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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 06-T-0650 - Application of New York Regional
Interconnect Inc. For a Certificate of Environmental
Compatibility and Public Need Pursuant to Article VII
for a High Voltage Direct Current Electric Transmission
Line Running Between National Grid's Edic Substation in
the Town of Marcy, and Central Hudson Gas & Electric's
Rock Tavern Substation Located in the Town of New
Windsor

Evidentiary Hearing
3 Empire State Plaza
19th Floor
Albany, New York

March 24, 2009
9:33 a.m.

BEFORE: MICHELLE L. PHILLIPS,
Administrative Law Judge

JEFFREY STOCKHOLM,
Administrative Law Judge

1 JUDGE STOCKHOLM: I call Case 06-T-0650 in the
2 matter of the Application of New York Regional
3 Interconnect, Inc., for a certificate of environmental
4 compatibility and public need under the Public Service
5 Law.

6 Begin with the appearance of counsel.

7 MR. SINGER: For New York Regional
8 Interconnect, the law firm of Couch White by Leonard
9 Singer, Garrett Bissell and William McCarthy.

10 MR. KLUCSIK: For Communities Against Regional
11 Interconnect, the law firm of Gilberti, Stinziano,
12 Heintz & Smith, P.C., by Brenda Colella and John
13 Klucsik.

14 MR. BELSITO: For the Department of Public
15 Service, Anthony Belsito, assistant counsel, and Steve
16 Blow, assistant counsel.

17 MR. MALONE: For the New York Power Authority,
18 Mark Malone and Sarah Barish-Straus.

19 MS. SMITH: For the New York State Department
20 of Agriculture and Markets, Diane Smith, associate
21 attorney.

22 MS. LEARY: For the Office of the Attorney
23 General, Maureen Leary.

24 MS. WILKINSON: For the Department of

1 Environmental Conservation, Lisa Wilkinson and William
2 Little.

3 MS. HINTZ: For New York State DOT, Donna
4 Hintz.

5 MR. SWEENEY: For the New York State Thruway,
6 law firm of Holland & Knight, Patrick Sweeney.

7 JUDGE STOCKHOLM: Any other appearances?

8 Okay. Good morning. I think we are beginning
9 a new witness this morning, Mr. de Waal Malefyt. Is
10 that correct, Mr. Blow?

11 MR. BLOW: Yes, Your Honor.

12 MR. BISSELL: Your Honor.

13 JUDGE STOCKHOLM: Yes.

14 MR. BISSELL: If I may, actually I have a
15 preliminary matter. There's an issue that came up
16 yesterday with the panel with respect to Exhibit 173,
17 which was the response from DPS Staff to NYRI-183.

18 JUDGE STOCKHOLM: Yes. Something regarding the
19 attachments.

20 MR. BISSELL: Questions were raised regarding
21 the eight figures that were not included. If I may, I
22 have for identification as an exhibit the full response
23 NYRI-183 that includes the eight -- the eight attached
24 figures that were not included yesterday.

1 MS. LEARY: Your Honor, the parties, I think we
2 stipulated that it would just be a part of that same
3 exhibit, but that's up to you.

4 JUDGE STOCKHOLM: Yes. Does the document that
5 you have include the answer as well as the attachments?

6 MR. BISSELL: Correct. It's the same one page
7 that was in -- that was 173 plus the eight attached
8 figures that were not included yesterday.

9 JUDGE STOCKHOLM: Okay. And that exhibit
10 number again?

11 MR. BISSELL: Is 173.

12 JUDGE STOCKHOLM: 173. All right. The
13 document counsel described should be distributed and
14 marked for identification as 173. And that will be
15 substituted in the official record.

16 (Exhibit 173 remarked for identification.)

17 MS. HINTZ: Your Honor, if I may. I have a
18 question about scheduling of DOT's witness.

19 JUDGE STOCKHOLM: Yes, ma'am.

20 MS. HINTZ: I was wondering if I could get a
21 sense of how many folks had cross-examination questions
22 for Mr. Mariotti.

23 JUDGE STOCKHOLM: Certainly. NYRI?

24 MR. SINGER: I'm not entirely sure at this

1 point, but I do believe I will have a few questions for
2 him.

3 JUDGE STOCKHOLM: Okay. CARI?

4 MR. KLUCSIK: I think it would be largely
5 dependent on what he says in response to cross by
6 others, but it won't be much.

7 JUDGE STOCKHOLM: Okay. Staff?

8 MR. BLOW: If he, in fact, is going to be
9 crossed by NYRI, I might have one question.

10 JUDGE STOCKHOLM: Okay.

11 MR. BLOW: Or two maybe.

12 JUDGE STOCKHOLM: DEC?

13 MS. LEARY: Nothing, Your Honor.

14 MS. WILKINSON: Nothing, Your Honor.

15 MS. SMITH: Nothing from Ag and Markets.

16 MR. MALONE: I don't believe anything from
17 NYPA, Your Honor.

18 JUDGE STOCKHOLM: Sounds to me like maybe an
19 hour.

20 MS. HINTZ: Thank you, Your Honor. At this
21 point, he would be available on Friday or possibly
22 Thursday morning.

23 MR. BLOW: Your Honor, while we're on
24 scheduling?

1 JUDGE STOCKHOLM: Can we plan on having that
2 witness on Thursday this week?

3 MS. HINTZ: He is available just in the
4 morning. He has another obligation in the afternoon.
5 If he could be finished by noon, that would be fine.

6 JUDGE STOCKHOLM: When is Panel D going to be
7 available? We had talked at least about on Thursday, I
8 think.

9 MR. SINGER: Panel D will be available tomorrow
10 morning.

11 JUDGE STOCKHOLM: Wednesday morning. Is
12 tomorrow Wednesday?

13 JUDGE PHILLIPS: Yes.

14 JUDGE STOCKHOLM: I apologize. My notes do
15 show that. Sorry.

16 MS. LEARY: Your Honor, I'm not sure this
17 helps, but Dr. Schreiber is also scheduled for tomorrow.
18 And Mr. Singer and Mr. Blow and I have reached an
19 accommodation. They will have not have
20 cross-examination of Dr. Schreiber and will stipulate to
21 the admission of her testimony by affidavit, but
22 Mr. Blow will be serving a discovery request that will
23 ask some fundamental questions he has of her. And he, I
24 believe, would reserve his rights - Steve, is that

1 right - to --

2 MR. BLOW: Mark the -- have the response marked
3 as -- as an exhibit.

4 MS. LEARY: And I --

5 JUDGE STOCKHOLM: I am -- I am concerned in
6 this case that it would appear initially to be --
7 individual questions often tend to grow into long series
8 of questions and raise questions in other parties' minds
9 as I think we've seen. What is the -- what is the --
10 what is Staff's position with regard to this witness on
11 a substantive level, Mr. Blow?

12 MR. BLOW: I'm not exactly sure what you mean.
13 We --

14 JUDGE STOCKHOLM: What is the question that you
15 want to ask this witness?

16 MR. BLOW: The questions are basically related
17 to the witness' knowledge regarding herbicide use in the
18 watershed and any documented contamination and
19 degradation regarding -- of the New York City water
20 supply as a result, and the witness' knowledge about the
21 construction of electric transmission lines.

22 MS. LEARY: If I could characterize
23 Dr. Schreiber's -- and I'm weary of doing this, but her
24 testimony was a supplement to Dr. Silver's testimony.

1 And generally those members of what I will call the
2 watershed-related panel, Thomas Snow and Dr. Silver,
3 were the primary witnesses. Mr. Eaton and Mr. Ferracane
4 were the others.

5 Her -- she expresses her concern in her
6 testimony about storm-water and erosion providing the
7 conduit for the -- for pesticides to enter water bodies
8 and, therefore, degrade water quality. So it's --

9 JUDGE STOCKHOLM: Let me -- let me explain my
10 concern. My concern is that we have a limited time to
11 get this record completed. If the parties are willing
12 to stipulate to this process, if all of the parties are
13 willing to agree to this process, I would have no
14 objection to it, but my concern is that the answers that
15 Mr. Blow solicits will simply raise questions in others'
16 minds. And if we put it off to a paper process, it may
17 be very difficult to reach a reasonable conclusion.

18 MS. LEARY: She is available for just about any
19 date, I believe, next week. I mean, she certainly can
20 come tomorrow, but it's -- it's up to you, Your Honor.
21 I don't want to unnecessarily take time with a witness
22 that I believe only staff and Mr. Singer had questions
23 of.

24 JUDGE STOCKHOLM: She is available tomorrow; is

1 that correct, ma'am?

2 MS. LEARY: Yes. I'm not certain that it is in
3 the morning. And I'm hearing that Panel D may go anyway
4 in the morning, but --

5 JUDGE STOCKHOLM: I very much hate to overrule
6 an agreement that the parties have reached on process
7 matter, but I am concerned that this could spin further
8 than the parties might have thought initially. If we
9 could have her come in tomorrow, that would be
10 appreciated.

11 MS. LEARY: Okay.

12 JUDGE STOCKHOLM: And I don't think it'll be
13 long, and hopefully it won't spin too far, but at least
14 we will have the record made at that point in time.

15 MS. LEARY: So can I advise Dr. Schreiber to be
16 here after lunch? Would that be acceptable?

17 JUDGE STOCKHOLM: When is your panel going to
18 be available?

19 MR. SINGER: I just want to get it straight in
20 my mind so I don't mess up again. Panel D will be
21 available first thing tomorrow morning. Panel A will be
22 available later in the afternoon.

23 MS. LEARY: Today you mean.

24 MR. SINGER: Tomorrow.

1 JUDGE PHILLIPS: Okay. This is what I'm
2 hearing: For tomorrow, we have Panels A, D and Witness
3 Schreiber; is that correct? And the preference is that
4 Witness Schreiber would go in the afternoon. That's
5 what I'm hearing. Did anybody hear anything different?

6 Okay. So we have three witnesses.

7 MR. KLUCSIK: And "D" -- and "D" in the
8 morning, Your Honor? Is that right, Len?

9 JUDGE PHILLIPS: "D" would be available in the
10 morning is what I heard.

11 MR. SINGER: Yes. It will be here first thing.

12 JUDGE STOCKHOLM: It's beginning to look like
13 we're not going to have witnesses on Thursday. Yes --
14 yes, I realize that DOT did say that they would be
15 available, I understand, but I don't want to have a
16 hearing just for a single witness I don't think.

17 MR. BLOW: Your Honor, Messrs Quimby and Schrom
18 could be available on Thursday, and so can Mr. Stolicky.

19 MS. LEARY: As can Dr. Schreiber, I believe.

20 JUDGE PHILLIPS: We already have her down for
21 Wednesday, though, but you're saying she's available
22 both days?

23 MS. LEARY: I'm concerned that when panels on
24 behalf of NYRI has testified, there's a -- it's more

1 lengthy than -- and I'm thinking of the convenience of
2 our witness, with all due respect.

3 JUDGE STOCKHOLM: That's perfectly fine.

4 JUDGE PHILLIPS: No, I understand. I was just
5 trying to clarify. You're saying basically she's
6 available Wednesday and Thursday. And, I mean, I don't
7 know how long Witness D -- or Panel D will take, but
8 what we could possibly do is, if she can be on call, if
9 everything is moving quickly, you can have her come in
10 in the afternoon. If not, then you can call her and
11 tell her to come on Thursday. I think that would work.

12 MS. LEARY: Yes.

13 JUDGE PHILLIPS: I'm just trying to get a sense
14 of who's available on what days.

15 MS. LEARY: Thank you.

16 JUDGE STOCKHOLM: And -- and a very good
17 question with regard to cross-examination. What is
18 Panel D?

19 MR. SINGER: Panel D covers the engineering
20 exhibits primarily.

21 JUDGE STOCKHOLM: Okay. And Panel A?

22 MR. SINGER: Panel A covers Exhibits 1, 2 and
23 3, which is an alternate -- the routing itself for the
24 proposed route, as well as the alternate routes, and

1 also Exhibit 7.

2 JUDGE STOCKHOLM: The original assumption
3 appears to be on -- on -- that the cross-examination of
4 those two panels would take at least a day and maybe
5 more. Is that -- is that fair? Is that what the
6 parties thought when they originally put this together?

7 MR. BLOW: Your Honor, when we put the -- the
8 table of the order of witnesses together, we had no
9 idea. We -- I just tried to put people where we could
10 and, you know, move people around to fit the convenience
11 of the parties. You know, so it was just a guess.

12 Right now, I don't believe we have any cross,
13 maybe a few questions for Panel D. We have some for
14 Panel A.

15 JUDGE STOCKHOLM: How about CARI?

16 MR. KLUCSIK: Your Honor, we may have some
17 questions for Panel D, probably a much more lengthy list
18 for Panel A.

19 MR. BLOW: It seems to me, Your Honor, that
20 unless --

21 JUDGE PHILLIPS: Hold on for just a second,
22 please.

23 What we have right now, it appears to be Panel
24 A and D available tomorrow. Witness Schreiber --

1 Schreiber it seems, we should just have her come on
2 Thursday I think at this point. Mr. Mariotti I believe
3 is available Thursday as well; is that correct?

4 MS. HINTZ: Yes, Your Honor, in the morning.

5 JUDGE PHILLIPS: Okay. And what I would like
6 to suggest, because that seems like it leaves us
7 possibly quite a bit of time -- well, I won't say quite
8 a bit, but might leave us time Thursday and Friday of
9 this week if the parties could maybe get together and --
10 and look at the schedule again, because I guess one
11 other separate concern that we have before we even came
12 up is we've canceled April 7th and we're not going to
13 have cross on April 8th.

14 Is it possible to maybe move some of those
15 witnesses from that one Monday either up earlier or
16 maybe make some other changes to the schedule so that we
17 can fill up whatever time we have left, either the end
18 of this week or at some other point?

19 So it kind of seems like based on the way that
20 we're moving, that the parties need to maybe reconsider
21 the schedule and see if we can move some people around
22 and use our time as efficiently as possible. So I'd
23 like to maybe suggest that you talk to one another and
24 see if we can have some other people possibly available

1 on Friday, for example, of this week.

2 MR. BLOW: Your Honor, if -- if I might. I
3 believe Mr. Singer said that Panel A was not going to be
4 available until later in the afternoon tomorrow, which
5 would leave time for Dr. Schreiber to be -- to testify
6 just after lunch, or even just before lunch depending on
7 how much -- how Panel A goes -- or Panel D goes, because
8 not very many people had cross for Panel D. Just a
9 suggestion.

10 JUDGE STOCKHOLM: When you said "in the
11 afternoon," what do you mean by that?

12 MR. SINGER: "A" will not be available until
13 2:00.

14 MR. BLOW: If there's only a half -- half an
15 hour of questions for Dr. Schreiber, it seems like after
16 lunch would work.

17 MS. LEARY: If I might make a suggestion, Your
18 Honor.

19 JUDGE STOCKHOLM: Yes, ma'am.

20 MS. LEARY: Dr. Schreiber is a 10 or 15-minute
21 walk away. I can have her available after Panel D
22 tomorrow. I'm not sure because Mr. Bucci was on "E" and
23 "F", I believe. How much "D" -- and I -- I'm not the
24 engineer, nor do I have engineering questions, but if

1 Dr. Schreiber can be available late tomorrow and as a
2 default for Thursday.

3 JUDGE STOCKHOLM: Well, it may be around -- it
4 may be noon-ish.

5 MS. LEARY: Oh, okay.

6 JUDGE STOCKHOLM: I mean, that's what I'm
7 thinking.

8 JUDGE PHILLIPS: I guess I'd like to go back to
9 something I think I suggested, I can't remember how long
10 ago now, but "A" and "D" are available tomorrow. Why
11 don't we see how the morning goes. And if we're moving
12 quickly and it looks like we can fit her in during the
13 time that you're saying she's available, we'll just call
14 her and maybe she can come in after lunch. If not,
15 we'll have her on Thursday. Does that work?

16 MS. LEARY: Yes. Thank you.

17 JUDGE PHILLIPS: Okay.

18 MR. BLOW: Your Honor, as I said, the
19 Quimby/Schrom panel can be available on Thursday, and so
20 can Mr. Stolicky. The Quimby/Schrom panel could also be
21 available on Friday.

22 JUDGE PHILLIPS: Okay. Can you make the same
23 arrangement with them, to have them on call --

24 MR. BLOW: Sure.

1 JUDGE PHILLIPS: -- or play it by ear?

2 MR. BLOW: Sure.

3 JUDGE PHILLIPS: I'm going to write them down
4 for both of those days. And depending on how quickly
5 that we move -- they're in the building --

6 MR. BLOW: Yes. Yes.

7 JUDGE PHILLIPS: -- so they can get here pretty
8 quickly.

9 MR. BLOW: Yes.

10 JUDGE STOCKHOLM: You -- you didn't want to
11 take Friday off, Judge?

12 JUDGE PHILLIPS: I'd rather take the Monday
13 off, actually. That Monday is the 6th, if we could.

14 JUDGE STOCKHOLM: If the schedule is running
15 far enough ahead, I think we should cancel the 6th.
16 Part of the reason is that when we leave -- if we have
17 that hearing on Monday the 6th, when we leave, we have
18 to take everything with us. We have to move out of this
19 room. And this room has to be set up for the Commission
20 session the next day. So it's not going to be a full
21 day in any event.

22 MR. SINGER: Your Honor, the problem with that
23 from our end is that Dr. Rutherford from our Panel C is
24 teaching college in Switzerland, and has made specific

1 arrangements to be here for that particular day.

2 JUDGE PHILLIPS: Okay. Again, it was just a
3 suggestion. And if we have to have him here on the 6th,
4 we'll do that, but, for example, maybe we can move
5 Witness Cline to another day. I don't know. It's
6 just -- I would appreciate it if the parties can maybe
7 talk to one another and just try to make sure that we're
8 able to move quickly and use our time efficiently. So I
9 realize we may not be able to cancel that day, but it
10 was simply a suggestion.

11 So hopefully the parties will talk to one
12 another, and maybe we can talk about this again perhaps
13 after lunch today or at the end of the day depending on
14 whether the parties have had a chance to talk to one
15 another.

16 MS. WILKINSON: Your Honor, one more
17 preliminary question.

18 As -- as the site visits are concerned, you
19 know, our concern is that there's enough notice that we
20 can give to our staff so that, if necessary, they can
21 accompany us. And I was just wondering at what point
22 you might finalize the dates of the schedule? I know we
23 still have to work out the locations, but the dates.

24 JUDGE STOCKHOLM: Well, and Mr. Singer also

1 suggested off the record last night that -- or offered,
2 I should say, to provide the aerial video along the
3 route that might help the parties decide on locations
4 that had not otherwise been planned for site visits
5 before that schedule gets finalized.

6 MS. WILKINSON: Okay.

7 JUDGE STOCKHOLM: And I don't know if the
8 parties want to do that or not. That's -- you know, I
9 certainly have no objection to it, but, you know, that's
10 up to you all.

11 Yes. Maybe -- Judge Phillips suggested a
12 Friday afternoon movie, matinee, perhaps with popcorn.

13 But in any event, we need to finalize -- I
14 think we need to finalize this week what we're going to
15 do. We can tweak individual stops as necessary, but I
16 think we need to have the basic outline.

17 And as I suggested yesterday, one of the things
18 that will have to be moved is the second week, because
19 briefs are due during that week, is the second week
20 of -- of the viewing as it's currently scheduled. If we
21 could get it done in a week, that would be nice, but I
22 think that's going to be an ambitious schedule, if --
23 but in any event, I think the parties need to think
24 about that and what they want do in that regard.

1 MR. BLOW: Your Honor, in that regard, you had
2 scheduled the second site visit starting on the 11th.
3 Was there a reason why the week of the 4th didn't work
4 for you, or you just scheduled it that way?

5 JUDGE STOCKHOLM: We just wanted a break I
6 think.

7 MR. BLOW: If we can't move it all into the --
8 into the same -- the week of the 27th, it seems to me
9 that probably we should do the site visit the week of
10 the 4th.

11 JUDGE STOCKHOLM: Anybody have any objections
12 to that?

13 MR. BLOW: Marcy South.

14 JUDGE STOCKHOLM: I think for general planning
15 purposes, that's a good idea. Why don't we consider
16 that change, the date to the 4th.

17 Yes, Mr. Singer.

18 MR. SINGER: Your Honor, as I understand it,
19 it's NYRI's responsibility to contract for the bus
20 transportation?

21 JUDGE STOCKHOLM: That's the way it's been done
22 in the past. Yes, sir.

23 MR. SINGER: Okay. We will need enough lead
24 time to be able to make sure that we -- we can -- we can

1 arrange for that.

