

1 4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2 STATE OF NEW YORK OFFICE OF RENEWABLE ENERGY SITING  
(ORES)

3

4 SITING PERMIT FOR A  
5 MAJOR RENEWABLE ENERGY FACILITY

6

7 IN

8 Towns of Avoca, Cohocton, Howard,  
9 Prattsburgh, and Wheeler,

10

11 Steuben County

12

13 ISSUED TO

14

15 Prattsburgh Wind, LLC

16

17 ORES DMM Matter No. 21-00749

18

19

20 ORAL ARGUMENT

21

22 DATE: April 16, 2024 at 12:55 p.m.

23

24 VENUE: WebEx

25

BEFORE: ALJ DAWN MACKILLOP-SOLLER

ALJ CHRISTOPHER MCENENEY CHAN

Reported by Annette Lainson

1 4/16/2024 - Prattsburgh Wind, LLC - 21-00749

2 (The proceeding commenced at 11:05

3 a.m.)

4 THE REPORTER: We're on the record.

5 A.L.J. MACKILLOP-SOLLER: Thank you,

6 Ms. Lainson.

7 We are on the record for the oral  
8 argument in the matter of Prattsburgh Wind, L.L.C.,  
9 matter number 21-00749. The date is Tuesday, April  
10 16th, 2024. And the time is 11:05 a.m.

11 My name is Dawn MacKillop-Soller. I'm  
12 the administrative law judge along with  
13 Administrative Law Judge Christopher McEneney Chan,  
14 assigned to handle this oral argument this morning.

15 As stated in the notice of oral  
16 argument issued on April 10, 2024, pursuant to 19  
17 N.Y.C.R.R. 900-8.381, the administrative law judges  
18 have determined that oral argument is necessary to  
19 give the panelists here today the opportunity to  
20 respond to arguments raised in ORES Staff's and  
21 Applicant's responses filed on April 2nd, 2024 which  
22 were in response to municipality and intervenor  
23 petitions for full party status and statements of  
24 local law compliance and supplements to the  
25 petitions.

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2 There are four issues to be discussed  
3 today. I will handle the first two issues and  
4 Administrative Law Judge Christopher McEneney Chan  
5 will handle the second two issues. We may have  
6 questions following your arguments today. And we  
7 will proceed with the first issue after I place  
8 appearances of everyone, the panelists only, on the  
9 record.

10 And I would begin with you, Mr.  
11 Muscato, on behalf of the Applicant. Are you  
12 appearing on behalf of the Applicant today and is  
13 anyone else appearing with you from your law firm?

14 MR. MUSCATO: Good morning. Yes, your  
15 Honor. Jim Muscato, appearing on behalf of the  
16 Applicant, Prattsburgh Wind, L.L.C., as well -- along  
17 with my colleague, Jessica Klami.

18 A.L.J. MACKILLOP-SOLLER: Thank you.

19 Ms. Klami, I would ask that you  
20 introduce yourself for the record, please.

21 MS. KLAMI: Yes, thank you, your  
22 Honor. This is Jessica Klami. I am a partner at  
23 Young Sommer on behalf of the Applicant.

24 A.L.J. MACKILLOP-SOLLER: Thank you,  
25 Ms. Klami.

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2 And as we continue with noting  
3 appearances for the record, Ms. Lainson, as a court  
4 reporter, I would ask that you please put your video  
5 on if you could?

6 THE REPORTER: Yes. I'm sorry.

7 A.L.J. MACKILLOP-SOLLER: No, that's  
8 fine. Thank you. That would be helpful.

9 So I'd like to turn to, now, for  
10 appearances for Mr. Kanyuck. Mr. Kanyuck, can you  
11 please state your name and who you represent?

12 MR. KANYUCK: Good morning, your  
13 Honor. My name is Dwight Kanyuck. I represent the  
14 Towns of Cohocton and the Town of Prattsburgh.

15 A.L.J. MACKILLOP-SOLLER: Thank you,  
16 Mr. Kanyuck.

17 Mr. Pullen, on behalf of the Town of  
18 Fremont, I'll turn to you now, sir. Are you here?

19 MR. PULLEN: Yes, Your Honor. I am  
20 appearing on behalf of the Town of Fremont, Seth  
21 Pullen, an attorney with the firm of Richardson,  
22 Pullen, and Buck, P.C.

23 A.L.J. MACKILLOP-SOLLER: Thank you,  
24 Mr. Pullen.

25 And I'd like to turn to Mr. Mullen on

1 4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2 behalf of the Towns of Avoca, Howard, and Wheeler.

3 MR. MULLEN: Good morning, your Honor.  
4 Aaron Mullen for the Towns of Avoca, Howard, and  
5 Wheeler.

6 A.L.J. MACKILLOP-SOLLER: Thank you.

7 And Dr. Sokolaw, are you here? Are  
8 you present on behalf of Prattsburgh Preservation  
9 Alliance?

10 I'm just checking the attendees to see  
11 if Dr. Sokolaw is in with the attendees by any  
12 chance. Is there a representative from Prattsburgh  
13 Preservation Alliance present as a panelist? All  
14 right. We -- we're starting with appearances. So  
15 we'll see if Dr. Sokolaw is able to join us as we  
16 continue with appearances.

17 Mr. Oehlbeck, can you please place  
18 your name on the record?

19 MR. OEHLBECK: Yes. My name is Marty  
20 Oehlbeck.

21 A.L.J. MACKILLOP-SOLLER: Thank you,  
22 Mr. Oehlbeck. And can you spell your name, please?

23 MR. OEHLBECK: Yes. O-E-H-L-B-E-C-K.

24 A.L.J. MACKILLOP-SOLLER: Thank you.

25 And I turn to ORES staff at this time.

1 4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2 And I would turn to Ms. Tooher as General Counsel for  
3 the Office of Renewable Energy Siting. Ms. Tooher,  
4 can you please state your name for record?

5 MS. TOOHER: Certainly, your Honor.  
6 Meave Tooher, General Counsel here at ORES. Your  
7 Honor, I would comment that you are a bit garbled as  
8 I'm hearing you. I don't know if anyone else is  
9 having that experience?

10 A.L.J. MACKILLOP-SOLLER: All right.  
11 Thank you for letting me know. I'll see if I can fix  
12 that. And I can speak up as well. Is that better?

13 MS. TOOHER: No.

14 A.L.J. MACKILLOP-SOLLER: All right.  
15 Let me see here. I see Dr. Sokolaw joined us.

16 Dr. Sokolaw, good morning. You're  
17 muted.

18 DR. SOKOLAW: Good morning.

19 A.L.J. MACKILLOP-SOLLER: Dr. Sokolaw,  
20 can you hear me okay?

21 DR. SOKOLAW: It's garbled. And I had  
22 difficulty getting on, too.

23 A.L.J. MACKILLOP-SOLLER: Okay. Let  
24 me see if I can fix the audio. All right. Is that a  
25 little bit better? Can everybody hear me okay?

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2 DR. SOKOLAW: That's better.

3 A.L.J. MACKILLOP-SOLLER: Is that  
4 still -- is it -- I can speak up, too. I can raise  
5 my voice a little bit to make sure everyone can hear  
6 me okay.

7 A.L.J. MCENENEY CHAN: It's still a  
8 little garbled, but someone's going to try and bring  
9 you a microphone to see if we can get the audio a  
10 little bit better.

11 A.L.J. MACKILLOP-SOLLER: Okay.

12 Great. Thank you very much.

13 MS. TOOHER: Your Honor, I believe --.

14 A.L.J. MACKILLOP-SOLLER: Yes.

15 MS. TOOHER: Are you using the Wi-Fi  
16 in the courtroom?

17 A.L.J. MACKILLOP-SOLLER: Yes, I  
18 believe I am on it.

19 MS. TOOHER: Directly through the  
20 Ethernet, it's a better connection.

21 A.L.J. MACKILLOP-SOLLER: Yeah, I did  
22 plug that in as a back-up, so I should be all set.  
23 All right. Let me just see -- let me try to fix this  
24 quickly.

25 A.L.J. MCENENEY CHAN: Should we go

1 4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2 off the record while we address the audio issue?

3 A.L.J. MACKILLOP-SOLLER: I think I  
4 can do this kind of quickly. Let me make sure  
5 everyone can hear me okay. Can everyone hear me  
6 okay?

7 DR. SOKOLAW: That's better.

8 MR. MUSCATO: Better.

9 A.L.J. MACKILLOP-SOLLER: Is that  
10 better? Is the headset better? Can everyone hear me  
11 a little bit better?

12 DR. SOKOLAW: It's the same.

13 A.L.J. MACKILLOP-SOLLER: It's the  
14 same? Okay. Okay. Can everyone hear me okay?

15 MR. MUSCATO: I can.

16 A.L.J. MACKILLOP-SOLLER: I'm just  
17 testing this. Can everyone hear me?

18 MR. MUSCATO: Okay. It's still  
19 garbled.

20 DR. SOKOLAW: You -- you're still  
21 garbling in and out.

22 A.L.J. MACKILLOP-SOLLER: Okay. Can  
23 everybody hear me okay?

24 DR. SOKOLAW: It sounds like a --.

25 A.L.J. MACKILLOP-SOLLER: Is that



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2 better? Dr. Sokolaw, can you hear me?

3 DR. SOKOLAW: It's garbled, but I can  
4 understand what you're saying.

5 A.L.J. MACKILLOP-SOLLER: All right.  
6 If everyone could just give me one moment, so I can  
7 address this. I'll have it fixed in under two  
8 minutes. Just give me a moment.

9 (Off-the-record discussion)

10 THE REPORTER: We're back on the  
11 record.

12 A.L.J. MACKILLOP-SOLLER: All right.  
13 Thank you.

14 So let's continue with introduction.  
15 Dr. Sokolaw, if you could please just introduce  
16 yourself again for the record?

17 DR. SOKOLAW: I'm Alice Sokolaw and  
18 I'm a board member of the Prattsburgh Preservation  
19 Alliance.

20 A.L.J. MACKILLOP-SOLLER: Thank you,  
21 Dr. Sokolaw. Is anyone else here with you today from  
22 Prattsburgh Preservation Alliance?

23 MS. SOKOLAW: On the line, I -- no.  
24 In the meeting, no, huh-uh.

25 A.L.J. MACKILLOP-SOLLER: Okay. Thank

1 4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2 you, Dr. Sokolaw. I appreciate you noting your  
3 appearance.

4 And I'd just like to go back to ORES  
5 staff. General Counsel need to introduce yourself  
6 for the record. Ms. Tooher, who is representing ORES  
7 staff or appearing on behalf of ORES staff in the  
8 oral argument?

9 MS. TOOHER: Yes, your Honor. Thank  
10 you. Deputy Counsel Hayley Carlock and Associate  
11 Counsel Will Bittinger.

12 A.L.J. MACKILLOP-SOLLER: Thank you  
13 very much. So Ms. Carlock, I'll turn to you to state  
14 your name, please, for the record.

15 MS. CARLOCK: Sure. Thank you.  
16 Hayley Carlock, Deputy Counsel ORES.

17 A.L.J. MACKILLOP-SOLLER: Thank you,  
18 Ms. Carlock.

19 And Mr. Bittinger?

20 MR. BITTINGER: Hi, William Bittinger,  
21 Associate Counsel ORES.

22 A.L.J. MACKILLOP-SOLLER: Thank you,  
23 Mr. Bittinger.

24 And I'd like to introduce  
25 Administrative Law Judge Christopher McEneney Chan.

1 4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2 Judge McEneney Chan, can you introduce yourself to  
3 everyone at this time?

