2 federally listed endangered or threatened species
3 have been encountered by the turbines during
4 operation?

5 A. So, again, there could be different
6 scenarios. Are you asking -- it would be reported by
7 the Applicant. And it could be that let's say state
8 endangered terns are nesting on the platforms. If
9 the Applicant is surveying, monitoring, and they
10 notice that the terns have built nests on the
11 platforms, they would report that to ODNR. So that
12 could be during operation.

13 It could be a carcass is recovered. It
14 could be potentially, again -- again, speculation on
15 the technology that's being used, it's difficult but,
16 you know, we've been discussing video, some sort of
17 monitoring technology that's able to record activity
18 at the turbines. So it's difficult to say. I think
19 it's very broad, but I think there are a lot of
20 possibilities in how it would be reported.

21 Q. Let's assume an Indiana Bat flies through
22 and is hit by a turbine and killed. You're telling
23 me one of the means of detection would be finding the
24 carcass?

25 A. It's possible. We've had discussions

1 revolving around all sorts of potential methods we
2 might use. Again, we haven't settled on one yet.
3 Right now, there are a lot of different options.

4 Q. Are you aware of any turbines in water
5 for which scientifically valid carcass studies have
6 been done with respect to bats?

7 A. No. This project is the first of its
8 kind. I'm not aware of any surveys that have been
9 done regarding bat carcasses over water.

10 Q. Okay. And you would admit to your
11 knowledge avian radar will not pick up species of a
12 target, right?

13 A. No. Right now, that's under development
14 but it's not a proven technology.

15 Q. Yeah. Okay. Now, if you look -- if you
16 go down to 21c, do you see that "Radar must suppress
17 false detections from insects, wave clutter, and
18 weather and without downtime bias with respect to
19 biological periods producing viable data 75 percent
20 or greater of the hours of the survey time (dusk to
21 dawn spring, summer, and fall April 1 to November
22 15)." Do you see that?

23 A. Yes.

24 Q. Now, at -- excuse me. Under the original
25 Staff Report, the paragraph 19 proposal regarding

1 feathering of turbines was for the period from March
2 1 through January 1, correct?

3 A. I'm sorry. Could you repeat the
4 question?

5 Q. Yes. The Staff Report paragraph 19,
6 "Turbine shall be feathered completely from dusk to
7 dawn from March 1 through January 1 until the
8 Applicant has demonstrated at the post-construction
9 avian and bat collision monitoring plan is sufficient
10 as determined by the ODNR in consultation with
11 Staff," correct?

12 A. Yes. In the original -- in the Staff
13 Report that is what Condition 19 said.

14 Q. Okay. And the reason for the dates March
15 1 through January 1, as you testified at the hearing
16 before, was that March 1 through January 1
17 comprehends the spring and fall migratory seasons for
18 birds and bats, correct?

19 A. It includes that as well as their
20 residency periods.

21 Q. Right. So by moving the monitoring
22 date -- dates or narrowing them from March 1 to April
23 1, you are missing part of the spring migratory
24 season, correct --

25 MR. SIMMONS: I am going to object.

1 Q. -- for birds and bats?

2 MR. SIMMONS: I am going to object to the
3 clarification of moving the dates without -- without
4 additional context. I think he is suggesting that
5 there was a change between prior the Staff Report and
6 the current Stipulation in regard to 22c.

7 ALJ ADDISON: Would you care to just
8 rephrase, Mr. Stock, to make it clear?

9 MR. STOCK: Yeah.

10 ALJ ADDISON: Thank you.

11 Q. (By Mr. Stock) You testified -- and so we
12 all understand, take a look at tab 29, page 1702, and
13 this is redirect from Mr. Simmons.

14 A. Page?

15 Q. 1702, tab 29.

16 A. Okay.

17 Q. This is your redirect examination by
18 Mr. Simmons --

19 A. Uh-huh.

20 Q. -- talking about Condition 19.

21 "Ms. Hazelton, in regard to Staff Condition 19, why
22 is it important to be protective for the entire
23 period from March 1 through January 1?" And could
24 you read for us what your response is.