2 JUDGE STOCKHOLM: Yes. And that raises another
3 issue which I don't want to get into now except a note
4 for later. We'll talk about this either at the end of
5 today or at the end of tomorrow in more detail, but we
6 need to consider some limitations on number of people on
7 this trip. I don't know how to set that kind of limit,
8 but perhaps we should start with the number of people
9 that the parties here think they want on that trip. So
10 let me ask you to all consider that.

11 And there will come a time, probably at the end
12 of the day today, where we're going to ask you for your
13 party, how many seats do you want. Okay?

14 JUDGE PHILLIPS: Actually, I -- I get the
15 unenviable task of reminding parties that the secretary
16 gets very upset when you don't use the receptacles. So
17 she wanted me to give you a reminder to make sure that
18 you actually place all of your recyclables in the bin
19 and place your trashes -- trash items in the bin and not
20 around it. So that's your reminder. Consider yourself
21 warned.

22 JUDGE STOCKHOLM: Any other preliminary
23 matters? You know, once you lecture them, you know,
24 they get quiet.

1 Okay. Mr. de Waal Malefyt, please raise your
2 right hand.

3 JAMES J. de WAAL MALEFYT,
4 after first having been duly sworn, was examined and
5 testified as follows:

6 JUDGE STOCKHOLM: State your name for the
7 reporter, please.

8 MR. de WAAL MALEFYT: James de Waal Malefyt.

9 JUDGE STOCKHOLM: Counselor.

10 MR. BLOW: Thank you, Your Honor.

11 DIRECT EXAMINATION

12 BY MR. BLOW:

13 Q Mr. de Waal Malefyt, you have in front of you a
14 document consisting of 61 pages plus a cover that
15 purports to be your direct testimony prefiled in this
16 proceeding?

17 A Yes, I do.

18 Q Do you have any corrections to make to that?

19 A Yes. I have a correction on page 15, line 22,
20 Spey Glen should be transposed. It should be Glen Spey.
21 That's all.

22 Q Okay. And if I were to ask you the questions
23 contained in that document, would your answers be the
24 same as they appear therein?

1 A Yes.

2 Q Do you adopt this as your sworn testimony in
3 this proceeding?

4 A I do.

5 Q And your rebuttal testimony, you have a
6 document purporting to be your rebuttal testimony
7 consisting of 14 pages plus a cover, correct?

8 A That's correct.

9 Q And do you have any corrections to make to
10 that?

11 A No.

12 Q And if I were to ask you the questions
13 contained therein, would your answers be the same as
14 they appear there?

15 A Yes.

16 Q Do you adopt this as your sworn testimony in
17 this proceeding?

18 A Yes, I do.

19 MR. BLOW: Your Honor, with
20 Mr. de Waal Malefyt's direct testimony, he has seven
21 exhibits.

22 Q Mr. de Waal Malefyt, if you would, describe
23 your exhibits.

24 A Exhibit Malefyt-1 is a response to DPS-70 about

1 the scout camps. It includes several maps.

2 Exhibit Malefyt-2 is the maps of the DPS
3 deviations along the Marcy South route. It consists of
4 12 figures.

5 Q Does it also include the -- the Marcy now
6 center?

7 A Yes, it does.

8 Q Alternative I should say.

9 A Right, along the alternate route, Figure 1.
10 Malefyt-3 is the map of the Greenwoods
11 Conservancy. It's one page.

12 Exhibit Malefyt-4 are certificate conditions.
13 Go through condition 79.

14 And Malefyt-5 are general guidelines for the
15 environmental management and construction plans. There
16 are 13 pages.

17 And Exhibit Malefyt-6 is two pages of cost
18 differences, the DPS deviations along the Marcy South
19 versus NYRI's overhead route. That was prepared by
20 NYRI. So they're two -- two large -- two large pages.

21 And then Malefyt-7 is an example of a water
22 quality certificate. Consists of three pages.

23 Q Mr. de Waal Malefyt, were the first five -- I'm
24 sorry. Which of the exhibits were prepared by you? I

1 think it's 2 through 5?

2 A Two through 5 and 7.

3 Q Okay. And numbers 1 and 6 were prepared by
4 NYRI, correct?

5 A Correct.

6 Q And actually, number 7 was a -- was a --

7 A I should point out, though, that this
8 Malefyt-1, the scout, there's a combination of the -- I
9 included some maps from the scout, so it's a
10 combination. So it's a combination of the response to
11 an interrogatory, plus some of my maps that I included.

12 Q Okay. And Exhibit 7 is actually a water
13 quality cert -- certification issued in another case,
14 right --

15 A That's correct.

16 Q -- in Case 06-T-1298?

17 A Right.

18 MR. BLOW: Your Honor, I would ask that the
19 exhibits be marked for identification.

20 JUDGE PHILLIPS: The exhibits will be marked
21 for identification as follows: Malefyt-1 is 175.
22 Malefyt-2 is 176. Malefyt-3 is 177. Malefyt-4 is 178.
23 Malefyt-5, 179. Malefyt-6 is 180. And Malefyt-7 is
24 181.

1 (Exhibits 175 through 181 marked for
2 identification.)

3 MR. BLOW: Thank you, Your Honor. The --
4 actually, I didn't ask. I will ask now, Your Honor,
5 that the direct and rebuttal testimony be copied into
6 the record as if given orally.

7 JUDGE STOCKHOLM: Granted.

8 (The following is the prefiled direct and
9 rebuttal testimony of James J. de Waal Malefyt:)

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BEFORE THE
STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of
New York Regional Interconnect, Inc.

Case 06-T-0650

January 9, 2009

Prepared Testimony of:

James J. de Waal Malefyt
Utility Supervisor
(Environmental)
Office of Energy Efficiency and
the Environment
State of New York
Department of Public Service
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Case 06-T-0650

James de Waal Malefyt

1 **INTRODUCTION OF WITNESS**

2 Q. What is your name and business address?

3 A. James J. de Waal Malefyt, New York State
4 Department of Public Service, 3 Empire State
5 Plaza, Albany New York 12223-1350.6 Q. What is your educational and professional
7 background?8 A. I received a Bachelor of Arts degree in
9 Environmental Science and Biology from Grand
10 Valley State College in Michigan in 1972. In
11 1974 I received a Masters of Science degree in
12 Biology from Michigan Technological University.13 From 1974 to 1977, I was employed by
14 Envirosphere Company, a division of Ebasco
15 Services, in New York City. My major
16 responsibilities included environmental
17 assessments of proposed electric generating and
18 transmission facilities.19 Since 1977, I have been employed by the New
20 York State Department of Public Service as a
21 Transmission Facilities Analyst, Aquatic and
22 Terrestrial Ecologist, and Utility Supervisor
23 (Environmental). In these capacities, I have
24 evaluated the environmental impacts of numerous

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1 electric and gas transmission facilities and
2 electric generating facilities. I have
3 monitored construction and operation of these
4 facilities to ensure compliance with
5 environmental conditions required by the Public
6 Service Commission and the New York State Board
7 on Electric Generation Siting and the
8 Environment (Siting Board). I have been
9 involved in developing policies and regulations
10 for the long-term management of right-of-way
11 (ROW) vegetation and electro-magnetic fields
12 (EMF). I have also conducted research and have
13 monitored utility research concerning
14 environmental effects of construction and
15 maintenance of transmission facilities. In
16 addition, I have supervised staff teams assigned
17 to various transmission and generating
18 facilities.

19 Q. Have you participated in any Article VII cases
20 involving direct current (DC) transmission
21 facilities?

22 A. Yes. I served as supervisor of the
23 environmental staff assigned to the 500 kV HVDC
24 Neptune Project in Case 02-T-0036 and as the

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1 project manager for the staff team assigned to
2 the 500 kV HVDC Conjunction Project in Case 03-
3 T-1641.

4 Q. What is your role in this case?

5 A. I have been assigned as project manager for the
6 staff team assigned to this case and I have also
7 reviewed several environmental impact areas,
8 including aquatic and terrestrial ecology.

9 **NYRI'S APPLICATION**

10 **Wildlife**

11 Q. How would you characterize New York Regional
12 Interconnect's (NYRI) environmental effects
13 assessment contained in Exhibit 4 and related
14 exhibits?

15 A. The environmental effects assessment performed
16 by NYRI is very minimal and lacks site-specific
17 information. It draws on large regional-scale
18 information and data sets.

19 Q. Can you provide some examples?

20 A. Yes. In Exhibit 4.10.4.4 on the environmental
21 effects on the state-threatened timber
22 rattlesnake, NYRI states that surveys to locate
23 potential rattlesnake dens will be performed
24 after the route has been certified by the PSC

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1 because it did not have any access rights to
2 property beyond the railroad. In the same
3 section, NYRI also states "After a route is
4 certified by the Public Service Commission and
5 the Environmental Management and Construction
6 Plan (EM&CP) is in preparation, additional field
7 work will be undertaken to survey the Proposed
8 Route Transmission Corridor, delineate wetlands
9 and complete detailed threatened and endangered
10 species surveys as applicable." Therefore, we
11 have an incomplete record on the environmental
12 effects of this project on these environmental
13 resources.

14 The brevity of NYRI's environmental
15 assessment is also illustrated by its fish and
16 wildlife effects and mitigation assessment in
17 section 4.10.3.2., which is a mere two pages.

18 Q. Are there other environmental impacts to fish
19 and wildlife that NYRI should have addressed?

20 A. Yes. In section 4.10.3.2 NYRI mentions only
21 some potential impacts to wildlife from habitat
22 destruction and habitat conversion. It did not
23 mention that the impacts to wildlife will extend
24 into the adjacent forested lands and thereby

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1 impact substantially more than 1,900 acres of
2 forest within the proposed rights-of-way (ROW).

3 Some studies of ground nesting birds, such
4 as the Ovenbird, have found an "edge effect" on
5 nest success and clutch size that extended 300
6 meters from the edge of clearcuts into intact
7 Wisconsin forests.

8 Small forest mammals such as the short-
9 tailed shrew and woodland jumping mouse were
10 less abundant within 100 meters of a 30 meter-
11 wide, recently cleared, pipeline corridor in
12 Lewis and St. Lawrence Counties, New York.

13 Therefore, based on 131 miles of the
14 proposed 190-mile corridor being forested, then
15 potentially 31,250 acres of forest wildlife
16 habitat may be impacted by the proposed ROW.

17 **Forest Habitat Fragmentation**

18 Q. Does the proposed NYRI transmission facility
19 contribute to forest habitat fragmentation?

20 A. Yes. The impacts of fragmenting large forest
21 wildlife habitats into smaller forest sections
22 by constructing a new 150-foot wide cleared ROW
23 is addressed by NYRI in Appendix P of its
24 application. As shown in Figure 1 of Appendix

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1 P, most of the fragmentation occurs in the
2 forested areas of Delaware and Sullivan
3 counties. Some of this fragmentation occurs
4 where NYRI proposes to leave the Millennium
5 Pipeline ROW or other transmission line ROW when
6 it encounters residences or buildings
7 constructed next to these other ROW. It also
8 deviates from the Millennium Pipeline ROW to
9 avoid the Upper Delaware River Corridor in the
10 Town of Fremont. For example, in the Town of
11 Hancock, Delaware County, the proposed NYRI
12 route leaves a 115 kV transmission facility near
13 station 106 where several residences are
14 situated with their backyards against this ROW
15 on County Route 67. It then swings away into
16 forested habitat and parallels the Millennium
17 Pipeline and the 115 kV line at various
18 distances out to about 2,000 feet adding to the
19 maze of ROW clearing in this area. The NYRI
20 route gets close to the Millennium Pipeline
21 again near the west side of the East Branch of
22 the Delaware River, but veers away again because
23 of the homes on either side of the underground
24 pipeline along Peas Eddy Road. Just past

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1 station 109 the NYRI route rejoins the
2 Millennium Pipeline on the east side of the
3 river. Here again it will create a new cleared
4 swath in the landscape and fragment more forest
5 habitat. In Sullivan County, the NYRI route
6 actually leaves the Millennium Pipeline and goes
7 into forestlands or "greenfields" for over 20
8 miles.

9 For the portion of NYRI's proposed route
10 where it did a limited study on forest
11 fragmentation, NYRI concluded that 37 patches of
12 continuous forest will be converted into 84
13 smaller patches for a combined area of 14,298
14 acres affected by fragmentation.

15 **Air Pollution**

16 Q. Will NYRI's facility have an impact on acid rain
17 in New York State?

18 A. Yes. In the CRA International report shown in
19 Appendix U of the application, NYRI shows the
20 impact of its facility on the fuel mix of
21 generation in New York State in 2012, 2015, and
22 2018. In response to Interrogatory DPS-124,
23 NYRI shows for each of those years the annual
24 emissions in tons of SO₂ and NO_x.

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1 Initially, as shown in 2012, NYRI's
2 facility produces reductions in SO₂ and NO_x
3 emissions under all three scenarios that NYRI
4 studied (CRA, 15 by 15, and RGGI). However, by
5 2015 and 2018, NYRI's facility results in more
6 SO₂ and NO_x emissions. In the CRA Study, the
7 combined SO₂ and NO_x emissions increase from
8 80,392 annual tons to 91,588 annual tons in
9 2018, a 14% increase. They also increase, but
10 to a lesser extent, under the 15 by 15 and RGGI
11 scenarios.

12 Q. Given these increases in emissions, please
13 describe to the extent possible the resulting
14 adverse impacts.

15 A. SO₂ and NO_x in the atmosphere form nitric and
16 sulfuric acids which, when deposited on land and
17 water, contribute to the acidification of lakes,
18 streams, and terrestrial ecosystems in New York
19 State. This has deleterious effects on aquatic
20 and terrestrial biota. Surface waters in the
21 Adirondacks and Catskills have been
22 deteriorating, showing lowered pH, decreased
23 acid-neutralizing capacity, and elevated toxic
24 aluminum concentrations. This has resulted in

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1 lowered fish populations and diversity in
2 species such as trout, bass, and aquatic
3 invertebrates like mayflies.

4 Soils in New York have also been altered by
5 acid deposition which depletes calcium and other
6 nutrients, and increased accumulation of sulfur
7 and nitrogen. This has had an adverse effect on
8 forests resulting in reduced soil fertility and
9 contributed to "multiple stress syndrome."
10 Mortality has been observed in high elevation
11 red spruce forests from acid deposition and in
12 species such as beech and economically important
13 sugar maples.

14 While acid deposition from burning fossil
15 fuels like coal and oil has occurred for
16 decades, recent air pollution legislative has
17 been aimed at reducing SO₂ and NO_x emissions.
18 Some recovery of brook trout populations has
19 been attempted in the Adirondacks, but projects
20 like NYRI that increase the long-term emissions
21 of sulfur and nitrogen oxides will only continue
22 the problem or delay recovery of these acid-
23 sensitive surface waters and ecosystems.

24

1 **Nine Mile Swamp and Alternative Route**

2 Q. Do you have any comments on NYRI's proposed
3 route through the Nine Mile Swamp?

4 A. Yes. During the public statement hearings in
5 Utica, Hamilton, and Norwich, many people spoke
6 of the impact the proposed facility would have
7 on Nine Mile Swamp in Oneida and Madison
8 counties. Nine Mile Swamp is a New York State
9 regulated, class I and II, freshwater wetland,
10 designated OF-9. It is a large wetland complex
11 located in the town of Sangerfield, Oneida
12 County and the towns of Brookfield and Hamilton
13 in Madison County. The Sangerfield River flows
14 through the center of this wetland where it is
15 open meadow and shrub habitat and becomes
16 progressively more forested wetland as one goes
17 east and west from the river. The proposed
18 route through this wetland is along the sides of
19 the New York Susquehanna and Western Railroad
20 (NYS&W). The railroad has kept its ROW cleared
21 to about 66 feet. Tall trees such as white
22 pine, red maple and ash, can be seen in the
23 wetland along the railroad property rising above
24 balsam fir and northern white cedar.

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1 Q. What is the nature of the probable environmental
2 impact of the proposed NYRI facility on this
3 wetland?

4 A. NYRI's application states that 16 structures
5 will be placed in state wetland OF-9 resulting
6 in concrete fill of between 60 and 80 cubic
7 yards for each pile type foundation. NYRI's
8 Figure E-1.1.1-1 shows the typical width of the
9 NYS&W ROW to be 66 feet wide or 33 feet on each
10 side centered on the middle of the railroad
11 tracks. Steel pole structures along the NYS&W
12 railroad are between 116 and 132 feet in height
13 according to NYRI's Figure E-1.1.1-1. NYRI's
14 Figure 4.4.1-1 shows that clearing of all
15 vegetation will be 70 feet in width centered on
16 the center of the railroad tracks. An
17 additional 15 feet of selective clearing will be
18 needed beyond that on both sides of the railroad
19 tracks and the removal of danger trees beyond
20 that on both sides of the tracks. Therefore,
21 NYRI will have to clear all tall growing wetland
22 trees 15 and more feet beyond the railroad
23 boundary on both sides of the NYS&W railroad.
24 NYRI shows a total of about 27 acres of state

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1 regulated wetland OF-9 within the proposed
2 transmission ROW.

3 Q. What do New York State freshwater regulations
4 state about activities in Class I wetlands?

5 A. Section 663.6 of 6 NYCRR on standards for
6 issuance of permits in Class I wetlands states
7 that "Class I wetlands provide the most critical
8 of the State's wetland benefits, reduction of
9 which is acceptable only in the most unusual
10 circumstances. A permit shall be issued only if
11 it is determined that the proposed activity
12 satisfies a compelling economic or social need
13 that clearly and substantially outweighs the
14 loss of or detriment to the benefits of the
15 Class I wetland." This regulation also states
16 that "for wetland Classes I, II, III and IV, the
17 proposed activity must be compatible with public
18 health and welfare, and be the only practicable
19 alternative that could accomplish the
20 applicant's objectives and have no practicable
21 alternative on a site that is not a freshwater
22 wetland or adjacent area."

23 Q. Since wetland OF-9 is a Class I wetland, is
24 there an alternative to crossing this wetland?

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- 1 A. Yes. NYRI has identified Alternative D in
2 section 3.3.5 of Exhibit 3 in its application as
3 a 13.9-mile alternative overhead route partially
4 along 7.8 miles of an existing New York State
5 Gas and Electric Corporation (NYSEG) 115 kV
6 transmission facility as a way to avoid
7 constructing transmission structures on the
8 NYS&W property in the Nine Mile Swamp or wetland
9 OF-9. Alternate D is several miles to the west
10 of the NYS&W railroad route along a higher
11 elevation in the towns of Marshall and
12 Sangerfield in Oneida County and the towns of
13 Madison and Hamilton in Madison County. A small
14 deviation from Alternative D is needed to avoid
15 being too close to the wind turbines in the Town
16 of Madison.
- 17 Q. Would undergrounding the NYRI facility in Nine
18 Mile Swamp minimize wetland impacts?
- 19 A. Yes. Placing the NYRI facility underground on
20 the railroad ROW would have less long-term
21 impacts to the vegetation of the Nine Mile Swamp
22 wetland complex. According to NYRI's proposed
23 vegetation clearing requirements for
24 undergrounding shown in Figure 4.4.3-1, NYRI

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1 would only maintain by mowing the vegetation
2 within one side of the present railroad ROW
3 which is about 33 feet from the centerline of
4 the railroad tracks. An overhead line in this
5 wetland would require selective clearing of
6 another 15 feet and danger tree removal beyond
7 that distance.

8 There would be adverse short-term impacts,
9 which I consider less significant compared to
10 the long-term removal of forest habitat. Short-
11 term impacts in the wetland would increase for
12 construction of an underground facility due to
13 the impacts of clearing all vegetation to enable
14 construction of the ditch and storing spoil,
15 having ditch spoil spilling over into wetland
16 and smothering wetland vegetation, and having
17 sedimentation extending beyond the railroad ROW.
18 Drainage channels into the wetland from the
19 upland areas would also be temporarily impacted
20 by trenching.

21 **Sullivan County Scout Reservations**

22 Q. Was there any mention in NYRI's application
23 about potential impacts to recreational camps
24 and reservations of both Boy Scouts and Girl

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1 Scouts in Sullivan County?

2 A. None that I could find. However, during one of

3 my field trips I noticed posted signs in the

4 vicinity of the proposed ROW containing the

5 address of the 10 Mile River Boy Scout

6 Reservation and the Glen Spey Camp of the Girls

7 Scouts of Bergen County, New Jersey. I

8 contacted both groups and asked about them in

9 Interrogatory DPS-70. Instead of sending me an

10 aerial photograph of the property outline of the

11 10 Mile River Reservation, NYRI sent an aerial

12 photo of another Boy Scout Camp named Forestburg

13 Scout Reservation owned by the Monmouth Boy

14 Scout Council in New Jersey.

15 Based on my field review, phone

16 conversations, and aerial photos, there are at

17 least three Scout Camps crossed by the proposed

18 NYRI facility in Sullivan County. They are the

19 10 Mile River Reservation of the Greater New

20 York Council in the Towns of Cohecton, Bethel,

21 and Tusten between station numbers 141 and 144;

22 Camp Glen Spey of the Girl Scout Council of

23 Bergen County, New Jersey, in the Town of

24 Lumberland between stations 152.5 and 153.5; and

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1 the Forestburg Boy Scout Reservation owned by
2 the Monmouth Boy Scout Council in New Jersey in
3 the Town of Forestburgh between stations 154 and
4 155.25. I have combined maps of these three
5 Scout Reservations into one exhibit (Exhibit
6 Malefyt-1).