4 A.L.J. MCENENEY CHAN: Yes. Good  
5 morning, everyone. Thank you for being here today.  
6 As Judge MacKillop-Soller said, I'm Christopher  
7 McEneney Chan. I'll be co-presiding on this oral  
8 argument.

9 A.L.J. MACKILLOP-SOLLER: Thank you  
10 very much, Judge McEneney Chan. I believe I've had  
11 all of the panelists introduce themselves. We're  
12 ready to begin with the oral argument.

13 We'll begin with issue number one.  
14 Issue number one is whether the final siting permit  
15 should include a site-specific condition to ensure  
16 that the noise design goals and limits set forth in  
17 Part 900 are met on a cumulative basis.

18 Mr. Muscato, I will begin with you on  
19 behalf of the Applicant, and also Ms. Klami. I'm not  
20 sure who will be presenting the oral argument today  
21 from your law firm, but you can begin at this time.

22 MS. KLAMI: Hi, your Honor. This is  
23 Jessica Klami. And Mr. Muscato may pipe in, but I  
24 will be presenting the oral argument today.

25 On behalf of the Applicant with

1           4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2           respect to the cumulative noise issue, the Applicant  
3           would note that the facility complies with ORES and  
4           town noise standards, and that the submissions by the  
5           Town of Cohocton did acknowledge that the Applicant  
6           used conservative assumptions in the modeling, and  
7           that the calculated sound levels are likely higher  
8           than what actually occur.

9                           At all six locations where cumulative  
10           sound is modeled above 45 dBA, Prattsburgh Wind meets  
11           the town and ORES sound limits. Only one location,  
12           Receptor 1963, has a contribution higher from  
13           Prattsburgh Wind than the surrounding facilities.  
14           The five other locations, Prattsburgh Wind does not  
15           contribute to an increase in sound beyond the  
16           existing modeled levels.

17                           With respect to Receptor 1963, the  
18           Applicant has reviewed the site-specific condition  
19           proposed by ORES staff in their response and believes  
20           a resolution can be achieved to reduce the sound  
21           impacts at this location as outlined in ORES's  
22           response.

23                           So the Applicant is considering the  
24           site-specific condition. Overall, we generally do  
25           not object to what ORES has in their issue statement.

1 4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2 And we are looking to work with ORES to resolve the  
3 issue through -- through the implementation of a  
4 site-specific condition.

5 A.L.J. MACKILLOP-SOLLER: Ms. Klami,  
6 does that complete your oral argument, this morning?

7 MS. KLAMI: Yes, it does. With  
8 respect to this issue, yes, your Honor.

9 A.L.J. MACKILLOP-SOLLER: Okay. Thank  
10 you, Ms. Klami. I have a couple of follow-up  
11 questions. You indicated that the Applicant is  
12 considering the site-specific condition. Can you  
13 explain yourself on what that means, exactly? Is  
14 Applicant agreeing to the site-specific condition  
15 proposed by ORES staff?

16 MS. KLAMI: So the Applicant has  
17 reviewed the site-specific condition and the text of  
18 ORES staff's response and had a few clarifying  
19 questions for ORES staff since the -- as I just  
20 explained, Prattsburgh Wind is -- contribution is  
21 higher from Prattsburgh Wind at this one specific  
22 location.

23 And so our discussions with ORES, we  
24 want to make sure that the site-specific condition  
25 captures what we believe is both the Applicant and

1           4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2           ORES's understanding that in instances where the  
3           Applicant is not contributing to an increase in  
4           sound, there isn't also some sort of obligation to  
5           mitigate our sound as in those situations mitigation  
6           wouldn't reduce the sound impacts anyway.

7                         So really, we're just seeking  
8           clarification and some edits to the site-specific  
9           condition to make it clear that the Applicant's  
10          responsibility to perform mitigation would be only in  
11          those situations where Prattsburgh Wind is  
12          contributing at an equal or higher level than the  
13          surrounding facilities to the modeled sound impacts.

14                        A.L.J. MACKILLOP-SOLLER: Thank you,  
15          Ms. Klami. Does the Applicant's agreement include  
16          completing updating -- updated noise modeling as a  
17          pre-construction compliance filing?

18                        MS. KLAMI: Yes, your Honor, it does.

19                        A.L.J. MACKILLOP-SOLLER: And the  
20          updated noise modeling, if I could just understand or  
21          have clarification on what that would include. Would  
22          it include current conditions? And what I mean by  
23          that is would it include the surrounding wind  
24          facilities including the re-powered Cohocton Wind  
25          Project and Barron Winds Phase II?

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2 MS. KLAMI: Yes, it would. Depending  
3 on what information is available at the time for  
4 Phase II, which I -- I hope that the information is  
5 fully available and public at that time. And we have  
6 already, in response to the issues raised by the Town  
7 of Cohocton, have begun to incorporate the re-  
8 powering from Cohocton into our analysis.

9 And so it is our full intent to, when  
10 we do the updated noise modeling, that the sound  
11 power levels that are publicly available to the  
12 Applicant at the time that that is conducted will be  
13 included in that.

14 A.L.J. MACKILLOP-SOLLER: Thank you,  
15 Ms. Klami. And the updated noise modeling that you  
16 are speaking about, will that be cumulative noise  
17 modeling and --

18 MS. KLAMI: Yes.

19 A.L.J. MACKILLOP-SOLLER: -- it will  
20 still be and -- okay. So that would be cumulative  
21 noise modeling taking into account current  
22 conditions; correct?

23 MS. KLAMI: Correct. And I just -- I  
24 just want to clarify, because the Town of Cohocton  
25 did put in their submission that they were looking

1           4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2           for additional ambient sound testing, that is not  
3           what we're proposing. What we're proposing is to  
4           update the sound modeling with the sound power levels  
5           from the turbine manufacturers.

6                         So we are not proposing to conduct any  
7           on-the-ground sound monitoring, as outlined in our  
8           response, but we will update the sound modeling to  
9           include updated information from those surrounding  
10          projects.

11                        A.L.J. MACKILLOP-SOLLER: And this  
12          would be on a pre-construction basis; correct?

13                        MS. KLAMI: Correct.

14                        A.L.J. MACKILLOP-SOLLER: And this is  
15          something different than sound measurements? Am I  
16          understanding this correctly?

17                        MS. KLAMI: That is correct, yes.

18                        A.L.J. MACKILLOP-SOLLER: You  
19          mentioned mitigation, Ms. Klami. Can you explain a  
20          little bit more what you meant by mitigation? And if  
21          we could just play out or I would propose a  
22          hypothetical to you. If your cumulative noise  
23          modeling pre-construction show results of cumulative  
24          noise levels at or above the ORES requirements, what  
25          would the mitigation efforts look like? Can you



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2 describe those?

3 MS. KLAMI: Yes. So in those  
4 situations for the turbines that were predicted to  
5 impact that receptor, the Applicant would have to  
6 propose noise reduction operations at those turbines,  
7 which is a mechanical mechanism to reduce the sound  
8 at those turbine locations. So the sound power  
9 levels would be reduced, essentially the turbines  
10 would be operating in reduced capacity mode, and the  
11 turbines in those situations would reduce their sound  
12 contribution such that the modeled result -- results  
13 indicate that the receptors are at the design limits  
14 for the facility.

15 A.L.J. MACKILLOP-SOLLER: Thank you,  
16 Ms. Klami. I do not have any further questions.

17 And I'd like to just take the  
18 panelists a little bit out of order at this time in  
19 terms of ORES staff for a response to Ms. Klami's  
20 oral argument.

21 Ms. Carlock, if you could let me know  
22 who is a representative of ORES staff? Is that  
23 yourself today?

24 MS. CARLOCK: Thank you, your Honor.  
25 Yes, I will be representing ORES staff as to issues

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2 one, two, and three, including this one, and Mr.  
3 Bittinger will be representing staff with regards to  
4 the fourth issue.

5 So in response to --.

6 A.L.J. MACKILLOP-SOLLER: Thank you,  
7 Ms. Carlock.

8 MS. CARLOCK: Thank you. So in  
9 response to Ms. -- Ms. Klami, it appears that there,  
10 you know, is no dispute then at this point between  
11 Staff and the Applicant as to the general concept of  
12 conducting the pre-construction sound modeling on a  
13 cumulative basis, using the most up-to-date  
14 information both regarding the Applicant's chosen  
15 turbine model, once they selected that, and the most  
16 up-to-date publicly available information regarding  
17 the existing facilities.

18 As Ms. Klami said, we have not yet had  
19 an opportunity to further discuss this additional  
20 language that the Applicant has proposed. That's  
21 something that Staff would have to consider. And  
22 Staff would also be very interested in the Town's  
23 perspective and whether the Town of Cohocton would be  
24 interested in entering into such a stipulation.

25 Just to cover the point about ambient

1           4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2           noise survey versus conducting additional noise  
3           modeling, Staff agrees with the Applicant that the  
4           best way to accurately project noise levels, both on  
5           a cumulative or individual basis, is through the  
6           noise modeling which, in this case, the Town's  
7           proposed expert, Mr. Bell, agreed that the noise  
8           methodology that the Applicant has used is sound and  
9           well accepted, and also that the results of their  
10          analysis, again, both on a cumulative and individual  
11          basis, represent a reasonable worst case scenario.

12                           In other words, the models results are  
13          likely to be worse or louder than the true sound.

14                           The other issue with doing an ambient  
15          sound survey as the Town has proposed is that the  
16          Applicant has, of course, no control over whether the  
17          other existing facilities are operating and at what  
18          capacity. If they happen to be offline or some of  
19          the turbines happen to be offline at any given time  
20          or if they are being curtailed for any reason, that  
21          would mean that it wouldn't be an accurate noise  
22          survey or, again, representing worst case scenario.  
23          And that's something that neither Staff nor the  
24          Applicant can control.

25                           So we believe that this is a

1           4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2           reasonable path forward that will ensure that the  
3           Town and the community are protected. The 45 dBA  
4           level sound limit that's set forth in 19 N.Y.C.R.R.  
5           900-2.8 is based on standards for public health and  
6           safety. And we do believe that, in this  
7           circumstance, given the number of additional wind  
8           facilities in the nearby area, this additional  
9           condition to ensure that public health and safety is  
10          protected in the town is warranted. And we look  
11          forward to further discussing this with the Applicant  
12          and perhaps with the Town, as well.

13                        A.L.J. MACKILLOP-SOLLER: Thank you,  
14          Ms. Carlock. And I have one question for you. If in  
15          all cases, at the completion of the cumulative sound  
16          modeling that Applicant is proposing to complete on a  
17          pre-construction basis meets the ORES sound level  
18          limits, what would be ORES's requirements or what  
19          would be ORES's -- what would be ORES's -- ORES's  
20          view regarding mitigation, taking into account raised  
21          or higher cumulative noise from surrounding wind  
22          facilities even if Prattsburgh Winds' results come  
23          back to be within ORES's requirements for noise?

24                        MS. CARLOCK: I'm sorry; you're  
25          breaking up a little bit. Let me make sure I

1           4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2           understood your question correctly. Are you asking  
3           whether if they conduct the pre-construction noise  
4           modeling as set forth in the proposed site-specific  
5           condition and if Prattsburgh does not cause any  
6           exceedances of the 45 dBA limit, but it's shown that  
7           the other existing facilities are over 45 dBA,  
8           whether we would require mitigation? Is that what  
9           you're asking?

10                           A.L.J. MACKILLOP-SOLLER: That was my  
11           question. What would be the mitigation, if any, that  
12           ORES Staff would require?