25 A. My answer was, "Again, given that we have

1 very little pre-construction data for this project
2 and this site at this time, that period" -- let me
3 start back.

4 "Different animals have different
5 migration periods and so that period encompasses the
6 time that we feel is a heightened risk for not just
7 songbirds but waterfowl, songbirds, and bats
8 specifically. So just to run through it quickly,
9 originally, so in the spring, early spring, starting
10 off March, for instance, is when the time the
11 waterfowl would be migrating north generally. And
12 that's followed shortly there by, in April, the bats,
13 and then, of course, mentioned before the songbird
14 migration around May."

15 Q. Okay. You can stop there. Now, go down
16 to the paragraph just above the question.

17 A. "And then in the fall"?

18 Q. Yep.

19 A. "It just reverses itself, where again we
20 have our songbirds leaving the north and heading
21 south, and then we have songbirds and bats and then
22 followed by waterfowl in the end of the year."

23 Q. And then the question "And would that go
24 all the way through November and December?" And your
25 response?

1 A. My response was "Yes. There are certain
2 species that do migrate, like I said, very early and
3 very late, specifically grebes, coots, I mentioned
4 cranes as well. Those are the ones that I'm aware
5 of."

6 Q. Okay. The dates March 1 through January
7 1, you believe that March included -- was a period
8 during which there was spring migration going on for
9 birds and bats, correct?

10 A. Correct.

11 Q. And that the December -- November and
12 December were months when migration is still going on
13 for birds and bats in the fall, right?

14 A. Correct.

15 Q. All right. And so with respect to -- if
16 you go back to the Revised Joint Stipulation, page 7,
17 paragraph 21c, for the avian radar monitoring, the
18 period is from April 1 to November 15, correct?

19 A. That's right.

20 Q. So you will miss the migration period in
21 March, that portion of the period in March, correct?

22 A. Yes. The radar -- the radar dates have
23 not changed from the Staff Report. We knew that we
24 would be missing certain parts of potential migration
25 events in tracking them via radar.

1 Q. Okay. So under the Revised Stipulation,
2 there won't be this radar monitoring for March,
3 correct?

4 A. There was never intended to be radar in
5 March.

6 Q. Okay. And under the Revised Stipulation,
7 there will not be, right?

8 A. Correct.

9 Q. And there won't be radar monitoring for
10 the second half of November and December, correct?

11 MR. SECREST: Objection, your Honors.
12 This hasn't changed from the prior version of the
13 Stipulation. Mr. Stock could have questioned
14 Ms. Hazelton on this previously, and I know he
15 indicated his belief that she was not adverse before.
16 However, that's incorrect. She certainly was adverse
17 as Staff was supporting the certificate with
18 conditions, and Bratenahl Residents were not
19 supporting any certificate.

20 ALJ ADDISON: Thank you, Mr. Secrest.

21 I do believe Ms. Hazelton has made it
22 very clear those dates have not changed. Perhaps we
23 could move on to the next area of your cross,
24 Mr. Stock.

25 MR. STOCK: That's fine.

1 MR. SECREST: Thank you.

2 ALJ ADDISON: Thank you.

3 Q. (By Mr. Stock) Let's talk about the 75
4 percent -- the viable data 75 percent or greater of
5 the hours of the surveyed time. What do you recall
6 to be the date range generally of the greatest
7 concentration of spring migration?

8 A. Again, it varies. It depends on the
9 species; but, you know, generally we are looking at
10 migration beginning in March for some animals and
11 moving all the way through the middle of May.

12 Q. Okay. And then for fall migration.

13 A. Again, I would say that it varies with
14 the species and definitely the year, but it's
15 typically recognized as being September through
16 really the end of the year and November and December.

17 Q. And so for purposes of the 75 percent,
18 the radar will be used April 1 through May for the
19 spring migration and September through November 15
20 during the fall migration, right?