7 Q. What will be the impact of the proposed facility
8 on these Scout Camps?

9 A. The proposed above ground powerline facility
10 will parallel the Millennium Pipeline ROW as it
11 crosses the northern section of the 10 Mile
12 River Reservation. As it does, it will cross
13 several hiking trails and unimproved roads that
14 connect several separate Boy Scout camps. It
15 will also be visible to the Scouts who recreate
16 on Niande Lake and Crystal Lake, situated just
17 north of the proposed powerline.

18 The proposed powerline facility will also
19 cross the northern section of Glen Spey, the
20 Girl Scout Camp in the Town of Lumberland. The
21 overhead facility and 150-foot wide ROW will
22 create a visual impact as they cross the
23 forested entrance road to Lake Metauque which
24 contains the main campgrounds. It will cross

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1 directly over the camps athletic field, the
2 highest elevation of land in the camp. The
3 athletic field contains a fitness trail, archery
4 range, soccer field, and bonfire activity areas.
5 The proposed support towers will likely be
6 visible from the lake and boathouse and areas
7 along the southwest shoreline of Lake Metauque.
8 If the proposed facility is approved, I
9 recommend that it be moved, if possible, to
10 avoid crossing this recreational field and that
11 NYRI be directed to work with the Girl Scouts to
12 minimize impacting their camping facility. I
13 would also recommend that, if approved, NYRI be
14 allowed greater flexibility to deviate from its
15 presently proposed route between stations 152
16 and 154 for good environmental reasons.

17 The third Scout Camp is the Forestburg
18 Scout Reservation. This camp has land on both
19 sides of the Rio Reservoir and is used by about
20 3,000 Scouts annually. The proposed facility is
21 planned to be underground beneath the small
22 western parcel named Rio West and underground
23 through the first part of the larger western
24 parcel named Rio East. A transition station

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1 from underground to overhead is proposed to be
2 near station 155 in the middle of the
3 Reservation and to parallel the Millennium
4 Pipeline as it exits the Reservation to the
5 southeast. The proposed section of overhead
6 lines will add to the visual impact by widening
7 the existing powerline corridor and crossing the
8 hiking trail named "Upper Trail" Because of the
9 size of the transition station, parts of the
10 Bear Paw Trail and Upper Trail may have to be
11 relocated if the facility is approved to be
12 located as proposed by NYRI. Because the
13 overhead section is on higher ground, it will
14 probably be visible to Scouts recreating on and
15 along Burnt Hope Lake, located 3,000 feet to the
16 north on this Scout Reservation.

17 **EMF**

18 Q. Have you been involved in monitoring the human
19 health implications of high voltage transmission
20 lines and in particular, what has been called
21 the "EMF" issue?

22 A. Yes. I have followed the EMF issue during my
23 entire 30 plus year career. Actually, I was
24 assigned to monitor the human health and safety

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1 issue as an Ebasco consultant when the issue
2 arose in the Article VII cases involving 765 kV
3 transmission facilities proposed by the New York
4 Power Authority (NYPA), Niagara Mohawk Power
5 Corporation d/b/a National Grid and Rochester
6 Gas and Electric Corporation in the 1970s.

7 When I came to the New York Department of
8 Public Service in the late 1970s I was assigned
9 as a biologist to look into this issue. I also
10 monitored the multi-million dollar research
11 program known as the New York Power Lines
12 Project, which was conducted to determine
13 whether there were any health hazards associated
14 with electric and magnetic fields produced by
15 60-Hz electric transmission lines. As a result,
16 I was part of the staff team that in 1990
17 recommended that the Commission adopt an interim
18 magnetic field standard of 200 milligauss at the
19 edge of ROW in Article VII cases and continue
20 the Commission policy of 1.6 kV/m for the
21 electric field standard established in 1978.

22 Q. Are the magnetic and electric fields of NYRI's
23 proposed facility consistent with the Commission
24 decisions?

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1 A. According to NYRI's figures for magnetic fields
2 shown in Appendix G of the application, the
3 proposed NYRI facility will meet the 200
4 milligauss interim policy for magnetic fields of
5 major electric transmission facilities adopted
6 on September 11, 1990 in Cases 26529 and 26559.

7 It appears, however, that the proposed NYRI
8 facility will not meet the standard for electric
9 fields (established in Opinion 78-13 in Cases
10 26529 and 26559) of 1.6 kV/m as illustrated in
11 Figures 13 and 14 of Appendix G of the
12 application. Here the electric fields in foul
13 weather are shown to be about minus (-) or plus
14 (+) 10 kV/m at the edge of the proposed ROW at
15 33 feet from centerline for the vertical
16 configuration and at 75 feet from centerline for
17 the horizontal configuration. In either
18 configuration, the electric field at the edge of
19 NYRI's proposed ROW exceeds the Commission's
20 standard of 1.6 kV/m.

21 Calculations of the electric fields by DPS
22 Staff witness Richard Quimby show that about 50
23 feet of additional ROW are needed by NYRI in
24 order to meet the Commission's electric field

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1 standard for the horizontal configuration. This
2 means that NYRI needs a 200-foot wide ROW
3 instead of a 150-foot wide ROW when it is not on
4 the railroad ROW. NYRI will also need to
5 acquire about 25 more feet for a 91-foot wide
6 ROW along the northern NYS&W railroad corridor
7 to meet the electric field standard as
8 calculated by DPS Staff for the proposed
9 vertical configuration. This would extend the
10 needed ROW beyond the existing railroad ROW and
11 may mean NYRI would have to purchase a number of
12 residences and buildings that are close to the
13 railroad in Oneida, Madison, and Chenango
14 counties.

15 Q. What are the implications of NYRI's proposed
16 facility not meeting the 1.6/m kV standard?

17 A. NYRI would have to acquire more ROW or increase
18 the height of its structures to meet the
19 Commission's 1.6 kV/m interim electric field
20 standard. Acquiring more ROW to prevent
21 residential development will add more cost to
22 the project and impact planned land uses.
23 Increasing the height of structures will also
24 increase project costs and visual impacts. More

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1 residences may be impacted if they are located
2 in the area where NYRI needs more ROW than it
3 proposed in its application.

4 Q. Have you reviewed the human health implications
5 of NYRI's proposed HVDC facility?

6 A. Yes. I reviewed the sections of NYRI's application
7 dealing with electric and magnetic fields and
8 their relationship to human health issues. I
9 have also read articles cited by many people
10 during the public statement hearings held in
11 October and November of 2008 in this case on
12 childhood cancer and power lines in England and
13 Wales.

14 Q. Do the studies in England and Wales on high
15 voltage power lines and childhood cancer give
16 any reason to alter the Commission's policy on
17 EMF?

18 A. No. The studies done by Gerald Draper and
19 associates show an association of childhood
20 leukaemia with distance from high voltage power
21 lines in England and Wales. Compared with those
22 who lived greater than 600 meters (1,968 feet)
23 from a power line at birth, children who lived
24 within 200 meters (656 feet) had a relative risk

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1 of leukaemia of 1.69; those born between 200 and
2 600 meters had a relative risk of 1.23. The
3 authors concluded if the association is causal,
4 about 1 percent of childhood leukaemia in
5 England and Wales would be attributed to these
6 lines, "though this estimate has considerable
7 statistical uncertainty." They also state
8 "there is no accepted biological mechanism to
9 explain the epidemiological results; indeed, the
10 relation may be due to chance or confounding."

11 This study is no different from the many
12 other epidemiological cancer studies done in the
13 United States and other countries in the last
14 three decades that show some type of an
15 association between cancer rates and
16 distribution and transmission power lines. This
17 study does not identify any causal relationship;
18 the possibility is that the association is due
19 to chance or some other confounding cause.

20 Q. Has the National Institutes of Health and
21 National Institutes of Environmental Health
22 Sciences (NIEHS) reported on a national program
23 of research and analysis aimed at providing
24 scientific evidence to clarify the potential for

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1 health risks from exposure to extremely low
2 frequency electric and magnetic fields (ELF-
3 EMF)?

4 A. Yes. In 1992 the US Congress authorized such a
5 program and in 1999 the NIEHS Report was issued.
6 It states that scientific evidence suggesting
7 that ELF-EMF exposures pose any health risk is
8 "weak." The strongest evidence for health
9 effects comes from associations observed in
10 human populations with two forms of cancer:
11 childhood leukemia and chronic lymphocytic
12 leukemia in occupationally exposed adults. In
13 contrast, no indication of increased leukemias
14 has been observed in animal experiments.
15 Epidemiological studies have serious limitations
16 in their ability to demonstrate a cause and
17 effect relationship, whereas laboratory studies,
18 by design, can clearly show that cause and
19 effect are possible. "Virtually all of the
20 laboratory evidence in animals and humans and
21 most mechanistic work fail to support a causal
22 relationship between exposure to ELF-EMF at
23 environmental levels and changes in biological
24 function or disease status." The NIEHS

1 concludes that ELF-EMF exposure cannot be
2 recognized as entirely safe, but also that it is
3 insufficient to warrant aggressive regulatory
4 concern.

5 Q. Has the World Health Organization reported on
6 human health concerns related to static electric
7 and magnetic fields, such as those produced by
8 the proposed NYRI HVDC transmission facility?

9 A. Yes. In 2006 the World Health Organization
10 (WHO) released a report on "Static Fields." It
11 pointed out that direct current power
12 transmission can produce static electric fields
13 of up to 20 kV m-1. WHO reports that few
14 epidemiological studies have been published to
15 date and the studies which leave unresolved
16 issues concerning the possibility of increased
17 cancer risk from exposure to static magnetic
18 fields. Because of this and the small number of
19 other studies in limited locations and other
20 limitations, WHO concluded, "there is
21 insufficient material for a health evaluation."

22 **ELECTRIC GENERATION ALTERNATIVE**

23 Q. What are the probable environmental impacts of
24 electric generation facilities in New York City

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1 or the Lower Hudson Valley area near the
2 termination point of the proposed NYRI facility?

3 A. I will discuss the environmental impacts of a
4 generation alternative in the Lower Hudson
5 Valley area while DPS Staff witness Davis will
6 discuss the New York City generation
7 alternative.

8 Instead of bringing 1200 MW of electricity
9 to the Lower Hudson Valley as proposed by NYRI,
10 one could assume one large 1200 MW electric
11 generating facility or two 600 MW electric
12 generating facilities could be built. Indeed
13 several power plants have received Certificates
14 of Environmental Compatibility and Public Need
15 from the Siting Board in Orange and nearby
16 Rockland counties, but have not been built.
17 Certificates were granted to Mirant Bowline
18 L.L.C. for a 750 MW natural gas-fired plant in
19 the Town of Haverstraw, Rockland County, and to
20 Calpine Construction Finance Company, L.P. for a
21 540 MW natural gas-fired plant in the Town of
22 Wawayanda, Orange County, both in 2002.

23 The Bowline facility was certified to be
24 built on 25 acres along the Hudson River. The

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1 main generator building was 60,000 square feet
2 and 82 feet tall with a 286-foot exhaust stack.

3 The Wawayanda facility was certified for a
4 53 acre site bordering the City of Middletown
5 and next to the Marcy-South 345 kV transmission
6 lines owned by NYPA. It was to have a stack
7 height of 225 feet and annual emission rates in
8 tons per year (TPY) as follows: carbon monoxide
9 260, sulfur dioxide 37, particulate matter 138,
10 and nitrogen oxides 126. The Siting Board found
11 that the Wawayanda project would have "minor
12 visual, traffic and noise impacts that are
13 expected to result from construction and
14 operation of the proposed facility that are more
15 than offset by benefits relating to air and
16 water quality, the competitive electricity
17 supply market, electric system reliability, and
18 the socioeconomic benefits associated with the
19 proposed facility."

20 Recently, in March 2008, another power
21 plant was proposed very near the Wawayanda site
22 by CPV Valley LLC for a 580 MW natural gas-
23 fired, electric generating facility. This plant
24 is probably what a typical power plant on an

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1 undeveloped site would be like. The proposed
2 plant would occupy about 30 acres of a 122 acre
3 site. It would take gas from the Millennium
4 Pipeline located seven miles east of the site
5 and connect to the Marcy-South transmission line
6 just one mile to the north of the site. The
7 generating facility would use about 5,000
8 gallons per day (gpd) of potable water and about
9 295,000 gpd of gray water from the Middletown
10 Wastewater Treatment Plant. The largest
11 structure would be the air cooled condenser
12 about 320 feet by 320 feet and 125 feet tall.
13 The two exhaust stacks between 250 and 285 feet
14 would be the tallest in height of the plant
15 structures. The site is in an industrial zoning
16 district. A typical combined-cycle natural gas
17 power plant would emit 20 pounds (lbs) per
18 Gigawatt hour (GWh) of sulfur dioxides (SO₂),
19 131 pounds of nitrogen oxides (NO_x) per GWh, and
20 400 tons of carbon dioxides per GWh. The plant
21 would cost about 700 million dollars.

22 New power plants on undeveloped sites would
23 have a local visual impact while new plants at
24 existing power plant sites would typically have

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1 an insignificant visual impact.

2 Q. How would new electric generating plants compare
3 environmentally to NYRI's proposed transmission
4 line?

5 A. The two greatest environmental differences would
6 be between the visual impacts and land use
7 impacts. The visual impact of NYRI's
8 transmission line with 85 to 135-foot tall
9 structures spread over 190 miles of village and
10 rural landscapes would be a very significant
11 adverse impact compared to two site specific
12 generating power plants in Orange or Rockland
13 counties. Similarly, two power plants on 25 to
14 50 acres each in appropriately zoned areas sold
15 by willing land owners would have significantly
16 less environmental impact compared to nearly
17 3,000 acres of land stretching across hundreds
18 of landowners who are unwilling to sell to NYRI
19 present tremendous environmental differences in
20 my opinion.

21 Other important environmental differences
22 between one or two power plants and the proposed
23 NYRI facility involve the electromagnetic field
24 issues, soil erosion, stream sedimentation,

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1 forest clearing and wildlife impacts, all of
2 which would involve significantly greater
3 adverse environmental impacts for the NYRI
4 transmission line compared to power plants.

5 Air pollution and water consumption would
6 be some of the greater environmental impacts for
7 the power plant alternative if one just
8 considers the NYRI transmission facility
9 isolated from its power sources. But emissions
10 from a new power plant may be offset or there
11 may be an improvement in air quality by
12 displacing generation from older more polluting
13 power plants. New natural gas-fired power
14 plants often have the net result of less
15 pollution because they replace older more
16 polluting generation plants.

17 **ENERGY EFFICIENCY**

18 Q. Did DPS Staff analyze whether energy efficiency
19 programs could be targeted geographically so as
20 to have an effect on the electric system?

21 A. No. As reflected in the testimony of Staff
22 witness Gjonaj and Wheat, however, the effect of
23 energy efficiency programs was modeled in the
24 MAPS run they performed.

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1 **ALTERNATE ROUTING RECOMMENDATIONS**

2 Q. Does DPS Staff have any alternate routing
3 recommendations?

4 A. Yes. DPS Staff evaluated NYRI's proposed route,
5 the various routes involving the Marcy-South
6 transmission facility, and Communities Against
7 Regional Interconnect's (CARI) Thruway Buried
8 Cable Alternative Route (to the extent
9 information on the Thruway Route was available
10 before the prefiling of our direct testimony).

11 It is DPS Staff's opinion that the proposed
12 transmission facility on the route proposed by
13 NYRI is not environmentally compatible and
14 should not be approved by the Commission. All
15 of the routes with ROW as proposed have the
16 problem of meeting the Commission's electric
17 field policy of 1.6 kV/m at the edge of ROW.
18 NYRI's proposed route will be closer to a higher
19 number of residences, have greater visual
20 impacts, impact more streams, wetlands and
21 recreational lands, destroy more forest and
22 wildlife habitat, and likely have more
23 undocumented environmental impacts. Also, the
24 NYRI facility is likely to require additional

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1 transmission facilities to be constructed with,
2 as yet, undocumented environmental impacts.
3 NYRI has stated in Exhibit E-4 that "upgrading
4 of selected 138 kV transmission elements in the
5 Shoemaker-Chester-Sugarloaf area" would be
6 required to mitigate overload if its facility is
7 constructed.

8 The transmission route with the least
9 environmental impact and the greatest electrical
10 system benefit is the Underground New York
11 Thruway Route from Utica to New York City
12 proposed by CARI.

13 Q. If CARI's Thruway Buried Cable Alternative Route
14 is not selected by the Commission, what is
15 Staff's second choice?

16 A. If CARI's Thruway Buried Cable Alternative Route
17 is not selected by the Commission, then Staff's
18 second choice would be a HVDC facility that
19 makes some use of NYPA's Marcy South 345 kV
20 facility and ROW. There are several facilities
21 that could do this and I will list them in order
22 of Staff's environmental preference.

23 The first environmental preference would be
24 a system alternative that could be pursued by

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1 NYPA by converting one of the Marcy South AC
2 circuits to a HVDC circuit. This conversion of
3 an existing facility would have minimal
4 environmental impacts. Several acres would have
5 to be disturbed for two AC/DC converter
6 stations.

7 Undergrounding cables in the existing Marcy
8 South ROW would have much more environmental
9 impacts through the disturbance of trenching
10 across agricultural fields and trenching across
11 water bodies, wetlands, and streams that can not
12 be avoided by horizontal directional drilling.
13 Access roads for construction equipment, even
14 though temporary, would have to be constructed
15 in places where resources such as wetlands were
16 avoided when the Marcy South line was built.
17 Obviously, the absence of a long-term visual
18 impact and other associated impacts of overhead
19 transmission structures would be avoided by
20 burying the HVDC cable.

21 Q. What is Staff's last choice for an alternative
22 route?

23 A. DPS Staff's last preference would be the
24 construction of the DC facility adjacent and

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1 parallel to the Marcy South facility as much as
2 possible. The greatest environmental impact of
3 this route is the incremental visual impact,
4 clearing forest and wildlife habitat,
5 agricultural impacts, and the taking of more
6 private lands as I state further in my
7 testimony.

8 **Marcy South Route**

9 Q. Can you explain why DPS Staff prefers the
10 Alternate Marcy-South Route (Alt. MS) to NYRI's
11 Proposed Route?

12 A. Yes. The Alt. MS Route has a number of
13 significant environmental advantages over the
14 Proposed Route. First of all, for the most
15 part, the Alt. MS parallels the existing Marcy-
16 South 345 kV transmission facility constructed
17 by NYPA in the 1980s. This facility has an
18 existing access road system with many existing
19 stream crossing culverts. The landscape has
20 already been visually impacted by the existing
21 Marcy-South towers, poles, and conductors. The
22 route and larger Marcy-South facility was
23 previously certified by the Public Service
24 Commission as environmentally compatible on

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1 January 30, 1985 in Case 70126.

2 Some of the environmental advantages of the
3 Alt. MS are as follows: Alt MS has fewer stream
4 and trout stream crossings that need access
5 roads constructed across them because 49 of the
6 204 crossings have already been constructed (see
7 the response to Interrogatory DPS 38) compared
8 to 230 stream crossings on the Proposed Route.

9 Alt. MS crosses fewer wetlands. Alt. MS
10 crosses 41 state wetlands of which 31 have
11 existing access road crossings (see the response
12 to Interrogatory DPS 38) compared to 66 state
13 wetlands along the Proposed Route. Similarly
14 there are fewer federal wetlands on Alt. MS
15 (188) compared to the Proposed Route (276).

16 Less forest fragmentation impacts will
17 occur along Alt. MS compared to the Proposed
18 Route. At least 37 large intact forests
19 totaling 14,300 acres will be fragmented into 84
20 smaller patches of forest along NYRI's Proposed
21 Route.

22 There is less residential land in Alt. MS
23 (less than 1 %) compared to 14 % in the Proposed
24 Corridor. Many of the ornamental trees along

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1 the overhead railroad section of the Proposed
2 Route in residential areas will be impacted by
3 their required removal and trimming to comply
4 with proper conductor to tree clearances.