13                           MS. CARLOCK: If the Prattsburgh Wind  
14           facility is not contributing to an increase in sound  
15           level, so just to be clear, a hypothetical, if the  
16           existing facilities that are not the subject of -- of  
17           this proceeding are currently emitting 48 dBA, for  
18           example, and Prattsburgh is emitting 40 dBA, but the  
19           cumulative sound level is still just 48 dBA, then we  
20           would not require any mitigation.

21                           A.L.J. MACKILLOP-SOLLER: Thank you,  
22           Ms. Carlock. What if the results were higher than  
23           that and something along the lines of 50 dBA, would  
24           mitigation be required?

25                           MS. CARLOCK: If the Prattsburgh

1           4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2           facility is causing an increase in sound levels that  
3           is above 45 dBA, then yes, we would require  
4           mitigation.

5                   A.L.J. MACKILLOP-SOLLER: Do you have  
6           an idea of what that mitigation would look like, or  
7           not at this time?

8                   MS. CARLOCK: I do not at this time,  
9           not beyond what Ms. Klami suggested. But I do know  
10          that such technology exists and is in use at other  
11          facilities and is well accepted as an appropriate  
12          mitigation measure.

13                   A.L.J. MACKILLOP-SOLLER: Thank you,  
14          Ms. Carlock.

15                   Next, I will turn to Mr. Kanyuck on  
16          behalf of the Town of Cohocton.

17                   MR. KANYUCK: Thank you, your Honor.  
18          As -- as you're all aware, the -- the Town of  
19          Cohocton petitioned with respect to the issue of  
20          cumulative noise, the concern being that the -- the  
21          modeling that was done, while conservative, did not  
22          represent the actual turbines that are currently in  
23          place with -- with respect to the existing facilities  
24          in Cohocton.

25                   There is 72 other turbines in town and

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2           we advocated for -- you know, to ensure that the  
3           existing conditions were understood for a noise study  
4           performed in -- under conditions where the existing  
5           turbines were fully operation.

6                         We did ask Mr. Bell to review the  
7           proposed site-specific conditions that -- that ORES  
8           made. And based on his recommendation in reviewing  
9           with the town, the town would support that site  
10          specific condition and -- and would enter -- and be  
11          willing to enter into a stipulation after further  
12          discussions on it.

13                        But as -- as presented, it addresses  
14          the Town's concerns.

15                        I think we would want to make sure  
16          that the -- the current turbines that are present and  
17          planned for Cohocton that are existing are -- are in  
18          the model and our -- the -- our expert is of the  
19          opinion that -- that the pre-construction filing  
20          modeling would help to ensure that the ORES standards  
21          are met in conjunction with -- with post-construction  
22          operational surveying.

23                        So in sum -- in sum, we are supportive  
24          of the proposed site-specific condition.

25                        A.L.J. MACKILLOP-SOLLER: Thank you,

1 4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2 Mr. Kanyuck. So just to confirm, so I understand and  
3 the record is clear, the Town of Cohocton is in  
4 agreement with the S.S.C. that -- that was proposed  
5 ORES Staff. Is that correct?

6 MR. KANYUCK: That is correct.

7 A.L.J. MACKILLOP-SOLLER: Are there  
8 any changes or revisions or any suggestions that you  
9 have for the site-specific condition? Or the Town of  
10 Cohocton is in agreement with it as -- as it is  
11 proposed?

12 MR. KANYUCK: We -- we -- we're in  
13 agreement as proposed.

14 A.L.J. MACKILLOP-SOLLER: Okay. Thank  
15 you, Mr. Kanyuck.

16 I would next turn to Dr. Sokolaw on  
17 behalf of the Prattsburgh Preservation Alliance.  
18 Thank you, Dr. Sokolaw.

19 DR. SOKOLAW: Okay. I do have a few  
20 questions. Under the assessment for public comments,  
21 page one forty-two, the cumulative noise was to be  
22 measured by a case-to-case basis. And I don't  
23 interpret it as a site-to-site basis. In other  
24 words, I don't think one site is going to represent  
25 the cumulative impact.



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2 And why I say that, Epsilon has been  
3 the acoustical evaluator since the beginning of the  
4 ORES project. In 9/26/2020, the cumulative noise in  
5 the first incomplete report was 48 dB for the whole  
6 project. And they had no standard to compare with  
7 and there was no standard met. That was table 7.3 on  
8 the D.M.M. 16.

9 In that footnote, it said the  
10 cumulative analysis was only run for receptors that  
11 have the potential to experience cumulative impact  
12 for the Cohocton and Baron Winds project for the two-  
13 mile zone. And under that, it said there were  
14 multiple numbers, I have them on the previous page,  
15 that did not meet the 45. The I.D. 22 -- 2333 had 48  
16 dB. 2364 had 50 dB. 735 had 54.

17 And then, they did make note again, at  
18 the beginning -- now this is at the beginning,  
19 remember, this is two years ago, that there was a  
20 significant discrepancy for Residence 1963 where the  
21 cumulative sound for the project contributed 7 dB.  
22 So that's -- that's very significant.

23 And I don't know if that's the only  
24 place where this project, Prattsburgh, attributes 7  
25 dB to the project. In other words, I don't think

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2 it's masking it as much as they say it is, especially  
3 from their own documents.

4 And then, they said the same thing  
5 again in the incomplete status in -- of 11 -- let me  
6 see -- no, 6/20/23. They didn't recognize all of the  
7 participating receptors. And in there, they actually  
8 acknowledge that the receptors that the Town of  
9 Prattsburgh included, under non-participating  
10 residents, had to be within the contour, the 45 dB,  
11 which were in question, T-one, T-four, T-five, T-six,  
12 and T-nine, which means -- I guess, there is a  
13 cumulative impact if they are using the same turbine  
14 throughout.

15 Are they using your model, because on  
16 their website up until January of this year, they  
17 were using three models. And that -- that changes  
18 the way that the information from the -- that goes  
19 into the SCADA system and the programs that are used,  
20 and are they compatible?

21 In Baron Winds I, I think there's a  
22 problem with compatibility of the Siemens Gamesas  
23 with the Vestas. And so they can't interpret it.  
24 And what happens is some of the turbines are not  
25 aligned with the other turbines and the wind, and so

1 4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2 the noise increases. And so I guess, I have to have  
3 clarity on whether there's one turbine being chosen  
4 or more than one.

5 A.L.J. MACKILLOP-SOLLER: Thank you  
6 very much, Dr. Sokolaw.

7 Mr. Oehlbeck, can you hear me okay?  
8 Mr. Oehlbeck, are you there?

9 MR. OEHLBECK: Sorry, I was on mute.

10 A.L.J. MACKILLOP-SOLLER: Thank you,  
11 Mr. Oehlbeck. It's time for you to place an argument  
12 on the record if you would like to do that at this  
13 time, sir. Would you like to do that?

14 MR. OEHLBECK: I would. I would, yes.

15 A.L.J. MACKILLOP-SOLLER: Yes, you can  
16 go ahead.

17 MR. OEHLBECK: As a general statement,  
18 my reading of the assessment of public comments, page  
19 48, is cumulative in nature. Section 900-2.8 is also  
20 cumulative. And 900-6.5 describes all noises from  
21 the wind facilities with an I.E.S., in parentheses,  
22 so therefore plural.

23 Cohocton compliance testing also  
24 measures sound received at a property line from any  
25 source or sources irrespective of the owner.

1 4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2 Cumulative is explicit or inherent in all four cases.

3 Prattsburgh Wind is the third or  
4 fourth wind project with the fifth substation  
5 proposed in the Brown Hill area. Not surprisingly,  
6 previous projects have consumed almost all of the  
7 allowable noise budget across the region, forcing  
8 Prattsburgh to select locations with utmost care and  
9 caution.

10 Applicant's position is that they  
11 should really only be responsible when they are a  
12 majority contributor. Given that there are several  
13 other projects ahead of them, I feel that that's a --  
14 a very bold statement.

15 Moving on to the ORES responses, Staff  
16 expressed a concern that the Baron Winds information  
17 that I pointed to as the most recent information may  
18 not have been publicly available for the Applicant.  
19 However, other previous Baron Winds information from  
20 that case which is 15-F-0122, contains identical or  
21 similar information dating back to 2017.

22 For example, Staff should review case  
23 number 15-F-0122, document number 805, which includes  
24 a narrative version of decibel offsets and rationale  
25 when converting between time weighted average noise

1           4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2           measurements and more instantaneous readings as  
3           required for compliance testing.

4                         That document, number 805, is a Young  
5           and Sommer memo confirming that compliance  
6           demonstration requires an appropriate conversion to  
7           align with the L.E.Q. 15-second 3 consecutive  
8           measurement criteria. This Young and Sommer memo  
9           also contains a footnote tracing back to the 2007,  
10          also which is often referred to as a P.N.I.A.

11                        That document referred to, this  
12          earlier document as document number 146. That's an  
13          error. It is really document number 145 in case 15-  
14          F-0122.

15                        Page two of this P.N.I.A. clearly  
16          shows a regulatory limit for Cohocton as a 45 dBA 15-  
17          second 3 consecutive measurement L.E.Q. format. A  
18          footnote on that page ties it to compliance  
19          monitoring results from the original Cohocton Wind  
20          Project. These documents were all publicly available  
21          to the Applicant and illustrate that 45 dBA time  
22          average measurements aren't sufficient to demonstrate  
23          regulatory compliance.

24                        I would also point out this sound  
25          modeling approach and the results were approved by a

1           4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2           Commission ruling on December 29th, 2022. That can  
3           be found as document number 713 in that same case,  
4           15-F-0122.

5                         Staff also concludes that I do not  
6           make a showing that the facility does not comply with  
7           local law. They are correct.

8                         The noise study submission by the  
9           Applicant was so flawed that such a showing is not  
10          possible from the erroneous data presented. That was  
11          a point I tried to make clear. The fact that Staff  
12          recommended a new revised study indicates the same  
13          and indicates I manifested a substantive issue in  
14          this case.

15                        The Staff recommendation of a revised  
16          sound study using up-to-date information is a good  
17          start. Amongst other flaws, both the Applicant  
18          response and the sound expert affidavit give the  
19          impression that all of the G.E. turbines in the  
20          Cohocton Wind project power re-power have low noise  
21          trailing edge configurations.

22                        The information supplied by Terraform  
23          to the Cohocton Town Planning Board in the form of a  
24          June 2019 supplemental environmental assessment  
25          indicated that only 17 of the 50 G.E. turbines were

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2 to be equipped with this low noise feature.

3 Obviously, the application -- the Applicant still

4 lacks reliable information currently.

5 However, Staff recommendations do not  
6 go far enough regarding noise for Cohocton residents.

7 As I outlined, there is a regulatory limit for

8 Cohocton in addition to the ORES project goal. For

9 the select few residents falling within the Cohocton  
10 Town boundaries in the overlapping project area where

11 noise could be cumulative, the Applicant should also

12 clearly demonstrate compliance with regulatory

13 limits. Applicant has indicated that they will

14 adhere to this.

15 Finally, I would like to address

16 Staff's review of Mr. Bell's input with their comment

17 that Prattsburgh Wind would not contribute to an

18 increase in noise. While mathematically, a decibel

19 addition calculation does not yield much increase,

20 this is an oversimplification of the issue.

21 The addition of the Prattsburgh Wind

22 equipment will add noise during quieter periods for

23 two reasons. First, for anyone near the substation,

24 that substation noise is 24/7/365 with only minor

25 fluctuations due to transformer loading and fan on,

1 4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2 fan off noise deviations.

