BEFORE
THE OHIO POWER SITING BOARD

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

JOINT REPLY TO
BRATENAHL RESIDENTS' MEMORANDUM CONTRA
MOTION TO EXCLUDE TESTIMONY

I. BACKGROUND

On July 26, 2019, Icebreaker Windpower, Inc. ("Applicant" or "Icebreaker"), Indiana/Kentucky/Ohio Regional Council of Carpenters, and Business Network for Offshore Wind, Inc. (hereinafter jointly referred to as "Joint Movants"), filed a Joint Motion to exclude the testimony of Jeff Gosse ("Gosse"), a witness identified by Intervenors W. Susan Dempsey and Robert M. Maloney ("Bratenahl Residents"), and request for expedited replies in this matter with the Ohio Power Siting Board ("Board"). On July 29, 2019, the Board's Administrative Law Judge issued an entry requiring that all memoranda contra the Joint Motion and all replies shall be due by August 5, 2019, and August 7, 2019, respectively.

On August 5, 2019, the Bratenahl Residents filed a memorandum contra the Joint Motion. At this time, the Joint Movants submit their response to the Bratenahl Residents' memorandum contra.

II. INTRODUCTION

Initially, the Joint Movants emphasize that the Bratenahl Residents do not dispute that, as the United States Fish and Wildlife Service ("USFWS") team lead, Gosse was intimately involved in the Icebreaker project on behalf of USFWS for practically the entire life of the project. "The U.S. Fish and Wildlife Service…has provided technical assistance for the Icebreaker project since

the early stages of project development." *Bratenahl Residents Ex. 6*. The Bratenahl Residents also do not dispute that Gosse's testimony will involve information he acquired while performing his official duties with the USFWS, that his testimony will include facts or events related to the official business of the USFWS, or that the United States has an interest in these proceedings. Accordingly, absent some other applicable legal principle, the *Touhy* regulations are applicable.

The Bratenahl Residents contend that the Joint Movants lack standing to enforce the *Touhy* regulations; however, the cases they cite in support of this contention do not involve matters in which the United States had an interest. They also contend that the regulation does not apply to former employees, despite the plain language of the regulations stating they do, in fact, apply to former employees. Most glaring is that the Bratenahl Residents make no mention of any attempt to obtain approval from the USFWS or the Department of the Interior (the "Department").

III. LAW AND ARGUMENT

A. *Touhy* challenges may be brought by private litigants.

The Bratenahl Residents maintain that *U.S. ex rel. Treat Brothers Co. v. Fidelity and Deposit Co. of Md.*, 986 F.2d 1110 (7th Cir. 1993) supports their contention that Joint Movants may not enforce the *Touhy* regulations. *Treat Brothers* concerned a dispute related to the construction of a dormitory on an Air Force base. Treat Brothers was a subcontractor and Blinderman Construction Company ("Blinderman") was the general contractor, with Fidelity and Deposit Company of Maryland serving as its surety. After a dispute with Blinderman, Treat Brothers walked off the job site and brought suit for money owed on the construction contact. Treat Brothers proffered the testimony of two individuals employed by the United States Army Corps of Engineers ("USACE").

In *Treat Brothers*, the 7th Circuit noted it was "a rather unusual situation in which a private litigant…is attempting to enforce Army regulations in litigation in which the Army is not a party and has no interest." *Id*. at 1118. *Treat Brothers* involved a dispute between two private litigants and neither the Army, nor the United States had an interest. As explained in detail in the Joint Motion to exclude Gosse's testimony, and as support by the record in this proceeding, USFWS has an interest and has taken various positions with regard to this project, both at the state and federal level. Further, the United States has an interest in these proceedings. Specifically, the United States Department of Energy provided Applicant with a grant of over $50 million to support the construction of the project.

In *Treat Brothers*, the two USACE individuals did not provide expert testimony. Although the trial court found that one of the witnesses qualified to give opinion testimony under Fed. R. Evid. 701 or 702, the 7th Circuit noted the testimony was limited to the witness's "opinion as to what he observed and knew about the work…." *Id*. Specifically, when an objection was raised that permission was not obtained from the Army for the witnesses to testify as experts, the Court overruled the objections and noted that neither was testifying as an expert. *Id*. at 1119. In *Treat Brothers*, both witnesses also stated they received permission to testify. *Id*. Here, the Bratenahl Residents intend to proffer Gosse as an expert and have not indicated that Gosse has received permission to testify.