5 Alt. MS crosses 48 miles of agricultural
6 district land compared to 70 miles on the
7 Proposed Route. Access roads already exist
8 along many agricultural fields of the Alt. MS
9 Route.

10 Less overall landscape acreage will be
11 visible along Alt. MS (686,090 acres) compared
12 to the Proposed Route (707,166 acres). And as
13 already stated, the Alt. MS Route has already
14 been visually compromised by the larger double-
15 circuited, Marcy-South 345 kV lattice towers,
16 steel poles, and conductors.

17 There are fewer nationally listed and
18 eligible historic properties along Alt. MS.
19 There are 73 listed and 435 eligible on Alt MS
20 compared to 89 listed and 574 eligible along the
21 Proposed Route.

22 There are fewer (146) archaeological sites
23 along Alt. MS compared to the Proposed Route
24 (238). And many of the sites along the Alt. MS

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1 have already been investigated and reported
2 during the cultural and archaeological
3 investigations for the Marcy-South project.

4 **Marcy South Route DPS Deviations**

5 Q. Do you have a recommendation about alternate
6 routes segments or deviations along NYRI's
7 Alternate Marcy South Route?

8 A. Yes. Many of the alternative route segments
9 proposed by NYRI along the Alternate Marcy South
10 Route deviate from the existing ROW when it
11 approaches planned subdivisions, buildings, or
12 residences built next to the ROW, then rejoins
13 the ROW after going around the residence and
14 other nearby residences. For example, in
15 response to Interrogatory DPS-88, NYRI lists ten
16 deviations from the Marcy-South electric
17 transmission facility to avoid residences,
18 buildings, and planned subdivisions along
19 segment MS-H in Orange County. This creates a
20 situation where the residence or cluster of
21 residences will be surrounded by high-voltage
22 powerlines, which I call "electrical islanding."

23 I was involved in several Article VII cases
24 with NYPA in the Town of Marcy where NYPA routed

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1 the lines to avoid having to take a residence.
2 In the end, the home owners begged NYPA to buy
3 their house so they would not have to live
4 surrounded by transmission ROW that did not
5 touch their property. Generously, NYPA did come
6 to agreement with the "islanded" owners and
7 either resold the houses to willing buyers or
8 had the houses moved out of the "electrical
9 island."

10 I would recommend that NYRI be permitted to
11 stay along the existing ROW and take the
12 residences or buildings where the owners are
13 willing to sell their property instead of being
14 surrounded by electric transmission facilities.

15 To this end, DPS Staff has proposed 18
16 deviations to NYRI's proposed Alternate Marcy
17 South (Exhibit Malefyt-2). These were
18 identified as alternatives in the November 25,
19 2008 filing to the parties and are shown on 12
20 maps or figures. Each is numbered along with
21 the alternate segment letter identified by NYRI
22 on its Alternate Routes Locus Map, Figure 2.2-
23 1d. They range in length from 0.29 miles to
24 2.37 miles and total 21.06 miles. These route

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1 segments along the Marcy South facility should
2 be the primary route certified by the Commission
3 with NYRI's proposed deviations as secondary
4 certified route segments. If a route along the
5 Marcy South facility is approved by the
6 Commission, NYRI should be directed to provide
7 details in the EM&CP on its attempts to
8 negotiate with owners of these buildings and
9 residences along the Marcy South facility. If
10 the owner of a residence, building, or structure
11 does not want to sell, NYRI should be directed
12 to present engineering solutions to go around
13 these structures in the EM&CP. NYRI should be
14 directed by the Commission to explore costs of
15 undergrounding on the NYPA ROW, going under and
16 back to the NYPA ROW via a buss structure,
17 relocating to the "south" side of the Marcy
18 South facility, or some other above ground
19 transmission structures that allows NYRI to
20 squeeze past structures adjacent to the Marcy
21 South facility. Another possibility is to have
22 NYRI build a new structure on the opposite side
23 of the ROW from a residence and move the Marcy
24 South line over to the new structure and have

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1 NYRI occupy the NYPA structure.

2 On December 23, 2008, NYRI provided some
3 cost information to DPS Staff on its deviations
4 away from Marcy South as well as a total
5 underground cost along Marcy South in response
6 to the Administrative Law Judges ruling issued
7 December 22, 2008 (Exhibit Malefyt-6).

8 Q. Is the concern about islanding residences with
9 electric lines the only reason DPS Staff is
10 proposing to stay parallel to the Marcy South
11 ROW?

12 A. No. There are other environmental impacts and
13 costs associated with NYRI's routing deviations
14 away from the Marcy South facility. These
15 deviations create new ROW, island land, fragment
16 wildlife habitat, impact future land uses, and
17 defeat the advantage of paralleling and
18 overlapping the Marcy South ROW. In Orange
19 County alone, NYRI has proposed 10 deviations
20 amounting to 9.48 miles of new ROW for about 40
21 percent of the Alternate Marcy South segment
22 Alt. MS-H.

23 For example, deviation DPS MS-H-7 proposed
24 by DPS Staff would avoid two new crossings of

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1 the Wallkill River and adjacent forested, river
2 bottom lands and floodplain in Wallkill and
3 Hamptonburgh, Orange County. Similarly, DPS MS-
4 H-8 in Hamptonburgh avoids another new crossing
5 of the Otter Kill River. DPS Staff witness
6 Andrew Davis will testify on other visual,
7 recreational, and land use issues and
8 environmental impacts that can be avoided by
9 staying along the Marcy South facility ROW.

10 **DPS Deviations Along Marcy South**

11 Q. Please identify the deviations DPS proposes
12 along the Marcy South Route?

13 A. The DPS Deviations are contained in Exhibit
14 Malefyt-2, which contains a cover sheet and
15 twelve figures.

16 **DPS Deviation MS-C-1** in Frankfort, Herkimer
17 County is 0.99 miles long. It may require
18 taking a residence on Route 27 (Joslin Hill
19 Road). It uses mostly overgrown fields and
20 forests along the Marcy South ROW. It avoids a
21 new ROW crossing, active agricultural fields,
22 fragmenting forestlands, a pond, two new road
23 crossings, and islanding another two residences
24 on Route 166.

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1 **DPS Deviation MS-C-2** in Franklin, Delaware
2 County is 0.84 miles long. It may require
3 taking a structure on Route 357. It crosses
4 both active and inactive agricultural lands. It
5 avoids clearing forest edges along active
6 agricultural lands, placing an angle structure
7 in an active agricultural field, a new crossing
8 of Ouleout Creek and Chamberlain Hill Road, and
9 islanding two residences and a barn.

10 **DPS Deviation MS-C-3** in Delhi, Delaware
11 County is 1.94 miles long. It may require
12 taking a camp and residence along Arbuckle
13 Hollow Road. It would be on forestland and some
14 agricultural fields along the Marcy South ROW.
15 It avoids islanding about 300 acres and a 0.75
16 miles long wide deviation. It avoids clearing
17 of more forestlands, fragmenting forest wildlife
18 habitat, crossing steep terrain, and two new
19 road crossings.

20 **DPS Deviation MS-D-1** in Rockland and
21 Liberty, Sullivan County is 2.37 miles long. It
22 may require being close to or taking several
23 camps or residences on Schleiermacher Road and
24 Cattail Road. It crosses a pond and requires

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1 clearing of deciduous forestlands along the
2 Marcy South ROW. It avoids clearing of more
3 forestlands, fragmenting forest wildlife habitat
4 and deviating almost a mile from the Marcy South
5 facility. It avoids new crossings of Shandeleo
6 Brook and associated conifer forestlands, a new
7 crossing of Shandeleo Road and Cattail Road. It
8 avoids surrounding about 1,000 acres in three
9 towns Rockland, Callicoon, and Liberty).

10 **DPS Deviation MS-D-2** in Liberty, Sullivan
11 County is 1.70 miles long. It may require being
12 close to or taking a camp or residence near Pine
13 Swamp and Lenape Road. It would require
14 clearing of forestlands along the Marcy South
15 ROW. It avoids what appears to be a longer
16 distance than necessary for the NYRI facility to
17 come back to the Marcy South ROW. It avoids
18 clearing of more forestlands, fragmenting forest
19 wildlife habitat, and putting a new transmission
20 ROW near other residences on Lenape Lake Road.
21 It also avoids crossing a wetland called Pine
22 Swamp.

23 **DPS Deviation MS-E-1** in Thompson, Sullivan
24 County is 1.26 miles long. It may require being

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1 close to or taking a residence on Hilltop Road.
2 It would stay along the Marcy South ROW and
3 require clearing of forestlands. It avoids
4 islanding several other residences, clearing
5 more forestland, fragmenting forest wildlife
6 habitat, making a new crossing of Hilltop Road,
7 and a new crossing of Burnt Meadow Brook.

8 **DPS Deviation MS-E-2** in Thompson, Sullivan
9 County is 1.31 miles long. It crosses the
10 parking lot of a business, Mr. Willy's
11 Restaurant, on Route 42. It avoids crossing
12 Sackett Road and a new crossing of Route 42. It
13 shortens the crossing of state regulated wetland
14 MO-62, a Class II wetland, to the north of the
15 Monticello Airport. NYRI's Alternate Marcy
16 South makes a new and longer crossing of about
17 2,400 feet of this wetland, which it cannot
18 span. Therefore, additional wetland forest
19 clearing and access roads and structures would
20 have to be constructed in this Class II wetland
21 along NYRI's Alternate Marcy South Route.
22 NYRI's $\frac{3}{4}$ mile wide deviation surrounds about 50
23 residences on about 500 acres.

24 **DPS Deviation MS-E-3** in Thompson, Sullivan

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1 County is 1.94 miles long. It would come near
2 or require the taking of a residence on Cold
3 Spring Road. It would require clearing of
4 forestlands along the Marcy South ROW. NYRI's
5 deviation goes south $\frac{3}{4}$ mile on Route 102 to
6 avoid a residential area, which requires the
7 crossing of several new roads, clearing more
8 forestlands, and fragmenting wildlife forest
9 habitat. If NYRI's Alt. MS-E in this area is
10 certified, NYRI should be required to look at
11 moving its facility to an abandoned railroad ROW
12 that it crosses west of Route 102.

13 **DPS Deviation MS-F-1** in Deerpark, Orange
14 County is 0.50 miles long. It would come near
15 or require the taking of a residence on each
16 side of Route 209. It would require clearing of
17 forestlands and be in the floodplain of the
18 Basha Kill, as would NYRI's Alt MS-F which
19 deviates about 1,200 feet northeast of the Marcy
20 South ROW and creates a new crossing of Route
21 209, and the Basha Kill River Corridor.

22 **DPS Deviation MS-H-1** in Mount Hope, Orange
23 County is 0.37 miles long. It would come near or
24 require the taking of a residence on the south

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1 side of Mountain Road. It is about 1/8 mile
2 from the Marcy South facility. It would require
3 clearing of some forestlands. It would avoid a
4 new crossing of Mountain Road about 700 feet to
5 the north of the Marcy South facility, avoid
6 placing a new transmission facility between two
7 residences on Mountain Road, each less than 200
8 feet from the centerline of NYRI's proposed Alt.
9 MS-H, and avoid surrounding three or four
10 residences with transmission lines.

11 **DPS Deviation MS-H-2** in Mount Hope, Orange
12 County is 0.29 miles long. It is less than 1/8
13 mile from the Marcy South facility. It would
14 come near or require the taking of a horse farm
15 building north of Guymard Turnpike. It would
16 avoid a longer crossing of the horse pastures.

17 **DPS Deviation MS-H-3** in Mount Hope, Orange
18 County is 0.53 miles long. It would come near or
19 require the taking of a residence on the north
20 side of Ridge Road. It would require the
21 clearing of some forestlands and shrublands
22 along the Marcy South ROW. It avoids the
23 surrounding of three residences on Ridge Road
24 with high voltage transmission lines, a new

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1 nearby crossing of Ridge Road and the placement
2 of a transmission line within 300 feet of two
3 residences on Ridge Road.

4 **DPS Deviation MS-H-4** in Greenville, Orange
5 County is 1.74 miles long. It would come near or
6 require the taking of a residence on the east
7 side of Burnt Corners Road. It would require
8 clearing of forestland, shrublands, and old
9 fields along the Marcy South ROW. It would
10 avoid NYRI's deviation, which creates two new
11 crossing locations of Manning Road and Camp
12 Stadie Road to the north of the Marcy South ROW.
13 It avoids NYRI's deviation which will require
14 clearing a new ROW in forestlands and which
15 winds around a large subdivision centered about
16 the Fox Hill Drive subdivision.

17 **DPS Deviation MS-H-5** in Wallkill, Orange
18 County is 0.78 miles long. It would come near or
19 require the taking of a residence on the east
20 side of Pocatello Road. It would require the
21 clearing of forestland and the spanning of a
22 narrow wetland along the Marcy South ROW. It
23 would avoid surrounding the residence on
24 Pocatello Road with two high voltage

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1 transmission lines less than 250 feet away. It
2 would avoid fragmenting forest wildlife habitat
3 and future land uses.

4 **DPS Deviation MS-H-6** in Wawayanda, Orange
5 County is 0.62 mile long. It would come near or
6 require the taking of two residences, on either
7 side of County Route 42 (Wawayanda Avenue). It
8 would avoid surrounding these two residences
9 with two high voltage transmission lines less
10 than 200 feet away. It would also avoid
11 crossing the south side of a senior residences
12 complex where the centerline is about 100 feet
13 from the closest building.

14 **DPS Deviation MS-H-7** in Hamptonburgh,
15 Orange County is 1.61 miles long. It would come
16 near or require the taking of two residences on
17 Kings Drive if the proposed facility has to be
18 placed on the north side of the Marcy South ROW.
19 It would require clearing of forestlands along
20 the Marcy South ROW. It would avoid NYRI's
21 proposed Alt. MS-H route that makes new
22 crossings of Mt. Joy Road and Scotchtown Avenue.
23 It would avoid crossing horse farm lands between
24 those two roads and the two crossings of the

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1 Wallkill River and its associated floodplains
2 and forest wildlife habitats.

3 **DPS Deviation MS-H-8** in Hamptonburgh,
4 Orange County is 0.96 mile long. It would come
5 near two residences on Booth Drive off of Route
6 207, if the proposed facility has to be placed
7 on the west side of the Marcy South ROW. It
8 would require clearing of forestlands along the
9 Marcy South ROW. It would avoid having two high
10 voltage transmission lines on either side
11 consisting of the subdivision of about 25 houses
12 on Booth Drive and Woodhull Drive. It would
13 avoid crossing farm fields and a new crossing of
14 the Otter Kill and Route 207. However, DPS
15 Staff's environmental preference is to avoid
16 both DPS MS-H-8 and Alt. MS-H by following
17 NYRI's Proposed Route on the Norfolk Southern
18 (NS) railroad route to the Southern Converter
19 Station Site starting where the Proposed Route
20 crosses the Alternate Marcy South Route in
21 Hamptonburgh.

22 **DPS Deviation MS-H-9** in Hamptonburgh,
23 Orange County is 1.31 miles long. It would come
24 near a residence off Otter Road that is on the

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1 north side of the Marcy South ROW. It would
2 impact the fruit and vegetable Rowe Farm along
3 the Marcy South ROW where the transmission line
4 is located over an old railroad grade before it
5 enters the Southern Converter Station Site. It
6 would avoid NYRI's longer Alt. MS-H route
7 segment and go further north through forestlands
8 and a row of houses on Otter Road, before
9 crossing the Rowe Farm to enter the Southern
10 Converter Station. Both DPS Staff's and NYRI's
11 routes cross state regulated wetland MB-18.
12 However, DPS Staff's environmental preference is
13 to avoid both DPS MS-H-9 and Alt. MS-H by
14 following NYRI's Proposed Route on the NS
15 railroad route to the Southern Converter Station
16 Site.

17 **Greenwoods Conservancy**

18 Q. What will be the impact of the Marcy South
19 Alternate Route upon the Greenwoods Conservancy
20 in Burlington?

21 A. The 1,200 acre Greenwoods Conservancy in the
22 Town of Burlington is already crossed on its
23 eastern side by NYPA's 150-foot wide, Marcy-
24 South, 345 kV, transmission ROW (Exhibit

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1 Malefyt-3). An additional 100 feet of
2 vegetation clearing is being proposed by NYRI on
3 the western side of the existing ROW for
4 Alternate MS-C. The proposed ROW on Greenwoods
5 Conservancy would cross open agricultural hay
6 fields, reverting old fields and shrub habitat,
7 conifer and deciduous forest lands, small creeks
8 and associated wetland drainages, and roadways
9 (amounting to about 14 acres of disturbance).

10 Dr. Willard Harman at the Biological Field
11 Station operated by the State University of New
12 York at the College of Oneonta has written a
13 letter dated October 24, 2008, to the Commission
14 and describes the Greenwoods Conservancy as
15 being protected by conservation easements and
16 dedicated to long term environmental and
17 ecological education and research. Vegetation
18 succession and insect studies have been carried
19 out in the past on the Marcy-South ROW on
20 Greenwoods Conservancy lands by students and
21 funded in part by NYPA.

22 I field reviewed the proposed Marcy South
23 Alternate across the Greenwoods Conservancy with
24 the benefactor, Earle Peterson, on November 24,

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1 2008. Widening the ROW another 100 feet would
2 not physically impact the conference center,
3 trails, or other physical facilities used for
4 ecological studies. Mr. Peterson emphasized
5 keeping the powerline away from the 70-acre
6 Cranberry Bog which is the central ecological
7 feature of Greenwoods Conservancy. Cranberry
8 Bog is over 1,000 feet to the west of the Marcy
9 South ROW.

10 **Other Marcy South Routing Preferences**

11 Q. Other than the deviations along Marcy South, are
12 there any other routing changes preferred by DPS
13 Staff?

14 A. Yes. Between station 186 on the proposed NYRI
15 route in Hamptonburgh and the Southern Converter
16 Station, DPS Staff recommends following NYRI's
17 proposed route instead of Alternate MS-H. These
18 last four miles utilize the railroad and the 115
19 kV ROW instead of making a new crossing of the
20 Otter Kill and the Rowe vegetable farm. This
21 also would avoid putting the transmission
22 facility on the west side of the residential
23 development off of Route 207 where the Marcy
24 South transmission line is already on the east

1 side of the development.

2 **Proposed Route and Alternates**

3 Q. If the Commission seriously considers NYRI's
4 Proposed Route, do you have any recommendations
5 for alternative routing along it?

6 A. Yes. DPS Staff has proposed an alternate route
7 at the future planned NanoCenter (shown in
8 Exhibit Malefyt-2) in the Town of Marcy which is
9 described by DPS Staff witness Richard Powell.

10 DPS Staff would also recommend that
11 Alternate D be selected instead of the Proposed
12 Route in the Nine Mile Swamp area, unless the
13 facility can be placed underground through the
14 swamp within the railroad ROW along the Proposed
15 Route.

16 **ROW VEGETATION MANAGEMENT**

17 Q. Do you have any recommendation about long-term
18 vegetation management of the NYRI ROW?

19 A. Yes. A number of citizens have raised questions
20 about the use of herbicides in the construction
21 and long-term vegetation management of the NYRI
22 ROW. Since NYRI has no previous experience in
23 ROW vegetation management, I recommend that it
24 follow the ROW vegetation management plans of

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1 the electric utility that its route generally
2 parallels if approved by the Commission. For
3 example, NYRI should follow the plan used by
4 NYSEG if its proposed route is approved.
5 However, it should follow the NYPA plan if the
6 facility is approved along the Marcy South ROW.
7 In this way, land owners would see the same
8 consistent approach to vegetation management
9 across their property by both utilities.

10 **Herbicides**

11 Q. Do you have any recommendations to minimize
12 environmental impacts from the use of herbicides
13 by NYRI during construction?

14 A. Yes. In Exhibit 4 of NYRI's application, it
15 only mentions that herbicides will be used as
16 appropriate to prevent resurgent growth and will
17 not be used at sensitive areas such as wetlands,
18 streams and other water bodies, threatened and
19 endangered species habitat, and public water
20 supplies. NYRI does not mention what herbicide
21 techniques will be used during construction.
22 However, based on my experience, it is usually
23 the cut and stump technique. This technique
24 requires the contractor to apply herbicides to

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1 the stumps of undesirable trees recently cut
2 down during ROW clearing. I recommend that
3 herbicides using this technique not be applied
4 within 5 feet of a stream or water body, nor
5 within 100 feet of wetlands or water supplies.

6 **CERTIFICATE ORDERING CLAUSES**

7 Q. Do you have any recommendations for Certificate
8 Conditions if the proposed facility is
9 authorized by the Commission?

10 A. Yes. I recommend that, if the Commission
11 authorizes the facility, it grant a Certificate
12 containing Ordering Clauses contained in Exhibit
13 Malefyt-4. I also recommend that NYRI be
14 ordered to follow the General Guidelines for
15 EM&CP developed by DPS Staff as set forth in
16 Exhibit Malefyt-5.