3 Second, the Prattsburgh turbine height  
4 of almost 700 feet dwarfs the adjacent Cohocton Wind  
5 turbines and exceeds those of the neighboring Baron  
6 Winds 550- and 600-foot turbines. Thus, the  
7 Prattsburgh turbine will engage in wind conditions  
8 earlier and more often.

9 This is one of the primary reasons why  
10 Prattsburgh asked for height variances. However, the  
11 result is a higher level of total average noise for  
12 nearby residents. Thank you very much.

13 A.L.J. MACKILLOP-SOLLER: Mr.  
14 Oehlbeck, thank you very much.

15 Okay. We are ready to move on to  
16 issue two and that completes oral argument on issue  
17 one. If there is going to be a stipulation by --  
18 that would be incorporating ORES Staff's proposed by  
19 S.S.C., I would just note for the record that the  
20 administrative law judges would require that in  
21 writing prior to May 2nd, which is the issues ruling  
22 deadline date.

23 So I'd like to turn to issue two at  
24 this time. And that issue is whether the final  
25 siting permit should include additional conditions



1           4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2           related to impacts to certain threatened and  
3           endangered, T and E, species recently discovered in  
4           the project area.

5                        I would note for this issue, ORES  
6           Staff and Applicant have stipulated to the type of T  
7           and E species involved and its location, which I just  
8           need to remind all the panelists today for  
9           confidentiality purposes, we do not need to refer to  
10          the specific species, necessarily, or the location of  
11          the nests or the number -- the specific number of the  
12          turbines involved. What I mean by that is the  
13          turbine numbers, themselves.

14                        So let's go ahead and start with  
15          Applicant. Ms. Klami, are you ready?

16                        MS. KLAMI: Yes, Your Honor. And I  
17          will do my best. I have this written up as vaguely  
18          as I can to maintain the confidentiality on this  
19          issue. Overall, as outlined in the Applicant's  
20          response to issues, the newly identified location of  
21          the T and E species does not change the conclusions  
22          in the application or warrant changes to the draft  
23          permit and the facility as currently proposed with  
24          the conditions of the draft permit, including the  
25          U.S.C.s, adequately avoids, minimizes, and mitigates

1 4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2 any impacts to the species.

3 The location is not between turbines  
4 and primary food sources and is far enough away to  
5 not pose an increased risk to the species during  
6 construction and operation.

7 Nevertheless, the Applicant has spoken  
8 with ORES regarding their concern and is, as the  
9 Applicant said in their response, willing to continue  
10 to engage in discussions with ORES to determine if  
11 any additional mitigation measures or minimization  
12 measures can and should be implemented as the project  
13 proceeds into construction and operation as a result  
14 of this newly identified location.

15 I could go further into some details,  
16 but I -- I don't want to toe the line too much, but  
17 the Applicant has fully briefed this response. They  
18 did have their experts go out. And as you mentioned,  
19 we did stipulate with ORES as to the location and  
20 type of species.

21 And there is an analysis provided in  
22 the Applicant's response regarding their position  
23 about the risk and increased risk to this species  
24 which the Applicant's position has not changed with  
25 respect to. However, as we've indicated, we are --

1           4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2           we are willing and able to speak with ORES about  
3           potentially finding a resolution that all parties who  
4           have concerns can agree to.

5                       A.L.J. MACKILLOP-SOLLER: Thank you,  
6           Ms. Klami. I only have a couple of questions on this  
7           issue for you. And they are specific to mitigation  
8           efforts by the Applicant. The first that I'd like to  
9           just clarify, if you could just state and explain to  
10          me, if the Applicant complies with the requirements  
11          for T and E, or threatened and endangered, species  
12          under the ORES regulations 19 N.Y.C.R.R. 900-6.401?  
13          And if so, how?

14                      MS. KLAMI: Yes, the Applicant will  
15          comply with those. And just give me one quick  
16          second, your Honor. I just want to make sure I have  
17          it up in front of me. These are the conditions  
18          related to contacting ORES and identifying if there  
19          has been a take of the species.

20                      And we don't have any objections to  
21          the Uniform Standards and Conditions that are in the  
22          draft permit that are part of the permit as it  
23          stands. I think -- and I don't want to put words in  
24          the mouth of ORES, but I think they -- this  
25          information came in and they were reviewing as to

1           4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2           whether or not the existing draft permit conditions  
3           were acceptable to them.

4                           They are to us. And I believe that  
5           our position has not changed with respect to being  
6           able to comply with those conditions regardless of --  
7           of the location of this new identified species. And  
8           we don't have any reason to believe that we cannot  
9           comply with the conditions set forth for this species  
10          in ORES's regulations and in the draft permit.

11                           A.L.J. MACKILLOP-SOLLER: Thank you,  
12          Ms. Klami. Just specific to the requirement, the  
13          660-foot buffer --

14                           MS. KLAMI: Uh-huh.

15                           A.L.J. MACKILLOP-SOLLER: -- that is  
16          also stated in the 2024, the updated Eagle Rule 50  
17          Code of Federal Regulations, Section 22.250 and the  
18          New York State Department of Environmental  
19          Conservation standards for this species, would the  
20          Applicant be in compliance with that buffer?

21                           MS. KLAMI: Yes, your Honor.

22                           A.L.J. MACKILLOP-SOLLER: How so?

23                           MS. KLAMI: The turbines are -- are  
24          more than a mile and a half away from this location.

25                           A.L.J. MACKILLOP-SOLLER: So that mile

1           4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2           and a half -- and this is my final question for you,  
3           and I appreciate you are answering my questions, Ms.  
4           Klami. If the updated United States Fish and  
5           Wildlife Survey protocol suggests a home range for  
6           the nesting -- this nesting species in particular, is  
7           less than two miles and Applicant admits that the  
8           project has a risk, I understand Applicant is stating  
9           it's a low risk for impacts to this species during  
10          construction and operation, given the distance  
11          between the nest and certain turbines, how are the  
12          existing conditions in the draft permit sufficient --  
13          sufficient for avoiding mitigating and minimizing  
14          impacts to this particular species?

15                       MS. KLAMI: Well, your Honor, the  
16          current conditions set forth in the draft permit in  
17          the U.S.C.s has a requirement to work with ORES if,  
18          in fact, take occurs. This is very similar to the  
19          general permit that is currently being offered by the  
20          U.S. Fish and Wildlife Service that has those  
21          distances that you mentioned.

22                       The U.S. Fish and Wildlife Service no  
23          longer requires a specific take permit for a specific  
24          number of species. And the take permit allows a  
25          certain level of take before it would trigger

1 4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2 additional mitigation and minimization measures.  
3 It's very, very, very similar to what ORES's current  
4 draft -- draft permit and Uniform Standards and  
5 Conditions already contemplate.

6 A.L.J. MACKILLOP-SOLLER: Thank you,  
7 Ms. Klami. Thank you for answering my questions on  
8 this issue.

9 I would like to turn to ORES Staff,  
10 basically to give its argument and also to respond to  
11 your oral argument just now.

12 Ms. Carlock, I would turn to you at  
13 this time.

14 MS. CARLOCK: Thank you, your Honor.

15 At the outset, I'll just state that  
16 Ms. Klami is correct that we have been preliminarily  
17 exploring potential resolution of this issue by  
18 stipulation. And so if -- if in fact, we're able to  
19 reach agreement as to any additional mitigation or  
20 other conditions required in the final siting permit,  
21 you know, then this issue will be resolved for  
22 purposes of ORES Staff.

23 However, in the event that we do not  
24 reach a resolution on this issue by stipulation, ORES  
25 Staff believes that there are factual issues here in

1           4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2           dispute between the office and the Applicant based on  
3           the Applicant's position in its issue statement, and  
4           here today at oral argument, that may require new  
5           additional conditions to the draft permit in addition  
6           to the Uniform Standard and Conditions that Ms. Klami  
7           was referring to, and that that issue -- those  
8           factual issues have to be fleshed out the record.

9                         In this case, the discovery of the  
10           occurrence of this particular New York State  
11           threatened species, as was mentioned, came to the  
12           attention of ORES Staff and the Applicant well after  
13           the issuance of the draft permit. So at the time of  
14           issuance of the draft permit, ORES Staff was not  
15           contemplating that this species had a known  
16           occurrence within the vicinity of the project.

17                         Currently, as Ms. Klami mentioned,  
18           Section 6.401 of the draft permit requires a notice  
19           to ORES Staff if such species is found within the  
20           facility site. Certain tree removal restrictions  
21           within certain distances and within certain  
22           timeframes, and then, mitigation is only required  
23           under that Uniform Standard Condition if the species  
24           is actually found to be injured or killed by the  
25           facility.

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2 And notably, ORES Staff leaves this  
3 condition applicable for every wind facility even  
4 when no presence of this species is known within the  
5 vicinity of the facility site.

6 So these conditions are sort of a stop  
7 gap in the event that the species is not known to  
8 occur nearby, but we understand that, at some point,  
9 the species could either move in or be migrating or  
10 otherwise traveling through the site. They're sort  
11 of a backstop measure.

12 In this case, now that we know that,  
13 in fact, there is an occurrence of this species  
14 within, as Ms. Klami said, about one and a half to  
15 two miles of certain turbines in this facility, we  
16 believe that more may be required.

17 I think the fundamental dispute  
18 between the Applicant and ORES Staff, it centers  
19 around the different treatment of this species at the  
20 federal and state level. ORES Staff doesn't dispute  
21 that the Applicant meets the federal requirements of  
22 the U.S. Fish and Wildlife Service.

23 This particular species is not listed  
24 as threatened or endangered by the federal  
25 government. It is protected under other statutes.



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2 And the construction buffer of 660 feet that was  
3 mentioned and then certain mitigation that would be  
4 required after a number of the species are actually  
5 taken are the only requirements of the federal  
6 government.

7 And that 660-foot buffer, it's  
8 important to note, is intended to ensure that  
9 construction of the facility does not impact the  
10 species. It does not address an operational impact  
11 or operational take.

12 Though there's diminished protection  
13 now at the federal level, the species remains listed  
14 as a threatened species under the New York State  
15 Endangered Species Act and the State D.E.C. often  
16 requires additional operational measures and  
17 mitigation well beyond what the federal government  
18 requires.

19 D.E.C. recommends specifically that,  
20 in order to avoid and minimize impacts from operation  
21 of wind turbines, that turbines not be sited in areas  
22 where they will negatively affect nesting, roosting,  
23 daily foraging movements, or migration of the  
24 species, and caution specifically that movements  
25 between nest and foraging areas and between winter

1           4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2           roosts and foraging areas need to be taken into  
3           consideration when making a siting decision.

4                           And while we have not confronted this  
5           issue in the context of a 94-C project, Article 10  
6           precedent is ripe with examples where the siting  
7           board has required adherence not just to those  
8           construction buffers required by the U.S. Fish and  
9           Wildlife Service, yes, it does require those, but in  
10          the Article 10 cases, the siting board required  
11          implementation of other additional protections during  
12          operation consistent with the D.E.C. recommendations  
13          I mentioned.

14                           Just for example, some of these  
15          projects include Barron Winds, High Bridge Wind,  
16          Canisteo Wind, and Alley Cat Wind. And often, the  
17          way that D.E.C. has assessed the take has looked at  
18          foraging and breeding behavior for this species  
19          within up to 10 miles of the facility site.

20                           But I will note that this has really  
21          been looked at on a case-by-case, site-by-site basis,  
22          depending on particular features of the landscape,  
23          the height of the turbines, and other factors. It's  
24          really a case-specific analysis to determine how far  
25          the territory is and whether the species is likely to

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2           interact with the facility during operation of the  
3           facility.