The Bratenahl Residents also cite to *U.S. ex rel. Liotine v. CDW Government, Inc.*, No. 05-33-DRH, 2012 WL 2807040 (S.D. Ill. July 10, 2012) for the proposition that a private litigant cannot enforce the *Touhy* regulations. While the Court followed the *Treat Brothers* holdings, based upon *stare decisis*, it also stated, "Nevertheless, the Court sees no reason why relator cannot comply with the Code of Federal Regulations at issue here prior to trial. Accordingly, relator is

ordered to obtain authorization from the designated agency ethics official of the agency in which [the witness] serves prior to testifying at trial." *U.S. ex rel. Liotine v. CDW Government, Inc.*, No. 05-33-DRH, 2012 WL 2807040, *6 (S.D. Ill. July 10, 2012). *Liotine* supports Joint Movants' contention that Gosse must obtain permission from the Department prior to testifying at the August 20, 2019 hearing and, absent evidence of such permission, he should not be permitted to testify.

B. The *Touhy* regulations apply to former employees.

Contrary to the assertions set forth by the Bratenahl Residents, the plain language of the Department's *Touhy* regulations state that "'employee' means a current or former Department employee…." 43 C.F.R. § 2.280(b). Courts have applied the *Touhy* regulations to former employees. In *U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 246 F.R.D. 322 (D. D.C. 2007), the defendant's expert, Mr. Yospe, was employed at the Department of Health and Human Services ("HHS") from 1972-1996. "Without first seeking HHS approval, [defendant] designated Mr. Yospe as an expert and filed an expert disclosure outlining his opinions pursuant to Rule 26(a)(2) of the Federal Rules of Civil Procedure." *U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 246 F.R.D. 322, 323 (D. D.C. 2007). The defendant later sought and obtained approval from HHS for Mr. Yospe to testify on a prospective basis; however, HHS noted it did not approve of Mr. Yospe's prior testimony, including the expert report, because of the failure to first seek approval. *Id*. at 323. The relator, a private party, then objected to Mr. Yospe's deposition on the basis the expert report was not approved by HHS. *Id*. at 324.

The court noted that HHS's *Touhy* regulations apply to current and former employees. *Id*. The court stated, "The *Touhy* regulations adopted by HHS require that a party first seek agency approval before attempting to secure the testimony of a current or former agency employee." *Id*. The court specifically acknowledged the regulations applied to a former (almost 20 years former)

agency employee and then determined the defendant complied with the applicable *Touhy* regulations and HHS approved Mr. Yospe's testimony. Instructive also is that the challenge to Mr. Yospe's testimony was brought by a private litigant.

Yospe's testimony and expert report were also the subject of prior motion practice between the parties. *See U.S. ex rel. Pogue v. Diabetes Treatment Centers of America*, 474 F.Supp.2d 75 (D. D.C. 2007). In that proceeding, the relator and the United States moved to strike Yospe's expert report and his designation as an expert. *U.S. ex rel. Pogue v. Diabetes Treatment Centers of America*, 474 F.Supp.2d 75, 78 (D. D.C. 2007). The court noted, "The valid *Touhy* regulations adopted by HHS require that a party first seek agency approval before attempting to secure testimony of a current or former agency employee." *Id*. at 79. After the filing of these motions, the defendant sought and received HHS approval to call Yospe as an expert and HHS approved, subject to conditions, an expert report. *Id*. at 80. As such, defendant obtained HHS approval for an expert report that differed from the original expert report that was the subject of the motion to strike.

While the court overruled the motion to strike the expert report, it stated:

> To avoid confusion between this expert report and the one that has passed through the HHS *Touhy* process, or between this report and any future affidavit or other exhibit furnished by Mr. Yospe, the Court admonishes relator, the United States, and DTCA not to incorporate by reference any portions of the original Yospe report or to otherwise refer to the original Yospe report in deposition or other testimony or in court filings. Rather, the parties and the United States should move forward on the basis of the current report as approved by HHS.

Id. at 81. In short, the court did not permit the parties to reference the expert report prepared by a former HHS employee that was not approved by HHS.

The Bratenahl Residents also cite *Koopman v. U.S. Depart.of Transp.*, 335 F.Supp.3d 556 (S.D. N.Y. 2018) in support of their contention that *Touhy* regulations do not apply to former

agency employees. *Koopman*, however, involved a subpoena issued to a former agency employee for testimony in a case in which the agency was a party. *Koopman v. U.S. Depart. of Transp.*, 335 F.Supp.3d 556, 559 (S.D. N.Y. 2018). Here, the Bratenahl Residents seek to introduce expert testimony of an employee in an action in which the USFWS and the Department are not parties. In *Koopman*, the court noted that the Department of Transportation had the ability to object to the subpoena and requested the parties submit letters addressing issues related to quashing or modifying the subpoena. *Id*. at 566.