17 Q. Should a Water Quality Certification be issued
18 by the Commission?

19 A. A Water Quality Certification pursuant to
20 Section 401 of the Federal Clean Water Act will
21 be needed in connection with any issuance of a
22 Federal permit, such as one by the U.S. Army
23 Corps of Engineers. If the Commission
24 authorizes construction and operation of NYRI's

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1 transmission facility, it should issue a Water
2 Quality Certification similar to Exhibit
3 Malefyt-7.

4 **SUMMARY OF STAFF RECOMMENDATIONS**

5 Q. As Project Manager for the DPS Staff assigned to
6 the NYRI proceeding, please present DPS Staff's
7 overall recommendation on whether or not the
8 Commission can make all the necessary findings
9 to certify the facility as proposed by NYRI.
10 A. It is our position that the Commission should
11 deny the application of NYRI. As I and others
12 testify, the proposed NYRI transmission facility
13 is not needed at this time, does not represent
14 the minimum adverse environmental impact,
15 considering the nature and economics of the
16 various alternatives, and will not serve the
17 public interest, convenience, and necessity in
18 the long-term.

19 It is DPS Staff's testimony that, if a
20 project to bring electricity from Central New
21 York to Southeastern New York is determined to
22 be needed, other electric system alternatives
23 are electrically and economically preferable and

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- 1 have less environmental impact than NYRI's
2 proposed transmission facility.
- 3 Q. Please explain why the NYRI line is not needed
4 at this time.
- 5 A. As mentioned in Staff Witness Schrom's
6 testimony, the NYISO performs a Reliability
7 Needs Assessment (RNA) annually to determine
8 what, if any, capacity additions are needed in
9 the State and in what zones they would be needed
10 to maintain reliability. The NYISO's most
11 recent RNA reference case finds that no
12 additional resources are needed through at least
13 2018 to maintain the reliability of the bulk
14 electric system.
- 15 Q. Aside from reliability, are there any other
16 benefits that the NYRI facility or another
17 project might provide?
- 18 A. Although not needed for reliability, additional
19 capacity could provide savings to customers by
20 reducing congestion, thereby allowing the
21 delivery of lower cost power.
- 22 Q. Will the NYRI project produce savings for
23 customers?

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1 A. As discussed in the panel testimony of Staff
2 Witnesses Gjonaj and Wheat, the NYRI project
3 will provide short-term savings. However, when
4 the project is evaluated in the long-term and
5 from a total societal cost-benefit perspective,
6 the costs of the NYRI project outweigh the
7 savings.

8 Q. Can the NYRI line or other proposed transmission
9 lines aid in the delivery of renewable energy?

10 A. Yes, if those projects were located close enough
11 to the NYRI or another transmission line to
12 allow interconnection, these additional
13 transmission facilities could aid in the
14 delivery of energy from those renewable
15 resources. However, as Staff witness Schrom
16 stated in his testimony, most of the existing
17 and proposed wind generation is in the Northern
18 and Western areas of the state and the limiting
19 factor is likely to be the existence of
20 sufficient transmission and potential bottling
21 of generation in these remote areas. A number
22 of studies are currently underway in the State
23 to examine the extent of this issue and
24 potential

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1 Q. What other alternatives might be preferable to
2 the NYRI proposal?

3 A. One or more electric generating, natural gas-
4 fired, power plants located in New York City or
5 surrounding zones could supply the same 1200 MW
6 proposed by NYRI. As DPS Staff Witness Schrom
7 testified, a generating station located closer
8 to the load it will serve (i.e., the Lower
9 Hudson Valley or New York City) is preferable to
10 a long transmission line from a reliability
11 perspective. In addition, DPS Staff witnesses
12 Gjonaj and Wheat testified that a generation
13 alternative in New York City may be more
14 economic.

15 Q. Are there any other potential alternatives that
16 might be preferable to the NYRI project?

17 A. Yes. As discussed above, an alternative
18 electrical system upgrade, namely the conversion
19 of one of the Marcy South AC lines to DC, would
20 be environmentally preferable and likely more
21 economic than NYRI's proposed transmission
22 facility.

23 Q. Do you have any other comments on the economics
24 of this project?

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- 1 A. Yes. Staff analyzed the economics of the NYRI
2 project as well as a few representative
3 generation alternatives in various locations.
4 However, this is not a comprehensive economic
5 evaluation of all potential projects. It is
6 expected, though, that a comprehensive economic
7 evaluation of proposed alternatives (including
8 transmission, generation and demand-side
9 resources) will be accomplished by the NYISO
10 through its Economic Planning Process. This
11 process, established through collaborative
12 stakeholder efforts, has been approved by FERC.
13 The NYISO will complete its first Congestion
14 Assessment and Resource Integration Study at the
15 end of 2009, which study will identify
16 opportunities for economic upgrades and possible
17 projects that could resolve congestion.
- 18 Q. If the Commission does not deny the NYRI
19 application, what does Staff recommend?
- 20 A. If the Commission does not deny NYRI's
21 application, then our first routing preference
22 would be a route along the Marcy South facility.
23 If the Commission nevertheless does not choose
24 such route, it should select NYRI's proposed

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- 1 route with the alternative routing and
2 underground recommendations made by Staff.
- 3 Q. What other recommendations does Staff make if
4 the Commission grants NYRI a Certificate
5 authorizing its project?
- 6 A. Several Staff witnesses recommend a number of
7 Certificate conditions for inclusion in any
8 Certificate for the NYRI project.
- 9 Q. Does this conclude your testimony at this time?
- 10 A. Yes.
- 11

BEFORE THE
STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of

New York Regional Interconnect, Inc.

Case 06-T-0650

March 2009

Prepared Rebuttal Testimony of:

James de Waal Malefyt
Utility Supervisor,
Environmental
Office of Energy Efficiency and
the Environment
State of New York
Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350

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1 Q. What is your name and business address?

2 A. James J. de Waal Malefyt, New York State
3 Department of Public Service, 3 Empire State
4 Plaza, Albany New York 12223-1350.

5 Q. Is your educational and professional experience
6 described in your direct testimony filed in this
7 proceeding?

8 A. Yes.

9 Purpose and Summary

10 Q. What is the purpose of your rebuttal testimony?

11 A. I am rebutting some aspects of the direct
12 testimony of Roy A. Jacobson, Jr., and Angus
13 Eaton, witnesses of the New York State
14 Department of Environmental Conservation (DEC),
15 Matthew Geneta, a witness of the New York City
16 Department of Environmental Protection (NYCDEP),
17 Michael A. Mariotti, a witness of the New York
18 State Department of Transportation (DOT), and
19 Lawrence J. Frame, and Christopher A. Waite,
20 witnesses of the New York State Thruway
21 Authority (NYSTA). These witnesses discuss the
22 need of their agencies to issue permits or
23 approvals in connection with any Commission
24 authorization of New York Regional Interconnect
25 Inc. (NYRI) to construct and operate its
26 proposed facility.

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1 Q. What is your understanding of the relationship
2 between a Certificate granted under Article VII
3 of the Public Service Law (PSL) and other
4 permits and approvals regarding topics covered
5 in such Certificate?

6 A. My counsel has informed me that PSL §130
7 supplants most procedural permitting
8 requirements of State and Municipal agencies.
9 The first sentence of PSL §130 states:
10 "Notwithstanding any other provision of law, no
11 state agency, municipality or any agency thereof
12 may require any approval, consent, permit,
13 certificate or other condition for construction
14 or operation of a major facility with respect to
15 which an application for a certificate hereunder
16 has been issued, other than those provided by
17 otherwise applicable state law for the
18 protection of employees engaged in the
19 construction and operation of such facility, and
20 provided that in the case of a municipality or
21 an agency thereof, such municipality has
22 received notice of the filing of the application
23 therefor."

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1 Rebuttal of DOT Witness Mariotti and NYSTA Witnesses
2 Frame and Waite

3 Q. What is your concern with DOT witness Mariotti's
4 testimony and that of NYSTA witnesses Frame and
5 Waite?

6 A. On page nine of his direct testimony Mr.
7 Mariotti discusses NYRI's need to obtain permits
8 and easements from DOT if the Commission grants
9 NYRI a Certificate. It is not clear from his
10 testimony whether Mr. Mariotti is referring to
11 approvals regarding only property rights or to
12 those involving regulatory activities.
13 Similarly, NYSTA witnesses Waite and Frame both
14 mention the need of the applicant to obtain
15 permits from NYSTA. In an Order (issued March
16 23, 2005) in Case 05-T-0089, a case in which an
17 applicant proposed a gas pipeline, the
18 Commission stated that "[w]hile §130 supplants
19 other permitting procedures in Article VII
20 cases, it does not supplant the need to obtain
21 property rights from the State, if necessary.
22 The Commission has the authority to issue a
23 certificate authorizing construction and
24 operation of the pipeline. It has no authority,
25 express or implied, to grant land, easements,
26 licenses, franchises, revocable consents to use

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1 real property, or any other kind of property or
2 right to use property. Similarly, in issuing a
3 certificate for the construction of an electric
4 transmission facility in the seabed of Long
5 Island Sound [in Case 00-T-1831], the Commission
6 established that the ownership of the land
7 underneath the Sound resides with the State of
8 New York and ordered that construction of the
9 facility could not commence, inter alia, until
10 the applicant had obtained from the New York
11 State Office of General Services such
12 authorizations as are necessary, in that case a
13 grant of lands under water pursuant to Article 6
14 of the Public Lands Law, similar to the DEC's
15 [temporary revocable permit]" (page 5).
16 Therefore, to the extent any permit is a
17 regulatory-type permit that governs actions but
18 does not involve the grant of property rights,
19 PSL §130 supplants such procedural permitting
20 requirement.

21 **Rebuttal of DEC Witness Jacobson**

22 Q. Is the issuance of environmental permits by DEC,
23 as recommended by Mr. Jacobson on page 36 of his
24 direct testimony, supplanted by PSL §130?

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1 A. Yes. The Environmental Permits that DEC would
2 issue pursuant to Articles 15 and 24 of the
3 Environmental Conservation Law (ECL) are
4 regulatory-type permits that do not involve the
5 granting of property rights. Therefore, the
6 requirements to obtain such permits, as well as
7 the procedures involved in obtaining them, are
8 supplanted by PSL §130. This includes the
9 requirement that the applicant provide a
10 complete application as described in ECL §70-
11 0105 as implemented by 6 NYCRR §621.2 (discussed
12 on pages 9 and 10 of Mr. Jacobson's direct
13 testimony).

14 Q. Are the substantive standards specified in
15 connection with stream and wetland crossing
16 permits supplanted as well?

17 A. No. According to PSL §126(1)(f), the
18 Commission, before it grants a Certificate, must
19 find (among other things) that the location of
20 the facility conforms to applicable state laws
21 and regulations.

22 Q. Do you believe that all the information
23 described by Mr. Jacobson is necessary in order
24 for the Commission to make a determination as to
25 whether the regulatory standards are met?

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1 A. No. Mr. Jacobson would require NYRI to submit
2 in its application detailed wetland and stream
3 information, which NYRI cannot obtain at this
4 time. For example, Mr. Jacobson states on page
5 22 that missing information for a regulatory
6 determination includes "specific locations of
7 transmission poles," "delineation of all
8 wetlands along the proposed and alternative
9 routes," "the specific amount and type of
10 impacts to streams," "specific locations and
11 dimensions of access roads," etc.

12 It is nearly impossible for NYRI to obtain
13 this information for a major transmission
14 facility proposed over private lands where
15 landowners can refuse to grant NYRI permission
16 to delineate natural resources, such as
17 wetlands, and to assess site specific impacts.
18 Obtaining such information for all reasonable
19 routes under consideration would be time-
20 consuming and extremely costly. Because of
21 these difficulties and costs, the Commission,
22 since the earliest Article VII cases, has
23 required such detailed information to be
24 submitted after certification, but prior to
25 construction, in detailed Environmental

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1 Management and Construction Plans (EM&CPs).

2 There is no provision in the Article VII
3 regulations requiring the information for
4 individual wetland or stream crossings to be
5 submitted in an Article VII application.

6 I would also point out that, despite the
7 lack of individual detailed wetland and stream
8 information, Mr. Jacobson was able to make
9 routing recommendations using quantified wetland
10 and stream information as shown on page 35 of
11 his direct testimony, and to make some gross
12 wetland and stream impact assessments about the
13 Proposed Route on page 32 of his testimony.

14 Q. Do you have any problems with Mr. Jacobson's
15 "Recommended Certificate Conditions?"

16 A. Yes. On page 36 of his direct testimony, Mr.
17 Jacobson recommends that the EM&CP contain
18 information on wetlands and streams in order for
19 DEC to issue "environmental permits." I agree
20 with the content of the information sought but,
21 as discussed above, recommend against any
22 requirement that the Commission order NYRI to
23 obtain wetland or stream permits from DEC if
24 this facility is approved.

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1 Mr. Jacobson also recommends that an
2 independent "Director of Compliance" funded by
3 NYRI be instituted, who would "report directly
4 to [DEC]" and who would "have the authority for
5 stopping work to prevent impending environmental
6 damage." This person should, according to Mr.
7 Jacobson, also have staff to assist him. I
8 recommend against this arrangement as it would
9 create a conflict with the stop-work provisions
10 that I recommend in proposed ordering clause 55
11 of Exhibit Malefyt. 4. Here, I recommend that
12 DPS Staff be specified as the Commission's
13 designated representatives in the field during
14 construction. Putting other people in the field
15 who do not report to DPS will only cause
16 conflict with the DPS Staff, and with NYRI and
17 its contractors.

18 Q. What is your understanding with respect to the
19 enforcement of the terms of Commission orders
20 and applicable environmental laws?

21 A. My counsel has informed me that the Commission,
22 in part through DPS Staff, enforces the terms of
23 the Certificate, pursuant to PSL §§ 4(1), 8, 11,
24 24, 25 and 26. Moreover, while no statutory
25 provision bans DEC from enforcing substantive

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1 provisions of the ECL and its implementing
2 regulations, such enforcement must be carried
3 out in cooperation with DPS Staff. It is for
4 this reason that I recommend against Mr.
5 Jacobson's proposal on page 38 of his direct
6 testimony that DEC be given authority to enforce
7 provisions of any Clean Water Act §401 Water
8 Quality Certification issued by the Commission.
9 As stated in the conditions of a sample Water
10 Quality Certification shown in Exhibit Malefyt-
11 7, the methods used to protect water quality are
12 detailed in the EM&CP. The EM&CP is reviewed in
13 every Article VII case by DPS Staff and other
14 parties to the certification proceeding. DPS
15 Staff representatives are the most knowledgeable
16 in the field to enforce compliance with the
17 Certification. DPS Staff members have been
18 enforcing Water Quality Certification provisions
19 for tens, if not hundreds, of Article VII
20 projects for over thirty years and this
21 enforcement should not be given to DEC for this
22 project.

23 Rebuttal of DEC Witness Eaton and NYCDEP Witness
24 Giannetta

25 Q. Are you in agreement with the pre-filed direct

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1 testimony of DEC witness Angus Eaton and NYCDEP
2 witness Matthew Giannetta concerning stormwater
3 pollution prevention plans (SWPPP)?

4 A. No. Both witnesses recommend approval of the
5 SWPPP by their respective agencies if this
6 project is approved by the Commission. Neither
7 recommends that it be submitted to the
8 Commission as part of the EM&CP to allow all the
9 parties to comment so differences can be worked
10 out. I see potential problems if other agencies
11 approve different methods for controlling
12 erosion and sedimentation and for monitoring
13 compliance.

14 Q. To which agency should NYRI submit the SWPPP

15 A. I recommend that, if its project is authorized,
16 NYRI be required to submit its SWPPP as part of
17 the EM&CP for Commission approval. Hopefully,
18 NYRI, DEC, NYCDEP and other interested parties
19 will be able to come to an agreement on the best
20 plans to control stormwater discharges so they
21 can be presented for DPS review and Commission
22 approval.

23 Q. Does DEC have the authority to issue an
24 individual State Pollution Discharge Elimination
25 System (SPDES) permit in this Case?

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- 1 A. Yes. My counsel has informed me that the
2 Memorandum of Agreement recognizing the United
3 States Environmental Protection Agencies
4 approval of the State's SPDES program under the
5 Federal Clean Water Act provides for DEC to
6 issue individual SPDES permits.
- 7 Q. If NYRI applies for a Federal license or permit,
8 what state agency would provide the water
9 quality certification required under §401 of the
10 Clean Water Act?
- 11 A. My counsel has informed me that §401 of the
12 Clean Water Act requires an applicant for a
13 Federal license or permit to conduct any
14 activity that may result in any discharge into
15 navigable waters to "provide the licensing or
16 permitting agency a certification from the State
17 in which the discharge originates or will
18 originate ... that any such discharge will
19 comply with the applicable provisions of [the
20 Clean Water Act]." The Federal regulation
21 concerning such certification, 40 CFR 121.1,
22 defines "certifying agent" as "the person or
23 agency designated by the Governor of a State, by
24 statute, or by other governmental act, to
25 certify compliance with applicable water quality

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1 standards." In chapter 272, §1 of the Laws of
2 1970, the Legislature (after making several
3 findings) stated: "The legislature therefore
4 hereby declares that it shall be the purpose of
5 this act to provide a forum for the expeditious
6 resolution of all matters concerning the
7 location of electric and gas transmission
8 facilities presently under the jurisdiction of
9 multiple state and local agencies including the
10 courts of the state, and all matters of state
11 and local law, in a single proceeding to which
12 access will be open to citizens, groups,
13 municipalities and other public agencies to
14 enable them to participate in these decisions."
15 In PSL §121(1), the Legislature further
16 provided, in pertinent part: "no person shall ...
17 commence the preparation of the site for the
18 construction of a major utility transmission
19 facility in the state without having first
20 obtained a certificate of environmental
21 compatibility and public need (hereafter in this
22 article called a "certificate") issued with
23 respect to such facility by the commission. ...
24 Any facility with respect to which a certificate
25 is required shall thereafter be built,

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1 maintained and operated in conformity with such
2 certificate and any terms, limitations or
3 conditions contained therein. A certificate may
4 only be issued pursuant to this article."
5 Moreover, in PSL §126(1), the Legislature set
6 forth several findings that the Commission must
7 make before granting a certificate. Among these
8 are a finding, pursuant to PSL §126(1)(c), that
9 the facility represents the minimum adverse
10 environmental impact given various pertinent
11 considerations (some of which are explicit and
12 others of which are implicit). Another finding
13 (as noted above) is that in PSL §126(1)(f) that
14 the location of the facility conforms to
15 applicable State laws and regulations. These
16 provisions, as well as PSL §130, by supplanting
17 most procedural permitting requirements of other
18 State and Municipal agencies, act to designate
19 the Commission as the certifying agency for
20 Article VII transmission facilities in New York.
21 I am also aware that, in several PSL Article X
22 proceedings where DEC had the authority to issue
23 SPDES permits, the New York State Board on
24 Electric Generation Siting and the Environment,
25 or an employee of DPS designated by the Board,

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1 issued the required water quality
2 certifications.

3 Q. Do you have any recommendations concerning the
4 hiring of third party monitors for compliance in
5 connection with stormwater, sediment and erosion
6 control plans as discussed by DEC witnesses
7 Jacobson and Eaton?

8 A. Yes. To the extent that additional monitors are
9 needed if the project is approved, I recommend
10 that they be required to report to DPS
11 Compliance Staff and not to other parties in
12 this proceeding. It would be confusing to NYRI
13 and its contractors and frustrating to DPS
14 Compliance Staff if environmental monitors are
15 not coordinated in enforcing and reporting
16 environmental compliance matters.

17 Conclusion

18 Q. Does this conclude your rebuttal testimony at
19 this time?

20 A. Yes.

1 MR. BLOW: The witness is available for cross.

2 JUDGE STOCKHOLM: Okay. Cross-examination.

3 NYRI, I assume you have a fair amount for this
4 witness?

5 MR. SINGER: That's correct, Your Honor.

6 JUDGE STOCKHOLM: DEC?

7 MS. WILKINSON: We have some, too, Your Honor.

8 JUDGE STOCKHOLM: Attorney General?

9 MS. LEARY: Yes, Your Honor.

10 JUDGE STOCKHOLM: Anybody have a limited number
11 of questions for this witness?

12 All right. Then let's start at the back table.

13 MS. LEARY: Your Honor, if -- if I might make a
14 suggestion. I think it would actually shorten if we
15 were able to hear from Mr. Singer first and have him
16 perform cross. And I think it might answer some of our
17 questions or eliminate us from having to recross or keep
18 going. It's just a suggestion.