4                        So based on existing State  
5           regulations, State policy, and Article 10 precedent,  
6           ORES Staff continues to believe that additional  
7           measures may be required in the final siting permit  
8           to avoid and minimize impacts in the first instance  
9           to the species and then, if impacts are -- are going  
10          to occur to mitigate impacts to the species.

11                      And again, because that is such a  
12          site-specific, case-specific analysis that occurs, if  
13          we're unable to resolve this with the Applicant by  
14          stipulation, then we do think a hearing would be  
15          required to flesh this out on the record.

16                      A.L.J. MACKILLOP-SOLLER: Thank you,  
17          Ms. Carlock. I -- I -- I just have one question for  
18          you. Just, you mentioned conditions that you gave  
19          detail about. There were two conditions that I heard  
20          specifically that you explained. And I thank you for  
21          that explanation.

22                      Other than those two conditions that -  
23          - that you detailed, are there -- are there any other  
24          mitigation efforts or what other mitigation, if  
25          anything else, is ORES Staff looking for?

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2                           MS. CARLOCK: At this point, that's  
3 something that is currently under discussion among  
4 Staff internally. But this mitigation could consist  
5 of additional studies, post-construction monitoring.  
6 Sometimes there is a fee associated with the take of  
7 this particular species. And those are all different  
8 options and avenues that ORES is open to at this time  
9 and willing to, you know, advance discussions with  
10 the Applicant.

11                           A.L.J. MACKILLOP-SOLLER: Thank you,  
12 Ms. Carlock.

13                           Ms. Klami, I would just turn back to  
14 you briefly, if I could. Ms. Carlock just gave us a  
15 lot of information and she was able to articulate  
16 conditions in a very detailed manner that -- that I'm  
17 understanding now.

18                           And since it's all being discussed at  
19 this time at the oral argument, I'd like to give you  
20 an opportunity to respond to what Ms. Carlock said,  
21 specifically, with respect to the conditions that she  
22 spoke about and also to potential additional  
23 mitigation efforts.

24                           MS. KLAMI: Yes, your Honor, I -- I  
25 think, you know, a little bit of what I said before

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2           is -- is applicable to the response here. And that  
3           is that the Applicant and ORES have a disagreement as  
4           to the risk to the species at this particular  
5           location and the distances to turbines.

6                           And so, you know, at the end of the  
7           day, we have submitted our expert's analysis on where  
8           the turbines are located in relation to this species.  
9           And -- and I will say I -- I press ORES to -- to find  
10          me a wind project that does not have this species  
11          present in some form or another.

12                           And so the -- the risk here is, I  
13          think, more nuanced than just a distance analysis.  
14          And our experts have put that in. And I think that  
15          is on par with testimony we've received from D.E.C.  
16          in other proceedings that have had this issue. I  
17          think it is on par with what ORES has in their  
18          response on this issue.

19                           And that is, certainly, if there is  
20          this species identified within a certain distance to  
21          turbines, a closer look should be conducted. We have  
22          done that. And in this instance, we do not believe,  
23          given the location of the turbines and the location  
24          of food sources, and all of the data we have from  
25          some of the other projects and this project on

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2 surveys, that this species is actually traversing  
3 through and near turbines, such that the risk is  
4 increased compared to another project that may have  
5 migratory species coming through.

6 Sorry, I'm trying to -- trying to keep  
7 my -- the words straight in my mouth. But --.

8 A.L.J. MACKILLOP-SOLLER: Yes, I  
9 appreciate it.

10 MS. KLAMI: The Applicant's position  
11 that this project has the same level of risk as other  
12 projects that have been permitted with the office and  
13 that this species is adequately protected from the  
14 existing draft permit conditions and Uniform  
15 Standards and Conditions.

16 A.L.J. MACKILLOP-SOLLER: Ms. Klami,  
17 just so I'm clear -- and I appreciate your time in  
18 explaining all of this and going through it. I am  
19 familiar with what the Applicant's consultant's  
20 Stantec, said on these issues regarding the location  
21 of the turbines, the food sources, and also flight  
22 patterns.

23 Is it the Applicant's position that no  
24 additional mitigation measures are necessary?

25 MS. KLAMI: Correct, your Honor.

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2 MR. MUSCATO: But you -- but I guess,  
3 that being said, your Honor, we would also be willing  
4 to consider the measures that Ms. Carlock mentioned.  
5 And obviously, if potential stipulation can be  
6 reached agreeing on potential additional mitigation  
7 measures, we would absolutely consider that.

8 A.L.J. MACKILLOP-SOLLER: Thank you.  
9 And that's where I was going with this. And again, I  
10 would just remind Mr. Muscato, Ms. Klami, Ms.  
11 Carlock, if there is a stipulation reached on this  
12 issue, to provide it to the administrative law judge  
13 in advance of May 2nd.

14 MR. MUSCATO: And in fact, your Honor  
15 --.

16 A.L.J. MACKILLOP-SOLLER: And Ms.  
17 Klami, thank you.

18 Yes?

19 MR. MUSCATO: One -- one of the  
20 additional measures, I -- I don't know that it's --  
21 it's really something that could be addressed today,  
22 but we're getting the office's position or Staff's  
23 position with respect to the submission that you  
24 referenced in the materials and evidence that was  
25 provided by Stantec, I think that's part of that

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2 discussion on the stipulation.

3 But you know, obviously, we -- we  
4 expect to have discussions with ORES Staff and -- and  
5 see if we can agree upon terms of the stipulation and  
6 we'll provide that to your Honors.

7 A.L.J. MACKILLOP-SOLLER: Thank you,  
8 Mr. Muscato.

9 And Ms. Carlock, just one final  
10 follow-up question for you. And again, I appreciate  
11 you answering my questions on this issue and  
12 explaining everything in the detail that you have.

13 With respect to the conditions that  
14 ORES Staff is proposing and also that you've  
15 discussed, are those conditions that are contemplated  
16 or in some way in ORES's view, part of the  
17 requirements of the ORES regulations?

18 MS. CARLOCK: Yes, your Honor. We --.

19 A.L.J. MACKILLOP-SOLLER: In other  
20 words, where is -- where is this coming from? Like  
21 where is -- where is ORES Staff stating its authority  
22 for such -- for more conditions and -- and pursuant  
23 to the standard?

24 MS. CARLOCK: Sure. Thank you, your  
25 Honor. Yeah. So pursuant to Part 900-2.13 and 900-



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2 6.40, Applicants must avoid and minimize impacts to  
3 listed threatened and endangered species. And to the  
4 extent that any impacts to a threatened or endangered  
5 species cannot be avoided or that there will be  
6 anticipated impacts, these impacts must be mitigated.

7 If mitigation is required, the  
8 Applicant is required to prepare a net conservation  
9 benefit plan pursuant to 6.40. This requirement is  
10 not triggered unless there is a known occurrence of a  
11 species in or around the facility site, not just for  
12 the species, but for any other species as well.

13 If it's not documented within the  
14 site, there are other certain Uniform Standards and  
15 Conditions as we've discussed related to this  
16 species, but they exist for others as well, that will  
17 be applicable even without a known occurrence of the  
18 species.

19 So knowing that we have a presence of  
20 the species within between one and a half and two  
21 miles of various components of this facility, we  
22 believe that triggers those requirements. Again,  
23 this is typically a discussion that is had between  
24 Staff and the Applicant very early on, even well  
25 before the application is submitted. We have

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2           consultation and usually the results of that  
3           discussion and consultation are included in the  
4           application.

5                         We're in a bit of an odd circumstance  
6           here because this occurrence was unknown to anybody  
7           until it was raised by a public commenter well after  
8           issuance of the draft permit. So those provisions of  
9           our regulations do require mitigation.

10                        You know, I -- I don't disagree with  
11           Ms. Klami that there are site-specific factors that  
12           we need to look at and understand in this case in  
13           order to determine is there going to be a take, what  
14           is the level of that take, and what mitigation would  
15           be required. But that's the discussion that we hope  
16           to have with the Applicant.

17                        But again, if we aren't able to  
18           resolve it, I do think it requires some factual  
19           evidence and discussion on the record since it's not  
20           currently on the record in any way other than the  
21           public comment.

22                        A.L.J. MACKILLOP-SOLLER: Thank you,  
23           Ms. Carlock.

24                        We're ready at this time to move on to  
25           issue three. That completes the oral argument for

1 4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2 issue two. And for issue three, I would turn to  
3 Administrative Law Judge Christopher McEneney Chan.

4 A.L.J. MCENENEY CHAN: Thank you,  
5 Judge MacKillop-Soller.

6 Can everyone hear me? Okay. Thank  
7 you again for coming here today. We're going to move  
8 on to issue three. This is whether the facility  
9 complies with the 19 N.Y.C.R.R. Part 900 setback and  
10 noise limits as they pertain to partially completed  
11 structures in the Town of Prattsburgh.

12 I'd like to hear from Applicant first,  
13 please.

14 MS. KLAMI: Yes, hi, your Honor. With  
15 respect to non-compliance with ORES non-participating  
16 residential setback requirements, the structures  
17 identified by the Town of Prattsburgh should not be  
18 treated as -- or I'm sorry -- should be treated as  
19 non-participating, non-residential structures, not as  
20 residences for the purposes of sensitive sound  
21 receptors or setback locations.

22 The Town here has argued that several  
23 building permits have been issued for what the Town  
24 calls dwelling units that are within the residential  
25 and sound setbacks for two turbines, T-one and T-

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2 nine. Therefore, the Town argues that these turbines  
3 are not compliant with residential setback and noise  
4 standards.

5 However, none of the structures  
6 identified by the Town have been fully constructed.  
7 None of them have septic systems or running water.  
8 None of them have certificates of occupancy at this  
9 time. None of them were identified as hunting camps  
10 or seasonal residences on property tax codes. And in  
11 the Applicant's opinion, these structures, which are  
12 small and akin to something you can -- can buy at  
13 Home Depot, are a coordinated effort by a handful of  
14 landowners to place, quote, unquote, residences at  
15 the back portions of their property to frustrate the  
16 development of this project.

17 Again, none of the building permits  
18 indicate that these are residences where people will  
19 be spending any significant amount of time. The  
20 setback and sound limits, as outlined in our response  
21 and ORES response, are specifically designed to  
22 address impacts to people residing near or close to  
23 turbines.

24 These are not residences. Under the -  
25 - you know, definition of residence in Merriam-

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2           Webster's Dictionary, they don't -- they don't meet  
3           that definition. And they also don't meet that  
4           definition in the ORES regulations, which provide  
5           some insight within the sound limits and requirements  
6           for how sound shall be modeled.

7                         One of the reasons that there's a  
8           requirement to have septic systems and running water,  
9           both for setbacks and for sound requirements, is  
10          because these are setbacks and -- and sound limits  
11          designed to protect people who are there year-round.  
12          They are not intended to design to be for people  
13          traveling through the area or taking short stays.

14                        If someone can't take a shower at this  
15          cabin, I -- I highly doubt they will be spending any  
16          significant amount of time there. To treat them as  
17          year-round residences or even, to a certain extent,  
18          seasonal residences would be inconsistent with the  
19          regulations, the intent, and the goals of the  
20          C.L.C.P.A.

21                        The sound limits and setbacks to  
22          property lines are adequately protective of these  
23          types of structures which have been set back -- the  
24          turbines have been set back one point five times to  
25          these structures. And in fact, the Applicant did

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2           move one of the turbines in response to the Town's  
3           raising this concern.