21 A. It will capture that portion, yes.

22 Q. Yeah. Okay. And so this interim period
23 of time, let's say from June 1 to August 30, which
24 would not -- which would be outside the significant
25 migration periods, right?

1 A. Okay.

2 Q. Okay. The way the 75 percent would work,
3 if there were data captured 95 percent of the time or
4 better during that June to August period, the
5 percentages could be lower for both the spring
6 migration and the fall migration, correct?

7 A. It's possible. However, there's a phrase
8 in there that addresses that concern.

9 Q. And what is that?

10 A. The phrase is "without downtime bias with
11 respect to biological periods." So that was inserted
12 to ensure that the minimum floor of 75 percent at any
13 biological period, which is a broad term, would be
14 met.

15 Q. So "without downtime bias" you interpret
16 to mean there has to be 75 percent during each
17 period?

18 A. It could mean -- biological period could
19 be applied to migration in summer and migration in
20 fall.

21 Q. So, again, so what I am asking does that
22 mean it has to meet 75 percent for each period?

23 A. It could be interpreted to mean that. It
24 depends on the data. We have to review the data.

25 Q. It could be interpreted to mean something

1 else?

2 A. It's possible. We have to look at the
3 data to make that determination.

4 Q. And who would make the determination?

5 A. DNR would be reviewing that along with
6 our consultants.

7 Q. Okay. Now, this would be radar data,
8 correct?

9 A. Correct.

10 Q. And the ODNR doesn't have any avian radar
11 experts, right?

12 A. Right. As I mentioned, with our
13 consultants are third-party consultants.

14 Q. And there is no requirement that the
15 third-party consultant in the Revised Stipulation
16 perform this review for bias, correct?

17 A. No. There is not a requirement of
18 third-party review.

19 Q. Let's turn to page 9, Condition 23.

20 A. Yes.

21 Q. "This condition applies to all avian and
22 bat species, with the exception of state or federally
23 listed endangered or threatened species, which are
24 exclusively addressed in Stipulation Condition 20.
25 The Applicant will immediately report a significant

1 mortality event (21 or more detected collisions at
2 the facility within a 21 -- 4-hour period based on a
3 facility-wide detection probability of 59%) to the
4 ODNR." How will ODNR determine -- let me ask you
5 this, the project is built. It's operating.
6 Icebreaker never reports a significant mortality
7 event defined here as 20 -- 21 or more detected
8 collisions at the facility within a 24-hour period.
9 How is ODNR going to establish that, in fact, there
10 haven't been such significant mortality events?

11 A. So, again, these -- these Joint
12 Stipulations were based off of guidance for
13 terrestrial projects which, as I've testified to
14 before, doesn't directly apply but was used to guide
15 the goals for this project. And as with our
16 terrestrial projects, DNR does not police any of
17 those. It is all based on the Company's
18 self-reporting as required by the certificate.

19 Q. Well, on terrestrial projects how is
20 mortality determined?

21 A. On terrestrial projects the consultants
22 working for the companies, they search the base of
23 the turbines for carcasses.

24 Q. Carcass counts, right?

25 A. Uh-huh, correct.

1 Q. All right. Are you aware of any
2 scientific study that shows that carcass counts are a
3 proper scientific method to use to determine
4 mortality at a wind turbine site in water?

5 A. Again, I'm not aware of any papers
6 counting carcasses over an aquatic facility. There
7 just aren't very many of those. So that's why we've
8 adopted different protocols and allowed for that in
9 the certificate because we recognize this is not a
10 terrestrial project.

11 Q. Right. So ODNR isn't suggesting it could
12 rely on carcass counts for this project to determine
13 whether or not 21 birds or bats were killed, correct?

14 A. No. We recognize there may be a
15 different technology that we use instead.

16 Q. Right. And if Icebreaker never reports a
17 significant mortality event using whatever technology
18 it uses, which hasn't been identified to date, how is
19 ODNR going to be able to check whether or not such
20 events have occurred despite the fact that they've
21 not been detected and reported by Icebreaker?