19 JUDGE STOCKHOLM: Mr. Singer, do you have any
20 objection to that?

21 MR. SINGER: Yes, I do. I think it would
22 actually be better if we went last, because I think it's
23 more likely that we'll ask questions based on the
24 questions of the other parties. And I think it would

1 eliminate any follow-up cross-examination after the DEC
2 and the Office of the Attorney General go if we were
3 able to go after they did as opposed to before.

4 JUDGE STOCKHOLM: Under that logic, I should go
5 first. That's okay. It was a rhetorical question.

6 MS. WILKINSON: Your Honor, I think there's
7 potential for recross regardless of who goes first.
8 And, you know, since the back table has gone first on
9 many of the witnesses, maybe it would be fair in this
10 case for NYRI to go first.

11 JUDGE STOCKHOLM: I think we're going to allow
12 NYRI to go last. Who goes first is up to the parties.
13 If I have no volunteers, I will appoint someone.

14 Yes, Mr. Malone.

15 CROSS-EXAMINATION

16 BY MR. MALONE:

17 Q Mr. de Waal Malefyt --

18 MR. MALONE: I'm sorry. Mark Malone from the
19 New York Power Authority.

20 Q Are you familiar with the mitigation measures
21 that were developed and put into place on -- on NYPA's
22 Marcy South transmission facility?

23 A I'm aware of quite a few of them.

24 Q Was avoidance of the wetlands one of the

1 mitigation measures when NYPA built Marcy South?

2 A Yes, that's true.

3 Q Are you aware of any other mitigation measures
4 for NYPA's Marcy South facility?

5 A There was, you know, visual mitigation, tree
6 screens that were left to mitigate the visual impact;
7 some landscaping that was done to minimize the visual
8 impact; access -- access road removal in certain
9 sensitive areas after construction; tower design was a
10 mitigation, you know, that was put forth in the EM&CPs;
11 color of the towers; agricultural mitigation measures
12 were employed. There were a lot of mitigation measures.
13 I could go on and on.

14 Q Okay. That's fine. Thanks.

15 Isn't it true that Staff's Marcy South
16 Alternate could adversely impact the mitigation measures
17 undertaken by NYPA when it built its Marcy South
18 facility?

19 A Not generally. I don't -- I don't see that it
20 would be a problem. If they built their facility as
21 it's proposed alongside of the Marcy South, I think a
22 lot of the mitigation measures can be -- like the
23 screens that -- ones that are left could still be put
24 there or, you know, still be left during NYRI's building

1 of their facility if it was put there.

2 Q So it's your testimony that if they built their
3 facility, that it would not adversely impact any of --
4 any of NYPA's mitigation measures?

5 A We would have to determine that in the EM&CP,
6 but the major mitigation measures, I mean, it might be a
7 visual contrast, again, with structure types, if they
8 have to build lattice where you have poles and they
9 have -- that could be, you know, visual contrast, but
10 we -- you know, the way the record is developing in
11 this, I think they're trying to strive to match your
12 structures as best they can, but it, you know, remains
13 to be seen in the final details what that will be.

14 Q Could you take a look at page 33 of your
15 testimony, lines 13 through 16?

16 A That's correct. I see that.

17 Q Do you see that portion that says, "Access
18 roads for construction equipment, even though temporary,
19 would have to be constructed in places where resources
20 such as wetlands were avoided when the Marcy South line
21 was built"?

22 A Right.

23 Q So wouldn't that -- doesn't your testimony
24 indicate that it could affect the mitigation measures

1 that NYRI put -- I'm sorry, that NYPA put in place?

2 A No, I don't see that. I see that, you know,
3 if -- you avoided a wetland. They have to go into that
4 area. They -- they can remove their access road. It
5 could be a mitigation measure that they employ. And so
6 there would -- you know, the long-term impact would be
7 mitigated.

8 Q Do you know how many new access roads NYRI will
9 build as part of the construction of its Marcy South
10 Alternate?

11 A I think they've estimated the approximate
12 acreage. I was looking at that last night. I think
13 it's around 500 acres of access roads they calculated in
14 one of the interrogatories, but, you know, my
15 understanding is that they would build -- we would, you
16 know, I guess propose that they use the access roads of
17 the Marcy South facility, and then use spurs off of them
18 to their tower sites to minimize the environmental
19 impact.

20 Q Do you know where any of those -- well, you
21 said that you know the approximate acreage, correct?

22 A Right.

23 Q Do you know the locations of any new access
24 roads that NYRI would build?

1 A I would hope, again, that they would use the
2 main access road system that was built for the Marcy
3 South facility. A lot of the towers are going to be in
4 the same locations. They're going to be on ridge tops;
5 but to span, you know, valleys. You know,
6 engineering-wise, I think it's going to be very similar
7 that way.

8 So I think the towers are going to be --
9 they're going to try and adjust the towers to be in the
10 same locations as your towers. That's where the access
11 roads are along the system. There's access roads, you
12 know, to avoid agricultural, you know, fields or to be
13 on the edge of the fields. I would hope they would
14 employ those same access roads.

15 Q I notice you said "hope" a number of times in
16 your -- in your answer.

17 A Right.

18 Q You hope, but do you know where those access
19 roads are going to go, NYRI's access roads?

20 A No, I don't know the final design. You know,
21 we don't know. But I'm just saying that what the
22 probable impact, based on what I know about the
23 facility, how they said they were going to construct it,
24 and based on my experience.

1 Q Do you know whether any of those access roads
2 would be in wetlands?

3 A That -- yes. They will -- there's several
4 wetlands that they can't span that they proposed.
5 They'll have to have an access road into them.

6 Q When you say "several", can you give me a rough
7 estimate?

8 A Well, for example, along the one large wetland
9 that's -- that they responded to in an interrogatory is
10 down by the Monticello airport.

11 JUDGE STOCKHOLM: Mr. de Waal Malefyt, are you
12 familiar with helicopter construction techniques? And
13 if that were appropriate, could that eliminate the need
14 for access roads in wetlands?

15 MR. de WAAL MALEFYT: That's possible. Again,
16 that's -- it's a very selective, you know, construction
17 technique that's expensive, but if it needed to be done
18 that way, that's possible.

19 JUDGE STOCKHOLM: Thank you.

20 Q Mr. de Waal Malefyt, I asked you a series of
21 questions with regard to NYRI's Marcy South Alternate.
22 And I'm going to ask you the same basic questions with
23 regard to -- to CARI's Marcy South Alternate.

24 Would -- would CARI's Marcy South underground

1 alternate adversely affect mitigation measures that NYPA
2 installed when it built its Marcy South line?

3 A There -- there again, I think it -- like for,
4 you know, tree screens or avoiding, you know, some of
5 the archaeological sites, if they have to underground
6 through them, obviously that would ruin their
7 mitigation, but hopefully, again, they could avoid doing
8 that. The screening less likely, but archaeological
9 sites, I think they could go around them with the
10 undergrounding.

11 Q And -- and how would you envision them avoiding
12 things like the archaeological damage?

13 A It would just have to be a physical moving of
14 the trench, you know, the center line of the trench
15 with -- you know, might have to move out of the
16 right-of-way of the Marcy South facility.

17 Q Did DPS recommend certificate conditions for
18 NYRI's proposed route, the proposed route now?

19 A Could you say that again?

20 Q Sure. Did -- did DPS recommend certificate
21 conditions for NYRI's proposed route?

22 A We proposed certificate conditions in general
23 in my Exhibit 4, or Exhibit 178.

24 Q Were those conditions also set forth in an

1 interrogatory, DPS-116?

2 A Yes. I believe, you know, we asked the company
3 to respond. And they provided their, you know,
4 certificate conditions that were acceptable to them.

5 Q And was -- when you say it was general, was
6 that -- did you anticipate that those certificate
7 conditions would be included in any certificate, whether
8 it be the proposed -- for the proposed route or for one
9 of the alternates?

10 A I did in general. They'd have to be tailored
11 to the specific facility, especially if it's an
12 underground facility versus an overhead facility.

13 Q Would you recommend those certificate
14 conditions be incorporated into any certificate for
15 the -- for the NYRI Marcy South Alternate?

16 A Yes. In general I said.

17 Q And -- and the same question, would you
18 recommend that they be incorporated into the staff Marcy
19 South Alternate?

20 A Yes. Yes.

21 Q And those would be the conditions that are set
22 forth in your, I believe it's --

23 A Well, the -- the conditions that I set forth in
24 Exhibit 4 are not all of the conditions like Witness

1 Davis yesterday had specific, you know, conditions, you
2 know, visual mitigation. Some of the engineering
3 conditions, Witness Edward Schrom will have some
4 specifics. So there's additional conditions that are in
5 the testimony, the prefiled testimony of each of the
6 Staff witnesses.

7 Q And would it be your recommendation that all of
8 the DPS certificate conditions be incorporated into a
9 certificate that the Commission would issue regardless
10 of the proposed route or an alternate route?

11 A Again, they'd have to be tailored to the
12 specific, you know, route that the Commission, if it
13 does certify the facility, that the Commission
14 certifies.

15 Q Can you take a look at page 39, line 15 of your
16 testimony?

17 A Yes.

18 Q I'm sorry. It's actually line 14. It begins
19 on line 13 and goes to line 14.

20 Do you see that portion that says, "NYRI should
21 be directed by the Commission to explore costs of
22 undergrounding on the NYPA right-of-way"?

23 A Yes, I see it. I see that.

24 Q And it also indicates going under and back to

1 the NYPA right-of-way via a buss, B-U-S-S, structure.

2 Do you see that?

3 A I see that.

4 Q Have you discussed with anyone else from DPS
5 the potential reliability impacts associated with
6 repeated buss crossings?

7 A Yes. I discussed that with Witness Edward
8 Schrom.

9 Q And who is Mr. Schrom?

10 A He's our electrical engineer on reliability.

11 Q And did he have an opinion of that?

12 A It's not favorable, his opinion of that.

13 Q When you say "not favorable", can you expand on
14 that?

15 JUDGE STOCKHOLM: Is this -- is this the right
16 witness to be asking those questions, Counselor?

17 MR. MALONE: It was -- Your Honor, it was a
18 part of an interrogatory which Mr. de Waal Malefyt
19 answered.

20 JUDGE STOCKHOLM: Okay. Fine. Proceed.

21 A I think I'll leave it, you know, what I said in
22 the interrogatory.

23 Q If NYRI constructed a transmission facility
24 adjacent and parallel to NYPA's Marcy South facility,

1 would there be visual impacts?

2 A Yes.

3 Q Has NYRI studied the cumulative visual impacts
4 of constructing its Marcy South Alternate adjacent to
5 and parallel to the NYPA Marcy South Alternate -- I'm
6 sorry, Marcy South facility?

7 A Well, they haven't assessed it to the extent
8 they've done -- you know, have done the assessment on
9 the proposed route. There is, you know, some statements
10 about the visual, you know, impact.

11 Q And has DPS done any type of study along those
12 lines?

13 A Yes. I think Witness Davis, you know, covered
14 that yesterday.

15 Q Would there be additional forest clearing if
16 NYRI built a facility adjacent to and parallel to the
17 NYPA Marcy South route?

18 A Yes.

19 Q Do you know whether NYRI has studied those
20 impacts?

21 A Yeah. They've, you know, assessed what the
22 acreage is. It's in, you know, their exhibit on the
23 alternate route on the Marcy South study. It's
24 approximately 2,000 acres.

1 Q And would there be an impact to the -- to the
2 wildlife habitat if NYRI were to build a facility
3 adjacent and parallel to NYPA's existing facility?

4 A Yes. It would be, again, a widening of the
5 right-of-way corridor. It would be less, you know,
6 impact on the fragmentation because, you know, a lot of
7 the forested areas have already been fragmented, but it
8 would create more habitat for shrub-land birds that use
9 the right-of-way corridor.

10 Q Do you know if NYRI has studied those impacts?

11 A No, they haven't.

12 Q Would there be agricultural impacts if NYRI
13 were to build a facility adjacent to and parallel to
14 NYPA's Marcy South route?

15 A Yes. Yes.

16 Q Do you know whether NYRI has studied those
17 impacts?

18 A Well, again, they've, you know, given us
19 information on amount of acreage or the number of miles,
20 that, you know, cross agricultural districts or
21 different active cropland. So there's different
22 resource categories that they, you know, describe. And
23 they're similar, again, to the proposed route.

24 Q If NYRI constructed a -- a facility adjacent to

1 and parallel with NYPA's Marcy South facility, would
2 NYRI have to take additional private lands?

3 A Yes, they would.

4 Q And do you know approximately how much?

5 A There again, it's about 3,200 acres.

6 Q Can you take a look at page 3, and then it goes
7 on into 4 of your testimony, your direct testimony. I'm
8 sorry.

9 JUDGE STOCKHOLM: I apologize, Counsel, but the
10 3,200 acres that you referred to, Mr. de Waal Malefyt.

11 MR. de WAAL MALEFYT: Right.

12 JUDGE STOCKHOLM: What configuration of the
13 line is assumed?

14 MR. de WAAL MALEFYT: This is assuming NYPA's
15 proposal of alternate route, Marcy South. It's --

16 JUDGE STOCKHOLM: NYRI's? NYRI's proposal?

17 MR. de WAAL MALEFYT: NYRI's. NYRI's proposal.
18 It's, you know, a combination of the underground in the
19 northern area, and then overhead for most of it, the
20 rest of the route.

21 JUDGE STOCKHOLM: Okay. Okay. I just wanted
22 to make sure that number and that identification was
23 together.

24 A Yes, I -- I have that page.

1 Q Do you see in -- in response to a question,
2 "How would you characterize New York Regional
3 Interconnect's environmental effects assessment
4 contained in Exhibit 4 and related doc -- and related
5 exhibits," do you see that question?

6 A Yes, I see that question.

7 Q And did you respond, "The environmental effects
8 assessment performed by NYRI is very minimal and lacks
9 site-specific information. It draws on large regional
10 scale information and datasets"? Was that your answer?

11 A Yes.

12 Q These statements, were they made in reference
13 to the NYRI proposed route?

14 A That's -- Exhibit 4 is the NYRI proposed route.
15 It's the -- Exhibit 4 didn't include the Marcy South.

16 Q So your -- your testimony with regard to that
17 is with regard to the proposed route?

18 A That's correct.

19 Q Would you also characterize the environmental
20 effects assessment of the NYRI Marcy South Alternate as
21 very minimal and lacking in site-specific information?

22 A Same -- yes, that would be the same.

23 Q Can you take a look at page 56, lines 4 through
24 17 of your direct testimony?

1 A Yes, I have that.

2 Q In response to the following question, "As
3 project manager for the DPS staff assigned to the NYRI
4 proceeding, please present DPS staff's overall
5 recommendation on whether or not the Commission can make
6 all necessary findings to certify the facility as
7 proposed by NYRI," did you give the following answer:
8 "It is our position that the Commission should deny the
9 application of NYRI. As I and others testified, the
10 proposed NYRI transmission facility is not needed at
11 this time, does not represent the minimum adverse
12 environmental impact considering the nature and
13 economics of various alternatives, and will not serve
14 the public interest, convenience and necessary --
15 necessity in the long-term"? Did you give that answer?

16 A Yes, I did.

17 Q Given that NYRI did not provide sufficient
18 environmental effects assessment for either the proposed
19 route or the NYRI Marcy South Alternate, the Commission
20 should also deny the NYRI Marcy South Alternate; isn't
21 that correct?

22 MR. SINGER: Your Honor, I object to that
23 question. The premise of it was given the fact,
24 essentially, assuming that that was correct. And

1 obviously that's not our position here.

2 MR. MALONE: It's his testimony, Your Honor.

3 JUDGE STOCKHOLM: No, that's not exactly what
4 he testified to either. I'll sustain the objection and
5 I'll allow you to rephrase the question, Counsel.

6 Q I believe that you testified that the -- that
7 NYRI provided a very minimal, lacking in site-specific
8 information with regard to the Marcy South Alternate; is
9 that correct?

10 A I said that, you know, again, in regards to the
11 environmental impact assessment.

12 MR. MALONE: I have nothing further, Your
13 Honor.

14 JUDGE STOCKHOLM: Mr. de Waal Malefyt,
15 question: On this statement on page 3 of your
16 testimony, you state that NYRI's assessment is minimal
17 and lacks site specificity. Does that mean that you
18 believe that the information that's been filed by NYRI
19 is inadequate?

20 MR. de WAAL MALEFYT: It was adequate for the
21 secretary to deem the application complete, but detailed
22 information, especially on wildlife, as I cite here, you
23 know, is needed. And we've made recommendations that a
24 lot of that be submitted in the EM&CP stage if it is

1 certified. But generally, it's just my characterization
2 that it's very minimal type environmental assessment in
3 this area.

4 JUDGE STOCKHOLM: You've looked at a number of
5 Article VIIs in your career; is that correct, sir?

6 MR. de WAAL MALEFYT: That's correct.

7 JUDGE STOCKHOLM: And how does the applicant's
8 filing in this case, in your judgment, stack up against
9 the other applications that you've seen in your
10 experience? Is it the best, the worst, is it somewhere
11 in the middle? How would you characterize it?

12 MR. de WAAL MALEFYT: It's probably, you know,
13 somewheres in the lower part. I've seen a lot better,
14 especially when you have Article VII transmission
15 applications that are like rebuilds on an existing
16 right-of-way where the applicant actually submits their
17 EM&CP with their application. So we have all the
18 details.

19 JUDGE STOCKHOLM: Okay. And that -- if that
20 would be a 10 --

21 MR. de WAAL MALEFYT: Right. That would be a
22 10.

23 JUDGE STOCKHOLM: And a zero is an application
24 that is not complete. And I think you said this -- this

1 was complete according to the secretary's --

2 MR. de WAAL MALEFYT: This was complete.

3 JUDGE STOCKHOLM: Okay. If the zero is not
4 complete and a 10 is what you just described, what would
5 NYRI be?

6 MR. de WAAL MALEFYT: I would say it's about
7 three.

8 JUDGE STOCKHOLM: If the Commission found need
9 for this facility, is there enough information in this
10 record for the Commission to determine the likely
11 environmental impacts of the certification of one of the
12 routes on the record here?

13 MR. de WAAL MALEFYT: It's our position that
14 they don't have enough information to make that
15 determination. We're recommending that it be denied.

16 JUDGE STOCKHOLM: Right. Then -- then we --
17 let me ask you the next question. Specifically what
18 doesn't it contain that -- that leads you to the
19 conclusion that it should be denied?

20 MR. de WAAL MALEFYT: It doesn't contain
21 enough, I think, environmental mitigation, you know,
22 minimizing the -- like the visual impact. We recommend
23 about 50-some miles of undergrounding that they haven't
24 proposed to -- to minimize the visual impacts and the

1 impacts to river corridors, for example.

2 There's a lot of information missing, you know,
3 again, on the -- on the electric field issue. Do they
4 have sufficient right-of-way, and is it going to include
5 additional residences that will have to be acquired to
6 meet the Commission standard for the electric field? We
7 don't have that information. So we don't know how many
8 additional residences have to be acquired.

9 JUDGE STOCKHOLM: Let me go back to the
10 number-three ranking on my scale of zero to 10. Are you
11 aware of other applications that might rank in the
12 general category of a three on that scale and, yet, were
13 certified by the Commission?

14 MR. de WAAL MALEFYT: Yes, some -- like the
15 Iroquois Pipeline, or like the three or four in that
16 category. They were certified. I might add, there have
17 been some routes that have very minimal information.
18 This drawing on a topographic map reminds me of some of
19 the Marcy South Alternate routes that were ultimately
20 certified that way.

21 JUDGE STOCKHOLM: Okay. So there's a variety
22 of information that the Commission uses on which to
23 determine whether certificates should be granted?

24 MR. de WAAL MALEFYT: That's correct.

1 JUDGE STOCKHOLM: Thank you.

2 Mr. Malone, the only reason I jumped in with
3 those questions is because you raised that question.
4 And I think that the record should be clear as to what
5 Staff's view of the record here is. If that raised any
6 questions you'd like to get back to, I'll allow you to.
7 Otherwise, we'll move on.

8 MR. MALONE: No, Judge. I have nothing
9 further.

10 JUDGE STOCKHOLM: Thank you very much.

11 Ms. Smith.

12 BY MS. SMITH:

13 Q Just a couple of questions, Mr. Malefyt.

14 You were testifying regarding the access roads.
15 To your knowledge, were the access roads in agricultural
16 areas along the Marcy South facility removed after
17 construction?

18 A The access roads that were in active
19 agricultural fields were removed, but a number of them
20 were left along the edges of the fields, especially
21 where the farmers wanted them to be left to improve
22 their access to fields maybe beyond the transmission
23 line, you know, corridor.