4                         However, there is no basis to treat  
5           these structures as residences. And in doing so  
6           would be very detrimental to the project and it could  
7           lead to additional folks who see this as an  
8           opportunity to try to take away from their neighbors  
9           an opportunity to help the State achieve its  
10          renewable energy goals.

11                        A.L.J. MCENENEY CHAN: Okay. Thank  
12          you. And in your view, Ms. Klami, are there any  
13          facts in dispute on this record regarding this issue?

14                        MS. KLAMI: No, your Honor, there are  
15          no facts in dispute. There are these building  
16          permits have been pulled. The Town has submitted  
17          them with their response. I -- I don't believe we  
18          have a disagreement regarding how these will be used.  
19          The Town has -- has stated that there is no intent  
20          for these to be used as residential structures.

21                        A.L.J. MCENENEY CHAN: Okay. Thank  
22          you.

23                        All right. We'll hear from the Town  
24          of Prattsburgh now, please. And thank you for your  
25          oral argument.

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2                           MR. KANYUCK: Thank you, your Honor.  
3                           So the Town of Prattsburgh submitted a  
4           petition with respect to the three structures that --  
5           where the building permits were provided first in  
6           2022 for these structures. As is the case with these  
7           types of seasonal residences in the town which are  
8           not uncommon, it often takes several years for them  
9           to be constructed. They're often built by or  
10          substantially built by the -- the property owners as  
11          they do.

12                           And I think there's testimony and  
13          comments in the record from Mr. Wordingham -- Mr.  
14          Wordingham and Mr. Schwab with respect to that. As  
15          far as the motivation of those two people with  
16          respect to the location of the residences, I would  
17          defer to the comments that were presented in the  
18          record of the public hearing of those two gentlemen.

19                           And fundamentally, there's an issue  
20          here. Are these structures considered a residence  
21          under the regulations?

22                           And it's -- there's distinctions in  
23          the -- in the regulations that, in -- in the Town's  
24          opinion, makes these residences that should be  
25          considered for the -- the -- the two-time-the-

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2 turbine-height structure.

3                   First of all, there's a distinction  
4 between residence set -- for setbacks between  
5 residences and non-residential structures in -- in  
6 the regulations. This is the difference between a  
7 two -- two times the height versus one. These --  
8 let's call them cabins, seasonal residences, are  
9 intended for occupation. It may be for a short  
10 period of time. It may have limited facilities.

11                   These -- the dwellings in question  
12 will have, according to the owners, composting  
13 toilets. They will not have running water. Some  
14 have power. Some they're both insulated. They're --  
15 they're intended for occupancy for some period of  
16 time. So these are residential structures.

17                   So to call them -- they would not fit  
18 under the non-residential structure that would be  
19 subject to the one-and-a-half-times setback. These  
20 are -- these are residential structures. It's for a  
21 short period of time.

22                   But you know, the intent of setbacks  
23 are to -- to mitigate not only potential safety  
24 issues, which whether it's ice throw or turbine  
25 failure, which has happened in nearby town recently,



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2 but -- but also aesthetic issues.

3 The regulations also support this  
4 interpretation, again in the noise section, which is  
5 section 900-2.8, each to which provides that all  
6 residences shall be included as sensitive sound  
7 receptors, regardless of occupancy. So in this -- in  
8 this sense, the regulations use the term residences  
9 with respect to either year-round or seasonal use.  
10 So in -- in the Town's opinion, the -- the  
11 regulations clearly intend for seasonal use  
12 residences to be considered residences.

13 Again, this makes sense because,  
14 regardless of the amount of occupancy, there are  
15 intended reasons for these setbacks. And -- and  
16 whether it's for a few months of total occupancy over  
17 the years or -- or full season, there -- there's a  
18 rationale for it.

19 I think the -- the one concern that --  
20 and this -- this goes to, I think, the aesthetic  
21 issues associated with the setbacks, the Town has a  
22 substantial -- as I said, a substantial number of  
23 seasonal residents present. About 15% of the tax  
24 base is seasonal -- are seasonal residences.

25 So to consider them to have something

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2 less than treatment as a residence with respect to  
3 the -- the wind facilities would -- would prevent or  
4 would stigmatize continued influx into the town of  
5 seasonal residences, again, which is a substantial  
6 part of the tax base.

7 The -- and finally, the Staff notes  
8 that the Wordingham residence is part of a commercial  
9 enterprise. This -- this goes to the ownership and  
10 the -- and the ultimate used by the property owner of  
11 the -- of the -- of the dwelling, but the actual use  
12 is still for human habitation.

13 Whether it be for a few -- for  
14 different people passing through, this is a  
15 commercial enterprise that Mr. Wordingham is trying  
16 to develop. They're entitled to develop a business  
17 as necessary.

18 So in sum, the -- the regs are -- the  
19 regs do refer to these seasonal residences as  
20 residences. It's the interpretation and the language  
21 of the regs would -- would point to that. The  
22 Applicant had notice of the structures at the  
23 building permit phase. So ORES's concern that the  
24 ability to assess the impacts to these structures  
25 could not be done during the permit review is not

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2 correct. The building permits were -- were in place.

3 So in sum, these should be considered  
4 residences for the purpose of siting regulations and  
5 the turbine should be sited accordingly.

6 A.L.J. MCENENEY CHAN: Thank you, Mr.  
7 Kanyuck. Thank you. And in the Town of  
8 Prattsburgh's view, is this a purely legal question  
9 or are there any factual disputes that need to be  
10 resolved on this record?

11 MR. KANYUCK: I think we would agree  
12 this is a legal question. I -- the -- the Applicant  
13 has not raised a factual issue, so we would agree  
14 that this is a fact -- a legal issue.

15 A.L.J. MCENENEY CHAN: Okay. Thank  
16 you, Counselor.

17 All right. I'll turn to ORES Staff  
18 now, please, for -- to put on its oral argument.

19 MS. CARLOCK: Thank you, your Honor.  
20 And at the outset, kind of anticipating your  
21 question, I'll just state that Staff also views this  
22 as a purely legal issue. We believe that the facts  
23 are pretty well set forth in the record. And we  
24 certainly have no dispute with what the Town has set  
25 forth in its petition or the public comments that are

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2 on the record.

3 And Staff used the fundamental legal  
4 issue here to be whether or not the two structures,  
5 we'll call them the Wordingham structure and the  
6 Schwab structure, are residences for purposes of the  
7 setback and noise limitations in 900-2.6b and in  
8 2.8b.

9 And Staff agrees with the Applicant in  
10 this case that the two structures in question are not  
11 residences. This conclusion is supported by  
12 applicable Article 10 and case law precedence that,  
13 historically, has required the most protective  
14 setbacks for primary residences and lessened setbacks  
15 for other types of residences, including seasonal  
16 residences and other kinds of structures, even those  
17 that may be occupied consistently for significant  
18 periods of time, including schools, institutions,  
19 places of work, and so on and so forth.

20 The Wordingham structure, just to sort  
21 of set forth the two structures, are a little bit  
22 different in terms of their use, but I think are  
23 pretty analogous.

24 The Wordingham structure, as Mr.  
25 Kanyuck mentioned, is being constructed as part of a

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2           commercial short-term rental operation as represented  
3           by the property owner.

4                       It is located on a parcel that is  
5           already improved with a residence and is  
6           approximately ten feet by twenty feet in size. It  
7           will not be fitted with running water or septic, but  
8           will, according to the property owner, be fitted with  
9           a composting toilet and eventually powered by solar  
10          energy.

11                      The Schwab structure is being  
12          constructed as a secondary living space. It is also  
13          on a parcel that is already improved with the owner's  
14          primary residence. And according to that building  
15          permit, the home would be approximately twelve feet  
16          by twenty feet in size and would not have running  
17          water or septic.

18                      Neither residence nor non-residential  
19          structure are defined by regulation or by local law.  
20          However, there is instructive precedence supporting a  
21          conclusion that these structures are not residences  
22          because they are used intermittently and only on a  
23          seasonal basis.

24                      So in other contexts, the ORES  
25          regulations distinguish between residences and

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2           seasonal residences and other similar uses. For  
3           example, in Part 900-2.8h, an Applicant is required  
4           as part of its application to identify sensitive  
5           sound receptors.

6                           And in that context, sensitive sound  
7           receptors include residences, cabins and hunting  
8           camps, and any other seasonal residence with septic  
9           system and running water.

10                          And there, the separate enumeration of  
11           residences, as opposed to a separate category for  
12           cabins and hunting camps and a separate category for  
13           other seasonal residences, suggest that residences,  
14           as used within ORES regulations, have a very specific  
15           meaning and is not meant to be construed broadly as a  
16           catch-all term for any place where people, for  
17           example, spend the night or spend a significant  
18           amount of time.

19                          Applicable precedent in the Article 10  
20           context has historically recognized diminished  
21           protection for seasonal or intermittent residences.  
22           For example, in Barron Winds, the siting board found  
23           that setbacks there were adequate to protect health  
24           and safety, where residences received the largest  
25           setback, and a lesser setback was applied to seasonal

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2           residences.

3                           In the case of Stony Creek, the siting  
4           board declined to broadly apply the most protective  
5           setbacks to other uses other than residences. And  
6           notably in this case, this included the siting board  
7           did not apply the most protective setback for  
8           residences to an area of maple syrup production where  
9           the property owner in that case was on site  
10          continuously during certain seasonal periods as part  
11          of that operation. But it was not considered a  
12          residence despite that.

13                           There is also a case law that supports  
14          this differentiation between residences and other  
15          uses where domestic activities might occur. For  
16          example, in matter of Advocates for Prattsburgh  
17          versus Steuben County I.D.A., the court upheld a  
18          determination to approve a final generic  
19          environmental impact statement because it adequately  
20          addressed concerns about the sufficiency of setbacks.

21                           And specifically, the court found that  
22          distinguishing between permanent and non-permanent  
23          residences and applying a lesser setback to non-  
24          permanent residences has a rational basis.

25                           In other contexts, including Black's

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2 Law Dictionary, how a venue is determined under the  
3 C.P.L.R. and insurance law, they all consistently  
4 require some kind of a permanency and intention to  
5 remain for a long duration for a structure to be  
6 considered a residence.

7 Here, where we have, in the case of  
8 Wordingham, an Airbnb-type of operation explicitly  
9 for temporary, short-term and intermittent stays,  
10 and, in the case of the Schwab structure, a secondary  
11 cabin without heat, septic, and running water, but  
12 where the property owner plans to spend time  
13 seasonally and occasionally spend the night, do not  
14 meet the definition of residences for purposes of the  
15 setbacks and noise limits set forth in the ORES  
16 regulations.

17 A.L.J. MCENENEY CHAN: Thank you for  
18 that.

19 I'm going to go a little out of order  
20 and give it back to the Town of Prattsburgh to see if  
21 you have a short reply to ORES Staff's oral argument.

22 MR. KANYUCK: No, your Honor. I think  
23 ORES Staff's argument was consistent with their  
24 brief. You know, I -- I think -- I don't think  
25 there's anything new that --.



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2 A.L.J. MCENENEY CHAN: All right.

3 Thank you.

4 So this will conclude oral argument on  
5 issue number three. We'll move on to issue number  
6 four that was noticed for oral argument today. And  
7 that is whether Applicant has justified a waiver of  
8 the Town of Prattsburgh's local setback requirements  
9 for four wind turbines proposed to be sited in the  
10 town.

11 We will hear from Applicant on this,  
12 first, please.

13 MS. KLAMI: Yes. Thank you, your  
14 Honor.

15 With respect to the Town of  
16 Prattsburgh, the Applicant has sought four waivers  
17 from the Town's one point five times setback to non-  
18 participating parcel -- parcel lot boundary lines.