In *Sherwood v. BNSF Railway Corp.*, No. 2:16-cv-00008-BLW, 2019 WL 943548 (D. Idaho Feb. 25, 2019), the court considered the expert testimony of a former agency employee. The court stated, "A former employee such as Mr. Rusk should logically be permitted to testify regarding his personal opinions, so long as he does not purport to announce official [agency] policy, reveal privileged information, or otherwise undermine the governmental interests the *Touhy* regulations serve to protect." *Sherwood v. BNSF Railway Corp.*, No. 2:16-cv-00008-BLW, 2019 WL 943548, *3 (D. Idaho Feb. 25, 2019). That is not the case with Gosse. Gosse has been engaged to testify on behalf of individuals opposed to the Applicant's project. Accordingly, any such testimony will necessarily oppose construction of the project based upon the stipulated conditions. As evidenced in the record in this case, such a position is contrary to the position of USFWS and would undermine the interest the Department has in this project. Thus, *Sherwood* is distinguishable from the matter at bar.

C. Exclusion of the testimony under *Touhy* is consistent with public policy.

The Joint Movants note that the *Touhy* regulations were intended to advance a legitimate governmental interest, which is to prevent former employees from offering a different interpretation or rationale regarding the Department's deliberative process and decision than that

which is embodied in the official statements and administrative record of the matter in question. For this reason, the application of the *Touhy* regulations to former employees in this context is clearly within the scope of authority embodied in the statute. Moreover, allowing Gosse to testify as a former employee would unfairly prejudice Icebreaker since the *Touhy* regulations would preclude Icebreaker from calling a current USFWS employee to rebut Gosse's testimony or testify as to the reasons for the USFWS's position on the Icebreaker project, which, as already shown in the record in this matter, is contrary to Gosse's.

In addition, the Fair Housekeeping Statute, 5 U.S.C. § 301, authorizes federal agencies to issue *Touhy* regulations to, *inter alia*, govern "the conduct of its employees … and the custody, use, and preservation of its records, papers, and property." Essentially, *Touhy* regulations afford federal agencies some control over the documents and information disclosed to litigants. That control is ordinarily exercised by rejecting subpoenas seeking testimony, documents, or information from federal employees without prior approval from the agency. Even when a litigant issues a subpoena to a former employee of a federal agency, the federal agency has standing to challenge the subpoena and prevent the disclosure of information in the possession of the former government employee. *See Pleasant Gardens Realty Corp. v. H. Kohnstamm & Co., Inc.*, Case No. 08-5582, 2009 WL 2982632, *5 (D. N.J. Sept. 10, 2009) ("Unless the United States is permitted to assert appropriate objections to the subpoenas directed to its former employees, [the issuing party] may discover privileged or protect information it is not entitled to obtain. The public has an interest in assuring that protected government information is not discoverable."). Simply put, through *Touhy* regulations or protections embedded within Civil Rule 45, federal agencies can make sure that only appropriate information is made publicly available.

Here, however, the Bratenahl Residents are attempting to circumvent those safeguards that protect important government information. Indeed, by engaging a former USFWS employee to testify on their behalf, they effectively contend that neither the Applicant nor USFWS have any ability to limit the scope of Gosse's testimony. But that logic flies in the face of the public interest that assures protected government information is not discoverable. *See Pleasant Gardens Realty*, 2009 WL 2982632, *5. The most appropriate course of action is for the Board to preclude Gosse from testifying unless and until USFWS authorizes the same. That should ensure that no protected government information—particularly information protected by the deliberative process privilege—is disclosed by Gosse. Therefore, the Board should require the Bratenahl Residents to comply with the procedures established by the applicable *Touhy* regulations and the Administrative Procedures Act as those are the most appropriate procedures for this unique situation.

IV. CONCLUSION

For the reasons set forth in the Joint Motion and further supported herein, the Joint Movants respectfully request that the Board preclude Gosse from offering testimony in this matter. Moreover, the Joint Movants submit that the hearing in this matter should not be postponed due to the failure of the Bratenahl Residents to follow the federal regulations with regard to their proposed witness. Any further extension of this proceeding would be unwarranted and prejudicial the Applicant, given that the Bratenahl Residents could have and should have either obtained the necessary approval for Gosse's testimony prior to presenting him as their witness or employed a different expert that does not have the same restrictions as Gosse.

Accordingly, the Joint Movants request that the hearing in this matter commence, as scheduled, on August 20, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Ohio Power Siting Board's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a copy of the foregoing document is also being served upon the persons listed below via electronic mail this 7th day of August, 2019.

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Summary: Reply to memorandum contra Joint Motion to Exclude electronically filed by Christine M.T. Pirik on behalf of Icebreaker Windpower Inc.