22 A. And by reported I'm assuming you mean the
23 24-hour requirement because there are other
24 requirements for reporting, and certainly if they are
25 in violation of that, that would be in violation of

1 the certificate which has its own set of
2 repercussions but there are other ways of reporting
3 to where DNR will be able to review the information
4 about the site and specifically quarterly reports,
5 the data that are collected at the site, annual
6 reports, annual meetings. So there are numerous
7 opportunities to review the data and work with the
8 Company moving forward.

9 Q. No, no. I am not suggesting Icebreaker
10 would record 21 mortalities and not report it. What
11 I'm asking is if they don't detect 21 mortalities,
12 how is Ohio -- ODNR going to determine whether or not
13 at any point in time 21 mortalities have occurred
14 within a 21 -- 24-hour period?

15 A. I again would say that we are relying on
16 the analysis for whatever this technology is that DNR
17 and Staff agree to move forward. So we are agreeing
18 that it performs in a certain way and then that there
19 will be audits. So the equipment, when it's
20 operational out in the water, will be audited, and if
21 the results come back a different number for -- let's
22 say there is a known, a known number of targets, and
23 if the results are a different number, that's not
24 within the tolerance established in the monitoring --
25 in the post-construction monitoring plan, then I

1 think that that's where DNR would have those
2 conversations and there's -- the technology is not
3 working as agreed upon.

4 Q. How are you going to determine what the
5 known number of targets are if they are not picking
6 them up?

7 A. Again, I can't speculate as to how the
8 technology will work because we're really not sure
9 what it's going to be yet, so I don't know the
10 tolerances.

11 Q. Okay.

12 A. I don't know what those targets would be.

13 Q. Okay. Now, the detection probability of
14 59 percent, is that a figure from terrestrial carcass
15 studies?

16 A. It is. Again, we based our guidelines on
17 the terrestrial protocol and that was based off of
18 the average detection rate for those terrestrial
19 projects.

20 Q. But it's not contemplated by ODNR that
21 Icebreaker is going to be permitted to use carcass
22 studies for determining mortality caused by this
23 project in the water, right?

24 A. No. The -- whatever this technology is
25 will have a -- will have some sort of percentage

effectiveness and so that's what that 59 percent is referring to. If the technology, for instance, is tested and it's 100 percent effective, then that -- that number would be based on 100 percent, so it would be 36 or something like that.

Q. But, again, the number doesn't relate to any technology -- technology other than carcass studies, right?

A. Correct, correct.

ALJ ADDISON: Let's go off the record for just a minute.

(Discussion off the record.)

ALJ ADDISON: Let's go back on the record.

MR. STOCK: If you can just give me a minute.

ALJ ADDISON: Certainly.

MR. STOCK: No further questions.

ALJ ADDISON: Thank you, Mr. Stock.

Mr. Simmons, redirect?

MR. SIMMONS: Could I have a few minutes to confer with co-counsel?

ALJ ADDISON: Absolutely.

Let's go off the record.

(Discussion off the record.)

1 ALJ ADDISON: We'll go back on the
2 record.

3 Mr. Simmons, any redirect?

4 MR. SIMMONS: No, your Honor.

5 ALJ ADDISON: Thank you.

6 Ms. Hazelton, you are excused. Thank you
7 very much.

8 Mr. Simmons, I believe the parties may
9 have a stipulation to Mr. Hartman's testimony. Would
10 you like to mark that exhibit at this time before we?

11 MR. SIMMONS: Yes, your Honor. Staff
12 would move -- would mark revised prefiled testimony
13 of Travis Hartman as Staff Exhibit 15 and move that
14 for admission.

15 ALJ ADDISON: Thank you.

16 MR. STOCK: No objection.

17 ALJ ADDISON: It will be so marked.

18 (EXHIBIT MARKED FOR IDENTIFICATION.)

19 ALJ ADDISON: I believe that was the
20 understanding of the parties. No parties had
21 additional questions for Mr. Hartman today, correct?