19 The Applicant notes that there are  
20 eight turbines proposed in the Town of Prattsburgh  
21 and we are only seeking four waivers with respect to  
22 the Town's setback requirements.

23 The turbines are T-two, T-three, T-  
24 five, and T-nine. And the Applicant has demonstrated  
25 that each of these turbines requiring waivers to the

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2 Town's setback to property boundaries has been sited  
3 in the least environmentally impactful location to  
4 achieve compliance to the maximum extent practicable  
5 with the ORES requirements and Town requirements.

6 The siting and constraints analysis,  
7 which can be found in the application in Exhibits 15  
8 and 24 and 2, include optimizing the wind resource at  
9 each location, maintaining sufficient separation to  
10 minimize between other turbines, avoiding forested  
11 terrain, maintaining other setbacks as required by  
12 the Town and ORES, minimizing impacts to farmland,  
13 avoiding steep slopes and complex terrain, and a  
14 consideration of landowner development restrictions.

15 Areas with landowner-imposed  
16 development restrictions are depicted in figure 15-4  
17 of the application. And these restrictions are  
18 generally associated with lands located directly in  
19 proximity to participating residences, in specific  
20 agricultural fields, and in forest areas.

21 Typically, the Applicant negotiates  
22 what portions of the property a -- a landowner will  
23 allow turbines or other facility components to be  
24 located on. And that's a private contractual  
25 negotiation between the Applicant and those

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2 landowners. The Applicant does not have the  
3 authority to place components on locations that are  
4 not permitted by their real property agreements.

5 The Applicant has demonstrated that  
6 they have performed a comprehensive analysis of the  
7 impacts of siting these turbines and have  
8 demonstrated that the turbines are located, again, in  
9 the least impactful location, considering all of the  
10 siting constraints and requirements.

11 The Applicant, again, does not have  
12 the authority, nor could they propose a turbine on a  
13 parcel or a portion of a parcel for which they do not  
14 have real property rights.

15 The Applicant has an obligation to  
16 also avoid, minimize, and mitigate environmental  
17 impacts. For every turbine location, including these  
18 four, the Applicant went through a detailed iterative  
19 process whereby the Applicant identified preliminary  
20 turbine siting areas that accounted for siting  
21 constraints such as setbacks, topography, sensitive  
22 natural resources such as wetlands and T and E  
23 species, and other environmental impacts.

24 The final turbine locations were  
25 further determined based on wind capture,

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2           construction impacts, and factors such as noise and  
3           shadow flicker. This analysis is further  
4           demonstrated on figure 24-4, submitted with the  
5           Applicant's first response to the ORES notice of  
6           incomplete application.

7                           In the Town's issue statement, they,  
8           in particularly, asserted that two turbines, T-nine  
9           and T-two, could be moved to comply with the Town's  
10          one point five times setback. The Applicant notes  
11          that the map, which accompanies the Town submission,  
12          is not accompanied by any expert testimony, and  
13          clearly does not account for other environmental  
14          impacts.

15                          The Town must demonstrate that the  
16          shifting of these turbines is actually possible and  
17          not just speculate that the Applicant could move the  
18          turbines to comply. The map submitted by the Town  
19          clearly shows that T-two would be placed in the  
20          middle of trees and in an area not previously  
21          delineated for wetlands. The move proposed by the  
22          Town would also move the turbine closer to residents  
23          in all directions.

24                          As currently proposed, T-two resides  
25          almost equidistance from all non-participating

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2           receptors to the north, south, east, and west. It's  
3           also notable that T-two is at the edge of a farm  
4           field, reducing impacts to the farmland at that  
5           location, and also has been sited in a way to reduce  
6           impacts to collection and access roads coming in and  
7           through that property to access that turbine.

8                         For T-nine, again, it would be moved,  
9           if the Town had their way, into a heavily wooded area  
10          on steep slopes. And it appears, upon a careful  
11          review of the Town's map, that this location could  
12          also violate ORES's one point one setback to roads.

13                        Likewise, turbines T-three and T-five  
14          are located away from steep slopes and in areas that  
15          reduce impacts to farmland. Moving them would  
16          undoubtedly increase those impacts. The Town has  
17          failed to submit any credible evidence that the  
18          turbines can actually move to locations that they  
19          proposed. And the Applicant can confirm that the  
20          locations proposed by the Town present other  
21          environmental issues which are avoided by the  
22          placement of the turbines in their current locations.

23                        The Applicant has provided more than  
24          enough information in the record to support the  
25          setback waivers granted by the Department in the

1           4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2           draft permit. And the Applicant demonstrated that  
3           the setbacks are unreasonably burdensome on the  
4           facility in a manner inconsistent with the  
5           C.L.C.P.A.'s Renewable Energy targets.

6                         The Town, in response, has failed to  
7           meet its burden of proof and has not demonstrated  
8           that there are substantive or significant issues with  
9           the ORES waiver of the Town setbacks for two -- T-  
10          two, T-three, T-five, and T-nine.

11                        A.L.J. MCENENEY CHAN: Thank you very  
12          much for that.

13                        I'm going to switch up the order again  
14          and ask that ORES Staff weigh in on this -- on this  
15          topic now, please.

16                        MR. BITTINGER: All right. Thank you,  
17          your Honor.

18                        At the outset, ORES stresses that, in  
19          our view, the issue to be decided here today is  
20          actually not, as state in the oral argument agenda,  
21          whether the Applicant has justified a waiver of the  
22          Town of Prattsburgh's local setback requirements for  
23          four wind turbines proposed to be set in the Town.

24                        Rather, with respect, the issue  
25          properly presented is whether the Town of Prattsburgh

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2           has satisfied its burden to demonstrate a substance  
3           significant issue exists with respect to ORES Staff's  
4           recommendation. And this is something Attorney Klami  
5           just touched on.

6                           And regarding -- that's regarding  
7           factual issues. And regarding any legal issues  
8           within this overall issue, with respect to those, the  
9           Town of Prattsburgh must demonstrate that ORES Staff  
10          made an error of law.

11                           Both of these are high bars, neither  
12          of which the Town of Prattsburgh has met here, as  
13          I'll discuss today, and as Attorney Klami touched on,  
14          in its substance significant brief, Staff  
15          demonstrated the record included the necessary  
16          information under the 900-2.25c Local Law Relief  
17          Standard and provided a reasonable justification for  
18          its recommendation to approve limited relief.

19                           Under those five factors, Staff  
20          explained, in our brief, under factor one, the  
21          Applicant included individual analyses demonstrating  
22          the degree of burden for each turbine for which it  
23          requests a relief.

24                           Under factor two, the burden should  
25          not be reasonably borne. The Applicant discussed

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2 that full compliance with this local law would result  
3 in project production dropping by over 15% per year  
4 in some cases.

5           Regarding factor three, design  
6 changes, Staff explained that the Applicant  
7 demonstrated the request could not be reasonably  
8 obviated by design change because of various  
9 constraints, which Attorney Klami touched on,  
10 including physical constraints, participating  
11 landowner land use restrictions, and sound and shadow  
12 flicker minimization.

13           Factor number four, minimum necessary,  
14 the Applicant discussed how it was only needed the  
15 request for relief for four of the facilities'  
16 proposed turbines and no turbines will be closer than  
17 one point five times the turbine height to non-  
18 participating structures, and two point times the  
19 turbine height to non-participating residences as  
20 also required under 94-c.

21           And finally under factor five,  
22 mitigated to the maximum practical, the adverse  
23 impacts of providing this relief will be mitigated  
24 due to the facility compliance with the office's one  
25 point one times turbine height setback from all



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2           participating -- non-participating parcel off  
3           boundary lines and public rights-of-ways where  
4           compliance with the Town's one point five setback was  
5           infeasible.

6                           And in turn, the Staff's analysis  
7           discussed, in our brief, in general, we noted, again,  
8           that the Applicant has to comply with the setbacks  
9           set forth under 900-2.6b. The Applicant actually  
10          used a 668-foot turbine, the tallest under  
11          consideration, when assessing compliance with the  
12          Town's setback requirements.

13                          So the worst-case scenario under  
14          factor four, minimum necessary, the Applicant  
15          actually eliminated its request for relief for the  
16          participating other structure, quote, unquote,  
17          located within the Town's setback for T-one four  
18          consultation with the participating landowner and  
19          shifting the location by approximately 300 feet  
20          south.

21                          And regarding factor five, Staff, in  
22          our brief, provided its own detailed analysis of each  
23          individual turbine location and that why they appear  
24          to be the most suitable location in each parcel. We  
25          reasoned that this recommended relief in no way

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2           relieves the Applicant of its requirement to meet  
3           manufacturer setbacks to homes regardless of  
4           participation status.

5                         And Staff reviewed the information  
6           provided by the Applicant in Exhibits 5, design and  
7           drawings, Exhibit 6, public health safety and  
8           security, and agreed that the combination of  
9           compliance with the local setbacks were possible, and  
10          with 94-c setbacks, where compliance was infeasible,  
11          was suitably protective of public health and safety.

12                        And overall under the relevant  
13          regulatory standard, Staff concluded that the  
14          proposed locations of these four turbines are  
15          reasonable based on the existing straits. And the  
16          Applicant demonstrated that any potential adverse  
17          impacts associated with the limited relief would be  
18          negligible and outweighed by the environmental  
19          benefits of the proposed facility, which we talked  
20          about earlier in the brief, are 147 megawatts of  
21          renewable energy towards New York State C.L.C.P.A.  
22          targets and the environmental benefits of offsetting  
23          approximately 319,400 metric tons of CO2 and  
24          associated greenhouse gas emissions per year.

25                        And I would add the situation is in

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2           contrast to a precedent from Article 10, which we  
3           recognize that's a different standard for local law  
4           relief than under 94-c, but can provide guidance  
5           here. In the application number three wind for  
6           certificate under Article 10 in 2019, the siting  
7           board denied the Applicant's request for waiver and  
8           local setback laws as in two towns because the  
9           Applicant had not made the showings necessary under  
10          those regulations to justify a waiver of the Town of  
11          Lowville's one point five turbine height setback  
12          requirements and the Town of Harrisburg's setback  
13          requirements.

14                        So in sum, the Applicant in number  
15          three had not made the showings necessary. The  
16          record was insufficient to justify a waiver. Whereas  
17          here, a Staff established in briefs, as -- as I  
18          recite today, that's far from the case. There's  
19          ample record episodes, as Attorney Klami spoke to,  
20          and the Staff made a reasonable justification for its  
21          recommended relief. Thank you.

22                        A.L.J. MCENENEY CHAN: Thank you, Mr.  
23          Bittinger.

24                        And for the Town of Prattsburgh,  
25          please, Mr. Kanyuck?

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2 MR. KANYUCK: Thank you, your Honor.

3 In our -- in our petition, we -- we maintain that the  
4 -- the four turbines in question where the waiver was  
5 sought did not adequately assess modifications to the  
6 landowner-imposed restrictions on the property, and  
7 that those were sufficiently in the record in order  
8 to assess whether there were alternative locations  
9 for the turbines that could be -- that could be  
10 placed such that the -- the local laws for setbacks  
11 was complied with.

12 First of all, there's -- that the one-  
13 point-five setback of -- of the Town is not  
14 inherently unreasonable. There -- as was mentioned  
15 or it has been implied, the -- the one point -- a  
16 waiver of one-point-five turbine height setback was -  
17 - was not waived in Number Three Wind.