24 Q So in your opinion, is it likely that NYRI will

1 need spurs off existing access roads across agricultural
2 fields in order to access the NYRI tower locations?

3 A If they're placed in the active fields, yes,
4 they'll need to create spurs back again to those tower
5 locations.

6 Q And it was also your testimony that at this
7 point, NYRI plans to put tower locations parallel to the
8 existing Marcy South tower locations, correct?

9 A To the extent they can, they are proposing
10 that, but, again, that's a detail that remains to be
11 seen in the EM&CP stage.

12 MS. SMITH: Thank you very much.

13 JUDGE STOCKHOLM: Ms. Leary.

14 MS. LEARY: Thank you, Your Honor.

15 Ms. Colella, I would ask if you don't mind. I'm sorry.
16 Thank you.

17 BY MS. LEARY:

18 Q Good morning, Mr. Malefyt.

19 A Good morning.

20 Q I'm Maureen Leary. I just have a few questions
21 for you with respect to your direct testimony.

22 On page 7 and 8, you discuss the increase in
23 SO-2 and NOx as a result of the NYRI facility, I believe
24 by 2015; is that correct? I'm sorry. It's pages 7 and

1 8.

2 A Right. I -- their response wasn't -- you know,
3 2012, 2015 and 2018.

4 Q On page 8, I believe you indicate that while
5 initially NYRI's facility will reduce those emissions,
6 it appears that by 2015 and 2018, NYRI's facility will
7 result in more SO-2 and NOx, that's N-O-X, emissions.

8 A That's correct.

9 Q And can you tell me if there's anything in the
10 application that would indicate a mitigation measure for
11 that increase in SOx and NOx -- I'm sorry, SO-2 and NOx
12 emissions?

13 A Not that they proposed. I mean, this is --
14 again, that's -- you know, as a result of the fuel mix
15 in the model, it's kind of out of their hands, you know,
16 directly, but they haven't proposed mitigation for it.

17 Q Thanks.

18 JUDGE STOCKHOLM: Can I ask,
19 Mr. de Waal Malefyt, what the assumptions were that were
20 in the models that developed these numbers that are on
21 page 8 of your testimony with regard to incremental
22 imports of Canadian power? I believe there's an
23 interrogatory response in this case that at least
24 conversations were being had with Hydra-Quebec. Does

1 the model that shows these emission changes consider
2 incremental renewable power from Canada?

3 MR. de WAAL MALEFYT: I'm not the witness that
4 can testify about the -- what the -- the inputs into the
5 models.

6 JUDGE STOCKHOLM: Okay. Fine. Never mind.
7 Go ahead.

8 MS. LEARY: Thank you, Your Honor.

9 BY MS. LEARY:

10 Q I want to refer you to page 20. It actually
11 begins on page 18 in which you begin discussing in your
12 direct testimony electromagnetic fields.

13 A I see that.

14 Q On page 20, you indicate that the proposed --
15 and I'm quoting, "The proposed NYRI facility will not
16 meet the standard for electric fields, paren,
17 established in Opinion 78-13 in Cases 26529 and 26559,
18 closed paren, of 1.6 kV-M as illustrated in Figures 13
19 and 14 of Exhibit G of the application."

20 Have you had an opportunity to review the
21 current literature on electromagnetic fields?

22 A Yes.

23 Q And can you summarize some of the literature
24 studies that have been performed, let's say, in the last

1 three years on EMF exposure? And I -- I don't mean to
2 say three years. If they go back five years, that's
3 fine. I'm not necessarily placing a limit on "recent",
4 if you will. A study can be fairly current even if it's
5 five years old.

6 A Could -- do you want to re -- I guess keep this
7 to electric transmission lines or --

8 Q Yes. Thank you for that clarification.

9 A I mean, there have been some recent, you know,
10 studies, again, that were in -- in England, Wales that,
11 again, looked at the Childhood Leukemia Association.

12 Q I think you refer to that in your testimony as
13 well --

14 A That's right.

15 Q -- is that right? And the percentage of
16 increase in the incidents of childhood leukemia was --
17 can you state what that increase was?

18 A Well, the relative risk, they looked at
19 different distances from the lines. And I think the
20 highest risk, you know, again, looking at it close to
21 the line was -- 1.69 was the relative ratio there.

22 Q And --

23 A And so, you know, that's rather low. If you
24 have one, it's no difference. If you have a high number

1 like 20, like smokers have, it's -- there's a pretty
2 good association with smoking and lung cancer if you get
3 a relative risk of about 20.

4 Q So is it your understanding that one would be
5 the base line for that study, which I believe you're
6 referring to done by Gerald Draper?

7 A Right. One is not a base line. It's just if
8 you have a 1.0 relative risk, it means there's no
9 significant difference between the exposed group versus
10 the, you know, the comparison group.

11 Q And you're referring to a statistical
12 significance?

13 A Well, no. That's -- the ratio is not a
14 statistical analysis. It's just a -- you know, you take
15 the number of people that were exposed that came down
16 with something, compare it to your -- you know, your
17 other group that wasn't exposed and see if they have the
18 same disease. And it's expressed as a ratio. I don't
19 know if you call that a statistic. I guess you could
20 call it statistics, but it's not about significance.
21 You can then get into the statistical significance of
22 this with confidence limits.

23 Q Okay. Are you familiar with the work of Dr.
24 David Carpenter at the School of Public Health?

1 A Yes, I -- well, I'm familiar with his work,
2 especially, you know, in the 1980s and '90s when we
3 worked together on the -- the power lines project that
4 looked at the different studies on this about the
5 biological effects of EMF.

6 Q So would your testimony be consistent with some
7 of the work that Dr. Carpenter has been doing in the
8 last several years with respect to electromagnetic field
9 exposure?

10 A No. I kind of differ with him on this.

11 Q And can you tell me how?

12 A Well, he basically thinks there is an
13 association that's biological and, yet, we haven't seen
14 any conclusions that show that there is a biological
15 relationship. And it's -- you know, it hasn't been
16 proven so that, you know, the scientific community
17 accepts it. He's outspoken saying there is and that we
18 should be weary of it.

19 Q Why do you think he believes that? Why do you
20 think he holds that view?

21 A Well --

22 MR. SINGER: Your Honor, I object to that
23 question. I don't think it's relevant why
24 Mr. de Waal Malefyt thinks that someone else holds a

1 particular view about something.

2 MS. LEARY: Well, I think Dr. -- Mr. Malefyt's
3 work with Dr. Carpenter is already in his testimony and
4 has familiarity with Dr. Carpenter's work. I'm simply
5 trying to ask the witness the difference between Dr. --
6 Mr. Malefyt's conclusions and Dr. Carpenter's
7 conclusions. And I think they are relevant with respect
8 to Dr. Carpenter's education and background in studying
9 the field.

10 Obviously, Mr. Malefyt has a little bit
11 different background. And I'd like to know his
12 understanding of -- of the basis for Dr. Carpenter's --
13 if he knows it, for Dr. Carpenter's view on like the
14 exposure limits of electromagnetic fields.

15 JUDGE STOCKHOLM: Well, if Dr. Carpenter has
16 expressed that to the witness and the witness,
17 therefore, is only a single chain of hearsay away, I
18 think that's an appropriate question. However, asking
19 the witness what he thinks the doctor thinks is nothing
20 that will help this record. So I'd -- I'd ask you --

21 MS. LEARY: I wasn't trying to ask that. In
22 fact, I don't think I did ask that, but if I did, I
23 can --

24 JUDGE STOCKHOLM: Please rephrase the question.

1 BY MS. LEARY: -- rephrase.

2 Q Mr. Malefyt, you've worked with Dr. Carpenter
3 on -- on a particular project I believe you referred to.
4 And it sounds like you're quite familiar with his work.

5 Can you -- can you tell me what -- and you also
6 stated that your opinion on exposure to EMF -- EMFs is
7 different than Dr. Carpenter's; is that correct?

8 A That's correct.

9 Q And he believes, I believe you said -- or if
10 I'm putting words in your mouth, I apologize, I believe
11 that you said that he believes there is a causal link
12 when none has been established in your view.

13 A That's correct.

14 Q And that causal link would be between exposure
15 and disease.

16 A That's right.

17 Q And can you tell me on what basis you think
18 Dr. Carpenter is basing his position? Why does he
19 believe --

20 JUDGE STOCKHOLM: Excuse me. You can't ask the
21 witness what he thinks the other person believes,
22 because I don't think that that's relevant.

23 Has Dr. Carpenter ever expressed to you,
24 Mr. de Waal Malefyt, his rationale for his beliefs?

1 MR. de WAAL MALEFYT: Again, as I say, it goes
2 back, you know, 10, you know, 15, 20 years to the power
3 lines project, but I can only just, you know, remember
4 his discussions of the biological and experiments that
5 were being done and how he characterized them and how,
6 you know, I saw them. He -- he was more conservative in
7 his approach than I was. That's the only way I can
8 characterize it I guess.

9 MS. LEARY: Okay.

10 JUDGE STOCKHOLM: Counsel, you can follow that
11 up if you want. I just didn't want you asking --

12 MS. LEARY: Fine.

13 JUDGE STOCKHOLM: I just wanted the record to
14 reflect what the witness knew.

15 BY MS. LEARY:

16 Q But it's my understanding based on your answer
17 to Judge Stockholm, that you do -- you are familiar and
18 you do know to some degree the basis for Dr. Carpenter's
19 position.

20 A Well, he -- he looked at the same studies that,
21 you know, and, you know, maybe more than, you know, I
22 was exposed to in the, you know, the power lines
23 project. He had, you know, more of a, you know, a
24 background in it than I did at the time. So I can

1 only -- you know, he just came to different conclusions .
2 based on the same information that we were all looking
3 at.

4 Q And you stated that those conclusions, I
5 believe, were more conservative than yours?

6 A Yes.

7 Q And when you say "conservative", are you
8 referring to conservative from the perspective of
9 limiting exposure?

10 A Not necessarily. It was, you know, how we
11 wrote up the final, you know, summary -- executive
12 summaries of the power lines project, you know, what
13 words to use, which studies should be emphasized, how
14 to -- they were just, again, you know, I would say, you
15 know, more cautious, more conservative.

16 Q But would you agree that he does have a basis
17 for his position?

18 A Oh, yes. That's why he was on the project.

19 JUDGE STOCKHOLM: And what project was that?

20 MR. de WAAL MALEFYT: This was the power lines
21 project. That was an outgrowth of the, you know, extra
22 high-voltage transmission line cases where the
23 Commission ordered that a certain amount of, you know,
24 money be used to do research into the EMF issue and --

1 JUDGE STOCKHOLM: That was the -- was that the
2 Massena Marcy proceeding?

3 MR. de WAAL MALEFYT: Well, that was one of
4 the -- you know, one of the lines, right.

5 JUDGE STOCKHOLM: Okay.

6 MR. de WAAL MALEFYT: And it was --

7 JUDGE STOCKHOLM: And when this was examined
8 previously, those studies were all with regard to AC
9 power; is that correct?

10 MR. de WAAL MALEFYT: Not necessarily.
11 There -- you know, the studies were, again -- there were
12 proposals that were submitted. And the -- the team, you
13 know, the scientific advisory team would select, you
14 know, which studies should go forward. Some were on
15 cellular levels. Others were on, you know, whole
16 organisms. Others were looking at exposure to cancer.

17 So there was a whole range of studies. And
18 some of them, you know, a lot of it was we tried to use,
19 you know, AC because that was the most common, but there
20 were also DC exposures.

21 JUDGE STOCKHOLM: Do the DC study outcomes
22 differ from the AC study outcomes?

23 MR. de WAAL MALEFYT: You can't -- at the time,
24 that wasn't -- you know, we didn't tease them apart.

1 There wasn't any conclusive evidence saying, oh, look at
2 you know, here, the DC studies show, you know, some
3 result that we didn't see in the AC studies.

4 JUDGE STOCKHOLM: Or vice versa.

5 MR. de WAAL MALEFYT: Or vice versa.

6 JUDGE STOCKHOLM: The -- the England and Wales
7 studies that you describe in your testimony, are those
8 studies on AC or DC?

9 MR. de WAAL MALEFYT: They appear to be AC,
10 but, again, maybe a different hertz, you know, the 50
11 rather than the 60 hertz that we use here in the states.

12 JUDGE STOCKHOLM: Do you know if Dr. Carpenter
13 has a different opinion with regard to AC or DC?

14 MR. de WAAL MALEFYT: No, I don't.

15 JUDGE STOCKHOLM: Thank you. Go ahead.

16 BY MS. LEARY:

17 Q Does the electromagnetic field from an AC line
18 differ from that of a DC line?

19 A It's a different field -- the electric field is
20 static, you know, versus an oscillating field for AC
21 where it's static for DC. That's, you know, a primary
22 difference.

23 JUDGE STOCKHOLM: The same is true for the
24 magnetic fields?

1 MR. de WAAL MALEFYT: The magnetic fields, I
2 don't -- I guess there might be a component to that.
3 I'm not sure. I'm not an electrical, but, it's a -- you
4 know, it's still a magnetic --

5 JUDGE STOCKHOLM: It's not -- it's not
6 alternating.

7 MR. de WAAL MALEFYT: Right. It's not --
8 right. It's not alternating.

9 Q Are you aware of any studies that review the
10 different electromagnetic field for AC versus DC lines?

11 A Well, I'm aware of it. I mean, we've -- there
12 were a number of DC lines, you know, that were examined
13 early on, especially with relationship to cattle out
14 west because there was more use of DC lines in the far
15 west, and there was also more in Canada and Quebec.

16 Q Thank you. I want to turn your attention to
17 page 41 of your testimony -- direct testimony.
18 Actually, I'm sorry. Your direct testimony begins to
19 discuss the Marcy South route at page 34.

20 A Okay. I see that.

21 Q Have you looked at the cumulative impact that
22 would result from the NYRI project paral -- paralleling
23 the NYPA Marcy South line?

24 A Well, I think I try to summarize it here in my

1 testimony what the major differences are on page, you
2 know, 35.

3 Q Does the NYRI application discuss, including
4 Appendix L, discuss the cumulative impact of the NYRI
5 project with the NYPA Marcy South line?

6 A I don't recall -- I don't know what you mean by
7 "cumulative impact". But I guess if you're talking
8 about all the impacts somehow being accounted for, I
9 haven't seen that. I don't know that that's possible,
10 you know, quantifying it, unless you're just talking
11 about somebody making a qualitative estimate, you know,
12 an assessment looking at all the impacts. Is that what
13 you mean?

14 Q Yes. Cumulative environmental impacts refers
15 to those that are sort of bundled together. So two
16 apparently separate --

17 A Right.

18 Q -- things are viewed together; for example, if
19 a development is going in on one side of the river and a
20 second development is going in on the other side, you
21 would look at the impact of both together. Cumulative
22 impacts is -- is what I'm referring to.

23 So I apologize that I didn't quite set the
24 foundation for that, Mr. Malefyt, but does the NYRI

1 application, including either Exhibit 4, the
2 environmental impact statement, or Appendix L,
3 discussion of the comparison of the proposed route with
4 the NYRI south alternative, discuss the cumulative
5 impact of putting the NYRI line parallel to the NYPA
6 Marcy South line?

7 A I don't recall that its in the, you know,
8 Exhibit 4 or L, that they did a comparison of the
9 cumulative impacts as you describe them.

10 Q I guess it wouldn't be a comparison. It would
11 be a discussion.

12 A Well, they do discuss -- based on different
13 resources they do discuss the differences, again, for
14 streams or for agricultural land. They do it by
15 categories.

16 Q Okay. But to your recollection, there's no
17 discussion of the cumulative impact --

18 A Right.

19 Q -- of viewing both together. Okay.

20 With respect to the deviations that you -- what
21 I will term the DPS deviations along Marcy South, your
22 discussion that begins at page 41.

23 A Right.

24 Q Does the -- does the application examine -- the

1 NYRI application examine the impact of these deviations?

2 And when I say "impact", I'm talking about
3 environmental impact.

4 A No, because we proposed them at the phase when
5 we were, you know -- after the ruling, asking the
6 parties to identify alternate routes.

7 Q Can I refer you to page 53 in your direct
8 testimony?

9 A I have that.

10 Q You discuss right-of-way vegetation management
11 beginning on page 53.

12 A Right. I see that.

13 Q And you state that NYRI has no previous
14 experience in right of -- I'm sorry. Let me quote this
15 so I don't misstate what you've said here. Quote:
16 "Since NYRI has no previous experience in right-of-way
17 vegetation management, I recommend that it follow the
18 right-of-way vegetation management plans of the electric
19 utility that its route generally parallels if approved
20 by the Commission." End quote.

21 Can you identify for the record the
22 right-of-way vegetation management plan that you are
23 referring to in your testimony?

24 A For the -- if they're parallelling the Marcy

1 South route, I would -- talking about the Power
2 Authority's right-of-way vegetation management plan
3 where they parallel mostly the NYSEG right-of-ways along
4 the prime route or the proposed route, I was referring
5 to the right-of-way vegetation management of NYSEG.

6 Q And are you --

7 A And, again, if it was up in the northern end,
8 you know, where they're paralleling the Grid's lines,
9 possibly that would -- you know, they should look at the
10 Grid right-of-way vegetation management plan.

11 Q And are you familiar with all of those plans,
12 that is National Grid's, NYSEG's and NYPA's vegetation
13 management plans?

14 A Yeah, I'm generally familiar. I mean, I've
15 looked at them, reviewed them, you know, for this case.

16 Q Is it your understanding that pesticides would
17 continue to be used on the Marcy South Alternative by
18 NYPA under that plan?

19 A On parts of it, it sounds like, again, if
20 they -- if their recommendation -- that, you know,
21 they -- or their -- I don't know if it's a stipulation
22 or recommendation, that, you know, they request
23 herbicides in the watershed, New York City, and it's
24 denied, then they won't use them there.

1 Q You're referring to NYPA?

2 A Along the Marcy South Alternate.

3 Q There's some confusion --

4 JUDGE STOCKHOLM: Yes. You answered the
5 question with regard to NYRI.

6 MS. LEARY: Yes.

7 JUDGE STOCKHOLM: The question was with regard
8 to NYPA, I thought.

9 MS. LEARY: I'm sorry.

10 JUDGE STOCKHOLM: I thought, Counsel.

11 MS. LEARY: Yes. That's correct. That is
12 correct.

13 Q Let me -- let me take you back one minute.

14 A Yeah. I guess I lost -- sorry.

15 Q The -- is it your understanding that under
16 NYPA's plan, vegetation management plan, herbicides
17 would continue to be used along NYPA's Marcy South lines
18 that lies within the New York City watershed?

19 A I'm assuming it will -- they'll use it as they
20 have in the past. And, again, they're probably -- you
21 know, again, there might be restrictions on it based on
22 the agreements they come to with the city. It's --
23 it's -- you know, it's a tool box approach. I mean,
24 they don't always use herbicides. There's, you know,

1 sensitive areas, buffer zones they don't use herbicides.

2 Q That's the question I probably should have
3 asked you first --

4 A Okay.

5 Q -- which was to what extent do you know whether
6 NYPA utilizes pest -- herbicides in the New York City
7 watershed?

8 A I don't know what the current, you know -- you
9 know, this year, I mean, they did use herbicides when
10 the line was built.

11 Q In 19 -- in the 1980s?

12 A Right. But I don't know exactly what this
13 year's, you know, vegetation management plan is for that
14 line in the watershed.

15 Q You referred a minute ago to a number of tools
16 that the plan provides. Would those tools include
17 measures that do not require the use of herbicides?

18 A Yes.

19 Q With respect to the NYRI application, does --
20 I'm sorry. With respect to the NYRI project, and I'm
21 referring specifically to either the proposed route or
22 to the Marcy South Alternative, does the application
23 identify the type of pesticides that will be used for
24 right-of-way vegetation management on either of those

1 two routes?

2 A Yeah. I believe there's an interrogatory
3 response with a list of about four different types of
4 herbicides: 2,4-D, glyphosate and picloram.

5 Q Does the application reflect that information?

6 A Not to my knowledge.

7 Q Does the application reflect the volume of
8 pesticides that will be used?

9 A No.

10 Q Does the application reflect the method of
11 herbicides or pesticide application, that is the
12 equipment, that will be used?

13 A Not to my knowledge. I think, again, you know,
14 they defer to the EM&CP for the vegetation, you know,
15 management plan, you know, details. I mean, there is,
16 again, the summary of what that would include in the
17 application, but not the details which I think you're
18 referring to.

19 Q Is it your understanding that the type of
20 pesticide to be used and the volume of pesticide to be
21 used is deferred to the EM&CP stage?