22 MS. PIRIK: No objection.

23 ALJ ADDISON: Thank you.

24 MR. BERKOWITZ: No objection.

25 ALJ ADDISON: Staff Exhibit 15 will be

1 admitted.

2 (EXHIBIT ADMITTED INTO EVIDENCE.)

3 ALJ ADDISON: And then, Mr. Simmons,
4 would you also like to move for Ms. Hazelton's
5 testimony?

6 MR. SIMMONS: Yes, your Honor.

7 ALJ ADDISON: Thank you. Any objection
8 to Staff Exhibit 14 being admitted into the record?

9 MR. STOCK: Just the objections that I
10 stated before.

11 ALJ ADDISON: Thank you. Of course,
12 Mr. Stock.

13 Hearing no other objections, your
14 objections will be noted, Mr. Stock, and we will
15 admit Staff Exhibit 14 into the record.

16 (EXHIBIT ADMITTED INTO EVIDENCE.)

17 ALJ ADDISON: And, Mr. Stock, I believe
18 you had an exhibit too.

19 MR. STOCK: Yes, I do. I move the
20 admission of Bratenahl Residents Exhibit 24 which is
21 the prefiled testimony of Dr. Jeff Gosse which the
22 parties have agreed may be admitted.

23 ALJ ADDISON: And is that correct? No
24 parties had additional questions for Mr. Hartman and
25 are stipulating to the admission of his testimony --

1 or, I'm sorry, Mr. -- Dr. Gosse? I apologize,
2 Mr. Stock.

3 MR. SECREST: That's correct, your Honor,
4 with the caveat we reserve the right to address our
5 motion -- the ruling on our motion to exclude in
6 brief as well as Dr. Gosse's conclusions.

7 ALJ ADDISON: Of course.

8 MR. SECREST: Thank you.

9 ALJ ADDISON: Any other objections?

10 MR. BERKOWITZ: No, your Honor.

11 MR. SIMMONS: No, your Honor.

12 ALJ ADDISON: Seeing none, it will be
13 admitted.

14 (EXHIBIT ADMITTED INTO EVIDENCE.)

15 ALJ ADDISON: Let's go off the record for
16 a moment.

17 (Discussion off the record.)

18 ALJ ADDISON: We'll go back on the
19 record.

20 Mr. Secrest.

21 MR. SECREST: Your Honor, may we move for
22 the admission of Joint Exhibit 2?

23 ALJ ADDISON: Any objections to the
24 admission of Joint Exhibit 2?

25 MR. STOCK: No.

1 MR. BERKOWITZ: No, your Honor.

2 ALJ ADDISON: Thank you. Hearing none,
3 it will be admitted.

4 (EXHIBIT ADMITTED INTO EVIDENCE.)

5 MR. SECREST: Thank you.

6 ALJ ADDISON: Thank you. Following a
7 brief discussion off the record, the parties have
8 agreed upon a briefing schedule for this -- for this
9 case, initial briefs being due October 11 and reply
10 briefs being due November 15.

11 Is there anything else we need to address
12 before adjourning today?

13 MR. SECREST: No, your Honor. Thank you.

14 MR. BERKOWITZ: No, your Honor.

15 MR. STOCK: Thank you, no.

16 MR. LINDGREN: No, your Honor. Thank
17 you.

18 ALJ ADDISON: All right. Thank you. We
19 are adjourned.

20 (Thereupon, at 12:29 p.m., the hearing
21 was adjourned.)

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CERTIFICATE

I do hereby certify that the foregoing is
a true and correct transcript of the proceedings
taken by me in this matter on Tuesday, August 20,
2019, and carefully compared with my original
stenographic notes.

Karen Sue Gibson
Karen Sue Gibson, Registered
Merit Reporter.

(KSG-6797)

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Case No(s). 16-1871-EL-BGN

Summary: Transcript Volume VIII - In the Matter of the Application of Icebreaker Windpower Inc. for a Certificate to Construct a Wind-Powered Electric Generation Facility in Cuyahoga County, Ohio, hearing held on August 20th, 2019. electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Gibson, Karen Sue Mrs.