18 In Heritage Wind, which ORES review,  
19 Town of Barre had a one-point-five setback. The  
20 project complied with -- inherently, there's not an -  
21 - it's not, per se, unreasonable to have a one-point-  
22 five setback.

23 The -- there was, I think, a  
24 misconception in some of the briefs, when we raised  
25 the issue of the Applicant's involvement in the

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2           change from the setback, from two point three six, to  
3           one point five in 2019. We recognize it was in the  
4           record. What isn't in the record is that the  
5           Applicant was part of that discussion at the time and  
6           that the one-point-five setback was satisfactory at  
7           that time for the project.

8                         Again, that -- that demonstrates, in  
9           the Town's view, that their -- the Town's one-point-  
10          five setback is not inherently unreasonable.

11                        Now, what's -- what was the basis for  
12          the one-and-a-half setback? Well, the law was  
13          passed. It was based balancing health safety,  
14          property values, and project viability. So there was  
15          a recognition that there were safety and property  
16          value issues, but also that -- that the -- there was  
17          an interest in the Town at the time that the project  
18          remained viable.

19                        The safety response plan that the --  
20          the Applicant submitted relies on these setbacks, to  
21          a fair extent, in -- in maintaining that -- that the  
22          -- the facility, itself, is safe. The -- again, the  
23          -- there have been tower failures in the area  
24          recently. And the -- the Applicant states that the  
25          facility poses little risk to the community given the

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2           setback requirements established by local law and  
3           their safety standards.

4                        It also says, again, that the wind  
5           turbines shall be proposed for the project shall pose  
6           little risk to the community, setback requirements  
7           governing the location of the turbines and ancillary  
8           equipment protecting the project from potential harm.

9                        So there's twice in the -- in the  
10          safety response plan where the local law setback is -  
11          - is considered to be a substantial safety issue as  
12          far as preventing impacts to adjacent property  
13          owners. Again, inherently, the -- the one-point-five  
14          setback is not an unreasonable scenario.

15                       With respect to the landowner  
16          restrictions present in the record, the figure 15-4,  
17          if you look at it, it has no dimensions on it. It  
18          doesn't identify where the turbines are. And it  
19          doesn't mention -- there's -- there's even with the  
20          blobs that are on that -- on that figure, there is no  
21          obvious restriction in the vicinity of turbines three  
22          and nine as to why there's a landowner restriction.

23                       The -- the reference to appendix 15c  
24          is a pre-siting concerns of landowners just generally  
25          speaking to -- to issues. In -- in reviewing what we

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2           could from figure 15-4, for turbine two, the parcel  
3           that's excluded is -- is quite large. The landowner  
4           limits this turbine siting to a relatively small  
5           southwest portion and -- and the -- and the turbine  
6           is sited in the furthest southwest corner of that  
7           southwest field in there.

8                         It could easily go to another side of  
9           that field and still be 1400 feet away from the  
10          participating residence on that parcel.

11                        So the -- the actual degree of  
12          restrictions aren't satisfactory in the record.  
13          There are no boundaries. There's a -- a -- a circle  
14          near what appears to be turbine five. It's hard to  
15          say what that circle is based on, presumably its  
16          distance from the participating residence. In a  
17          sense, and if that's the case, that residence is in  
18          its own setback to -- to participating residences.

19                        So the -- the Town recognizes that  
20          there's a balancing with respect to siting the  
21          turbines. There's what I would call physical issues  
22          that -- that -- that are -- are limiting, that are  
23          not questionable, wetlands, steep slopes. There are  
24          others that are policy-related, agricultural impacts  
25          and forests.

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2 The Town law should be on at least the  
3 same level as those -- those concerns. And then,  
4 there are the landowner restrictions that are site-  
5 specific. Now, ORES does say they don't have the  
6 ability to impose new lease provisions on -- on  
7 landowners. We don't dispute that.

8 What ORES can do is say that, given  
9 the -- all the other restraints, whether it be  
10 wetlands, steep slopes, local law compliance, that  
11 perhaps this is not a good location for a wind  
12 turbine given the landowner restrictions that have  
13 been presented.

14 The Applicant can then go back to the  
15 landowner and make a decision with the landowner  
16 whether that turbine can be moved, whether the  
17 restriction can be --.

18 So in -- in -- in essence, these  
19 turbine locations have been placed without full  
20 knowledge of the specific landowner restrictions.  
21 And there's been -- given the, let's say the variable  
22 factors in siting it, there's inherently a preference  
23 given to landowner restrictions over the local law  
24 setbacks.

25 There has been a statement made that



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2           the -- that the impact -- the environmental impacts  
3           of the -- of the waiver area have -- are -- are  
4           minimal. But I think this does not recognize, one,  
5           there's -- these setbacks are based on safety  
6           considerations. And two, that the -- the overlap of  
7           -- into the waiver areas can, in a sense, limit what  
8           that adjacent property owner can do with its  
9           property.

10                           If the property owner is concerned  
11           about safety and proximity to the wind turbines and  
12           wants to put a seasonal residence in -- in that  
13           portion of the property, is he -- is by doing so, is  
14           he putting his family at risk by siting that  
15           residence in the future in that location?

16                           So inherently, this is giving  
17           preference to the landowner restrictions. And -- and  
18           in the opinion of the -- of the Town, the Town law  
19           should be taking precedence. Thank you.

20                           A.L.J. MCENENEY CHAN: Thank you, Mr.  
21           Kanyuck. I have a question for you.

22                           MR. KANYUCK: Sure.

23                           A.L.J. MCENENEY CHAN: The map that  
24           was referenced earlier by Applicant that you  
25           submitted in your petition as Exhibit B that was

1 4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2 depicting possible proposed movements for two  
3 turbines --

4 MR. KANYUCK: Yes.

5 A.L.J. MCENENEY CHAN: -- who was the  
6 -- who's the author of that map? Who -- who put that  
7 together?

8 MR. KANYUCK: That -- that map was  
9 prepared by a member of the planning board of the  
10 Town --

11 A.L.J. MCENENEY CHAN: Okay. Do you  
12 know who?

13 MR. KANYUCK: -- who has the ability  
14 to -- to do layout preparation.

15 A.L.J. MCENENEY CHAN: Is this person  
16 an engineer or have any other sort of specialty or  
17 expertise that you can put on the record here today?

18 MR. KANYUCK: It -- it's Mr.  
19 McAllister. I believe he is not an engineer. He's -  
20 - he's more of a mapping -- he has some mapping  
21 capabilities.

22 A.L.J. MCENENEY CHAN: Okay. Is there  
23 anything else you wanted to say on that point?

24 MR. KANYUCK: No.

25 A.L.J. MCENENEY CHAN: Okay. Thank

1 4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2 you.

3 I just wanted to turn over for a  
4 quick, maybe two-minute reply -- and thank you, Mr.  
5 Kanyuck -- to -- for the Applicant, if you just  
6 wanted to make a quick response to the oral argument  
7 today?

8 MS. KLAMI: Yes, your Honor.

9 There's just one point I wanted to  
10 address. And that is this idea that the one-point-  
11 five is necessary to be protective to, you know,  
12 property boundary lines. ORES has setbacks, which  
13 this project complies with, to residential property  
14 boundary lines, which, as ORES counsel pointed out,  
15 are protective of participating and non-participating  
16 property boundary lines.

17 So this is not the only -- the -- the  
18 waiver of the Town's setback requirements does not  
19 allow the placement of the turbine up to the limit of  
20 the property boundary. There is still an ORES  
21 setback being applied, which the Applicant complies  
22 with.

23 A.L.J. MCENENEY CHAN: Thank you.

24 And the Staff, if you want to have a  
25 brief reply of anything, if you'd like two minutes?

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2 MR. BITTINGER: There are a couple  
3 points. On the local law history, regardless of how  
4 you slice and dice exactly what regarding that is in  
5 the record or not allegedly, it's irrelevant. We  
6 take a local law as it stands at the time the relief  
7 was requested. There has to be a limiting principle  
8 here. Otherwise, how are -- how far back do you go  
9 in time?

10 And in terms of prioritizing the  
11 public or the public -- the private or the public,  
12 rather, with the Town's local law versus the  
13 participating landowners restrictions, and Attorney  
14 Kanyuck talked about, you know, alleged harm, there's  
15 no evidence to demonstrate a detriment to any other  
16 property owner.

17 That the Town would have to submit a  
18 proper piece of evidence to demonstrate that in terms  
19 of the local law being -- I think the term used was  
20 inherently reasonable. There's no such thing under  
21 the ORES regulations. It's a case-specific analysis.

22 And it -- there wasn't even a waiver  
23 request made in Heritage Wind, but that's that case  
24 and this is this case.

25 And I spelled out in detail how ORES

1 4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2 went through the five factors the Applicant did  
3 first, and we looked at it and determined that the  
4 Applicant met that standard.

5 In terms of the safety response plan,  
6 that safety response plan, itself, does not rely  
7 solely on the local setback compliance. But when  
8 there's a, quote, the wind turbines such as proposed  
9 for the Prattsburgh Wind project pose little risk to  
10 community's setback requirements governing location  
11 of the turbines and ancillary equipment, protect  
12 people and structures in the vicinity of the project  
13 from potential harm in the event of an emergency.  
14 Thank you.

15 A.L.J. MCENENEY CHAN: Okay. Thank  
16 you very much. That will conclude oral argument on  
17 issue number four.

18 I just want to note for attendees and  
19 -- and people in attendance who may not be familiar  
20 with the process or may not be attorneys, you know,  
21 the amount of time that we spend on each particular  
22 issue doesn't necessarily reflect how important the  
23 issue is.

24 That being said, if an issue wasn't  
25 earmarked or brought up today for oral argument, that

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2 doesn't mean that that's not -- you know, it's any  
3 less of an important issue in -- in this case.

4 And with that being said, I just  
5 wanted to give it back to Judge MacKillop-Soller, see  
6 if there's anything else that you'd like to add.

7 A.L.J. MACKILLOP-SOLLER: Thank you,  
8 Judge McEneney Chan.

9 This will conclude the oral argument  
10 for today on this matter. I would ask Ms. Klami and  
11 Mr. Muscato, if it is possible, if we could please  
12 have an expedited transcript from this oral argument.

13 MS. KLAMI: Yes, your Honor.

14 MR. MUSCATO: Yes, your Honor. I  
15 think we've made that request already, but if not,  
16 we'll make that formally and we'll make sure that  
17 gets filed as soon as possible.

18 A.L.J. MACKILLOP-SOLLER: I appreciate  
19 that. Thank you very much.

20 I'd like to thank everyone, on behalf  
21 of both Judge McEneney Chan and myself, for your  
22 participation in this oral argument today.

23 Thank you, everyone, for your  
24 patience, as well. We had a few connection problems  
25 with this, but we do appreciate everyone sticking by

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2 and -- and being patient as we resolved them.

3 Thank you and have a great rest of  
4 your day.

5 (The proceeding concluded at 12:55  
6 p.m.)

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1           4/16/2024 - Prattsburgh Wind, LLC - 21-00749  
2       STATE OF NEW YORK  
3       I, ANNETTE LAINSON, do hereby certify that the foregoing  
4       was reported by me, in the cause, at the time and place,  
5       as stated in the caption hereto, at Page 1 hereof; that  
6       the foregoing typewritten transcription consisting of  
7       pages 1 through 87, is a true record of all proceedings  
8       had at the hearing.

9                               IN WITNESS WHEREOF, I have hereunto  
10       subscribed my name, this the 19th day of April, 2024.

11

12       ANNETTE LAINSON, Reporter

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