22 A Well, again, in the EM&CP stage, we, you know,
23 look at the different techniques. And it's the
24 vegetation that, you know, you find out in the field

1 that dictates the volume that you would be using or the
2 type of, you know, technique. So I don't know that it's
3 necessarily that important to know that ahead of time.
4 I mean, in fact, we know what the range is of vegetation
5 management techniques on rights-of-way throughout the
6 state. So I don't think their facility is any different
7 than any other facility that we've experienced. I mean,
8 if someone wanted to know the exact volumes, I mean,
9 that's reported yearly, you know, in their
10 recordkeeping.

11 Q You're referring --

12 JUDGE STOCKHOLM: Mr. de Waal Malefyt, would
13 you just take a minute or two and explain the long-range
14 right-of-way management plan? Actually, I've made an
15 assumption that that is a recommendation of staff. Did
16 staff recommend --

17 MR. de WAAL MALEFYT: Yes. Yes, we did
18 recommend that.

19 JUDGE STOCKHOLM: And would you -- would you
20 describe what a long-range management plan is and how it
21 works in Article VII?

22 MR. de WAAL MALEFYT: Well, under Article VII,
23 once the facility is certified, we also, you know, ask
24 the company to, you know, detail, you know, what

1 herbicides they would use, what techs -- techniques they
2 would use even during the clearing of the line.

3 And then after the line is cleared, we ask for
4 a detailed vegetation -- a long-range vegetation
5 management plan be drawn up. And that, again, requires
6 an applicant to specify what techniques they'll use on
7 what type of vegetation, where they won't use
8 herbicides, you know, what other techniques that don't
9 use herbicides, especially in sensitive areas, you know,
10 along the certified line, and who -- you know, who's
11 going to be the coordinator, you know, how is the
12 company going to, you know, do this, are they going to
13 do it themselves, are they going to have contractors, et
14 cetera, et cetera.

15 JUDGE STOCKHOLM: If -- if a herbicide that is
16 identified today in the com -- in the applicant's
17 application or in the interrogatories, however it is
18 that you come about that knowledge, if that herbicide is
19 no longer permitted to be used in the State of New York,
20 would that kind of a restriction also restrict NYRI with
21 regard to future use of that herbicide on their
22 right-of-ways?

23 MR. de WAAL MALEFYT: Yes. I mean, if it's not
24 allowed to be used by the state, you know, through DEC

1 regulations or federal regulations, it won't be used by
2 anybody. And we would expect like a minor change, you
3 know, in the plan to come in where they would notify us
4 what substitute they're using, you know, before they use
5 it.

6 JUDGE STOCKHOLM: Thank you.

7 BY MS. LEARY:

8 Q Mr. Malefyt, are you aware of what is commonly
9 known as drift pesticide and herbicide drift?

10 A Yup.

11 Q Would you explain --

12 A Yes.

13 Q -- for the record what that is?

14 A Well, drift is the fine particles of the
15 herbicide application mixture that is carried by air and
16 wind, through wind, especially like on a Foliar
17 application, a high-volume Foliar where you have drift,
18 or if a helicopter application was made using a
19 herbicide, which hasn't been done years in years, but
20 that's an exam -- an example where you have more
21 potential for drift because it was dropped from a higher
22 distance to the target, you know, which is the
23 vegetation.

24 Q So can drift happen only when there's wind or

1 when there's a helicopter application?

2 A Well, if the particles are very small, even if
3 it's not windy, there is drift, you know, because the
4 application has a velocity, and you then have drift, you
5 know, if it's off the target.

6 Q Yes. I would -- that was my next question.
7 Can you explain what "off target" means?

8 A Well, some techniques are more precise than
9 others. High-volume Foliar, you know, maybe a nozzle is
10 pointed at a longer distance to the vegetation or -- so
11 you'd have more drift than, say, with a cut-and-stump
12 treatment where you're spraying it on a very, you know,
13 small area down at the ground level.

14 Q So would it be important to know the method of
15 application?

16 A Well, it's important to know the method, but
17 the method is usually dictated by the tar -- you know,
18 whether you have a very dense area, you know, of trees
19 coming up and you want to, you know, use the minimum
20 amount of herbicide to effectively kill the vegetation,
21 so you -- there you might use the Foliar. So when
22 you're clearing the right-of-way, instead of using
23 Foliar, you would use a cut-and-stump. It's appropriate
24 for that -- you know, the herbicides based on the label.

1 So we usually try -- again, it's usually the vegetation
2 density and type that dictate the technique, not the
3 other way around.

4 Q In terms of identifying whether there will be
5 off-target impacts as a result of drift, is it important
6 to understand before the application of herbicides what
7 the method of application would be?

8 A That's understood with the method. I mean, so
9 like you wouldn't use Foliar down at the banks of a
10 sensitive stream. You would, you know, use -- you know,
11 not use herbicides, or allow a buffer where no
12 herbicides are used, and then start your Foliar
13 application behind, you know, that distance, behind the
14 buffer. And you might use a different technique within
15 the buffer zone, say, like basal or cut-and-stump.

16 Q Have you had an opp -- you mentioned earlier an
17 answer to an information request that identified certain
18 pesticides. Have you -- is it your understanding of
19 that answer that NYRI provided, and I believe it's
20 DEC -- is it 34? I don't have the precise number for --
21 of DEC's information request to NYRI, but I understand
22 you're familiar with it. Is it your understanding of
23 NYRI's answer that they are, in fact -- that the
24 pesticides listed are, in fact, the pesticides that they

1 will use in right-of-way management?

2 A Again, I think they said they would use what is
3 registered for use in New York State on right-of-ways.

4 Q So they gave those 2,4-D --

5 A As examples. I mean --

6 Q As examples.

7 A Right.

8 Q Okay. You make a recommendation on page 55 of
9 your direct testimony with respect to the use of
10 herbicides near water bodies, streams and wetlands, or
11 water supplies.

12 A Right.

13 Q And you recommend, quote, "Herbicides using
14 this technique should not be applied within 5 feet of a
15 stream or water body, nor within 100 feet of wetlands or
16 water supplies." And I apologize. I'm jumping over
17 what this technique means. Can you explain the
18 technique you are referring to in your testimony there?

19 A It's on line 23 on page 54. That's called the
20 cut-and-stump technique.

21 Q And so your recommendation is that herbicides
22 not be applied within 5 feet of a stream or water body
23 or within 100 feet of wetlands or water supplies?

24 A That's correct.

1 Q There was a significant amount of discussion
2 earlier this week by a DEC panel that included Thomas
3 Snow, Angus Eaton, Charles Silver, and Patrick Ferracane
4 on storm-water, sediment -- sedimentation and erosion
5 control mitigation measures.

6 Assume for a moment that -- well, I'm not even
7 going to ask you to assume. Is it your understanding
8 during transmission line construction projects that
9 there must be some measures to control sedimentation and
10 erosion?

11 A Yes.

12 Q And is that a difficult thing to do, to control
13 erosion and sedimentation in storm-water?

14 A Well, the con -- those controls are not
15 difficult. It's sometimes the maintenance of it and
16 what God does with the rain.

17 Q So is it your experience that you've seen some
18 storm-water problems in transmission construction?

19 A Yes, we have. And it's mostly been on, again,
20 on pipeline construction.

21 Q But is it possible that transmission line
22 construction could result in the same types of
23 storm-water problems?

24 A Not to the extent you see on pipeline

1 construction.

2 Q And what is the basis for you saying that?

3 Have you seen a transmission line --

4 A Well, the major difference is with the pipeline
5 construction. Usually they have to clear the entire
6 width of the right-of-way, and you have to dig a trench
7 that's long and linear that funnels water down to
8 streams, wetlands.

9 Whereas electric transmission lines, you can
10 span those areas. You can have towers on the higher
11 ground, and there's small, selected areas where tower
12 construction is. You don't denude the whole
13 right-of-way. You clear it of vegetation, but it
14 doesn't require that the stumps be grubbed down and the
15 soil exposed like you do on pipeline construction. So
16 there's a major --

17 Q So you don't have -- is it your testimony that
18 you do not have storm-water problems from -- resulting
19 from vegetation clearing?

20 A You can have some, but it's a very different --
21 it's, you know -- to me, it's quite significantly
22 different from a pipeline construction. You can have
23 some problems that could depend on the contractor, you
24 know, who is building it and what controls they have.

1 They may say they can do things. And if they don't, you
2 might have problems with storm-water.

3 Q Yes. What about the situation where you have
4 an access road running parallel to where the poles are
5 going to be placed, so there's the construction of an
6 access road?

7 A Well, access roads, again, can be constructed
8 with proper sediment and erosion controls. You can have
9 like, you know, in steeper slopes rock-lined ditches
10 that go in as soon as you construct access roads. That
11 was the basis for some of our cross-examination of those
12 witnesses that you referred to. We don't want to see
13 the roads being -- the access roads hope being
14 constructed by somebody else, and then the erosion
15 control right alongside it being constructed by another
16 crew a different time. That creates a problem. We'd
17 rather see it all be done at once so you can have
18 control of sediment and erosion.

19 JUDGE STOCKHOLM: If you know,
20 Mr. de Waal Malefyt, on an electric transmission line on
21 a steep slope, is it a technique that is used to avoid
22 access roads becoming downhill creeks to zig-zag them
23 across the face if -- if they have to be built in a
24 steep slope.

1 MR. de WAAL MALEFYT: Yes. I keep, you know,
2 looking back at the Exhibit 37. You know, I think they
3 have to do with the Marcy South route. You can see the
4 off right-of-way access roads that go off the
5 right-of-way with the terrain. They don't -- they
6 zig-zag, as you call it, to, you know, go on a gentler
7 grade. They don't always go right up the right-of-way.
8 They -- like you do in pipeline construction.

9 JUDGE STOCKHOLM: And those details are
10 generally set forth in the EM&CP?

11 MR. de WAAL MALEFYT: That's right.

12 JUDGE STOCKHOLM: Thank you.

13 BY MS. LEARY:

14 Q Mr. Malefyt, if you have a storm-water problem
15 and it's quite recently after you've applied pesticides
16 for a right-of-way, is there a chance that pesticides
17 can get into a water body or a wetland via the conduit
18 of storm-water?

19 A Yeah. If you have -- somehow that herbicides,
20 you know, drifted on to the soil that was exposed. And
21 if the soil that was exposed got eroded into the
22 drainage, and if the drainage by chance went down to a
23 stream that you're concerned about, it's --
24 theoretically, it's possible.

1 Q I want to refer you to a -- I believe a report
2 that you did, which was presented at a professional
3 conference. And it's entitled "Common Environmental
4 Problems Encountered During Construction Of Major Gas
5 Transmission Pipelines."

6 A I think that was --

7 Q I'm sorry. You're right. It's Mr. Macks,
8 Mr. Morrell and Mr. Strubb.

9 A Strube.

10 Q You answered an interrogatory, I believe it's
11 DEC-1, with Mr. Macks?

12 A That's right.

13 Q In which that was attached?

14 A That's correct.

15 MR. BLOW: Your Honor, Mr. Macks is available
16 to be sworn if the -- the cross-examiner or any -- any
17 cross-examiners want to get into the substance of the
18 response to DEC-1. That's why -- Mr. Macks has been a
19 member of trial staff from the inception, basically.

20 Q Mr. Malefyt, do you have that answer to
21 interrogatory there?

22 A I do.

23 Q Are you familiar with what if you may call the
24 Macks' report?

1 JUDGE STOCKHOLM: M-A-X or M-A-C-K-S?

2 Q Am I saying that incorrectly?

3 A Macks. You're referring to the Macks, Morrell,
4 Strube report?

5 Q Yes.

6 A Yes.

7 Q Okay. I'm going to ask you about your
8 experience with both construction of gas transmission
9 pipelines as well as overhead electric transmission
10 lines. And I understand that this report is focused on
11 gas pipelines. And I think a few minutes ago you
12 identified some of the differences. I think your
13 testimony, pardon me if I mischaracterize it, please
14 correct me, was that, you know, the trenching and the
15 continuous aspect of disturbance along a pipeline -- gas
16 pipeline construction could create greater storm-water
17 problems; is that correct?

18 A Well, I think the potential is there for
19 greater problems. Again, if you have -- you have to
20 have a storm to have an event. And if you do it during
21 a dry period, you might not have any problem.

22 Q Would some -- in your experience, would some of
23 the environmental impact problems that are outlined in
24 the Macks' report also be evident for transmission --

1 electric transmission overhead lines?

2 A What -- could you refer to the parts that you
3 were -- because all of these have to do with pipeline
4 construction. And it's --

5 Q Is there anything -- let me rephrase.

6 Is there anything in this report that is stated
7 that would be applicable to a transmission -- electric
8 transmission overhead construction? Actually, I won't
9 even say overhead. I will say the NYRI project.

10 Is there anything in this report that would be
11 applicable from an environmental impact perspective to
12 the NYRI project?

13 A Well, all our information about like the EM&CP,
14 about non-compliance and compliance, how we monitor
15 that, you know, that's very similar.

16 Q So let me ask you specifically. On page 3 of
17 the report, you indicate that the primary environmental
18 problem occurring during pipeline construction is
19 inadequate temporary work space on slopes, wetlands and
20 at stream crossings. Would that same environmental
21 problem be evident for the NYRI project? Could that
22 same environmental problem be evident for the NYRI
23 project?

24 A Again, not to the extent -- because with the

1 NYRI project, you can span those stream crossings. You
2 can span wetlands that are small -- that can be spanned,
3 you know, say, 800 feet. You, you know, can avoid some
4 of the steep slope areas. So it's quite different, but,
5 again, you might have -- it could occur. You might have
6 a temporary work area for a tower construction on a
7 steep slope.

8 You know, it might be near a stream that, you
9 know, if it couldn't be designed around it, it's --
10 theoretically, it's possible. But, again, the -- the
11 type of clearing that's done for a pipeline during
12 construction is quite different than what you have for
13 an electric transmission line.

14 Q In your --

15 A So you might not have the same environmental
16 conditions.

17 Q Right. In your experience with electric
18 transmission lines as opposed to gas pipelines, have you
19 observed situations in which there were modifications to
20 the EM&CP and/or the application that would increase the
21 amount of work space that was previously estimated to be
22 necessary to construct the line?

23 A I mean, I wouldn't think of that as being
24 anything of significance. It would be a minor change in

1 like the environmental management construction plan that
2 was probably approved by the Commission before
3 construction started, so.

4 Q Have you seen modifications?

5 A Oh, yeah.

6 Q For increased work space?

7 A For changes in work space, not -- you know, an
8 increase might -- you know, if they underestimated or
9 sometimes it's done before the exact contractor is, you
10 know, selected. So he may say instead of a wire
11 pulling -- you know, a wire pulling site that's a
12 hundred by 200, I need it 200 by 300. So it could be a
13 minor change. There's a change in the work space, you
14 know, where the tower -- you know, again, the change in
15 the tower design based on field conditions, you know.

16 Q I'm trying to get a sense of -- of how often
17 this happens with transmission lines. So if you'd look
18 at the report at page 7, it talks about the need for
19 taking extra work space.

20 A Again --

21 MR. SINGER: Your Honor, if we're going to have
22 questions about this particular report, can we put it in
23 the record so that the record is clear?

24 MS. LEARY: Your Honor, this is a pretty

1 lengthy answer to an interrogatory. And I -- I was
2 reluctant to do that. I'm happy to do that, but I do
3 not have the copies at this very moment.

4 MR. BLOW: And, Your Honor, if -- if the report
5 is going to be coming in or if we're going to continue
6 to have questions on it, as I said before, we've made --
7 we have Mr. Macks available to provide testimony since
8 he was one of the authors of the report.

9 MS. LEARY: Well, the fact is that this is an
10 answer to an interrogatory that Mr. Malefyt prepared.

11 JUDGE STOCKHOLM: And so did Mr. Macks, I
12 believe the record shows.

13 MR. BLOW: Yes, Your Honor. The response was
14 prepared by Mr. de Waal Malefyt and Mr. Macks.

15 JUDGE STOCKHOLM: I'm going to -- yes. I think
16 we should have -- let me go back to the first issue.

17 Yes, I think we should have this document in
18 the record. I realize we don't have copies at this
19 point to mark it.

20 MS. LEARY: I will provide it after lunch if
21 that's acceptable to Your Honor.

22 JUDGE STOCKHOLM: That's perfectly fine.
23 That's perfectly fine.

24 MS. LEARY: Do you want me --

1 JUDGE STOCKHOLM: With regard to -- I'm sorry.
2 Go ahead.

3 MS. LEARY: Do you want me to identify this
4 with a number now or later?

5 JUDGE STOCKHOLM: No. We'll do a number when
6 we get the physical document in our hands.

7 With regard to this witness' testimony on this
8 report, I'm going to allow counsel to continue
9 questioning the witness on the stand. When this gets to
10 staff redirect, staff will be allowed to call Mr. Macks
11 for redirect examination together with Mr. Malefyt.

12 Is that acceptable to you, Mr. Blow?

13 MR. BLOW: Yes, Your Honor. We'll evaluate the
14 need before redirect if we can have a few minutes.

15 JUDGE STOCKHOLM: Absolutely. You will be
16 permitted. Go ahead.

17 MS. LEARY: Your Honor, this is just a
18 suggestion. I would be able to get this done quickly if
19 we took a break now. And I would request that we take a
20 break now.

21 JUDGE STOCKHOLM: It's just about right on
22 the -- just about right on the two-hour mark.

23 MS. LEARY: Can I -- can I ask Mr. Malefyt one
24 more question about this --

1 JUDGE STOCKHOLM: Yes. Go ahead.

2 MS. LEARY: -- before we break? Thank you.

3 BY MS. LEARY:

4 Q Mr. Malefyt, this report discusses in this
5 area, I believe between pages 6 and 9, the realistic
6 approach to right-of-way estimation, what a -- a gas
7 pipeline would need to accurately estimate.

8 Have you looked at the NYRI project from the
9 perspective of whether their right-of-way estimation is
10 realistic?

11 A The common -- it's -- the area that we're
12 talking about in the Macks' report is about insufficient
13 area for the construction of a pipeline which usually,
14 you know, includes a trench, and it's quite different
15 from an overhead electric line. But in the NYRI project
16 where we do trench for underground construction, I think
17 there is some application for it.

18 You know, I have some doubts, you know, if it's
19 constructed underground, say, in the -- or the Nine Mile
20 Swamp wetland whether there would be -- you know,
21 whether they could contain all of their construction
22 within the railroad right-of-way that's there now. It's
23 not their proposal, you know, to do that, but we do
24 recommend that it would have less visual impact if there

1 was underground construction through that wetland. But
2 it may have to be widened if that's what is certified.

3 Q The right-of-way would be widened?

4 A Because of construction for a trench. If you
5 have to, you know, open-dig the trench, you may have to
6 have an area for spoil. And if it's a very wet area,
7 you know, the trench may widen. You may have to
8 acquire -- you know, you may need more right-of-way.

9 That's what happens with pipeline construction
10 when they underestimate the work space that's needed to
11 dig the trench, have the construction equipment drive
12 alongside the trench, and then have spoil for the -- the
13 material that's dug out of the trench. That's what's
14 the subject really of the -- you know, listed there in
15 Dave Macks' paper.

16 Q Thank you.

17 MS. LEARY: Is that -- can we take a --

18 JUDGE PHILLIPS: Unfortunately he talked about
19 page 13. And I actually have a question about page 13,
20 so I'm going to jump in. It'll be quick, I believe.

21 As you indicated on page 13, I think you
22 discuss an Alternative D with a deviation. This is on
23 13, lines 1 through -- well, actually, the -- the
24 Alternative D with a deviation is discussed between

1 lines 1 and 16.

2 MR. de WAAL MALEFYT: Right.

3 JUDGE PHILLIPS: And then you also discuss
4 undergrounding in that same area.

5 MR. de WAAL MALEFYT: Right.

6 JUDGE PHILLIPS: Two questions.

7 Do you have a preference for undergrounding or
8 for the Alternative D with deviation, or are they
9 similar in your mind?

10 MR. de WAAL MALEFYT: I think our preference,
11 if they can do it underground through that area, that
12 would be our, you know, environmental preference to
13 have.

14 JUDGE PHILLIPS: Okay. And then were you
15 assuming open-cut trenching or horizontal directional
16 drilling for the underground?

17 MR. de WAAL MALEFYT: I was assuming open
18 trenching for that length, but it could be -- you know,
19 if -- if it's possible, it's better to do, you know,
20 horizontal directional drilling. They can do longer
21 distances that way. That would be the more, you know,
22 minimal environmental technique.

23 JUDGE PHILLIPS: Okay. Great. That's all I
24 have on that page.

1 MR. BLOW: Your Honor.

2 JUDGE STOCKHOLM: Just out of -- just out of
3 curiosity. How far can they go with one of those HDPs?

4 MR. de WAAL MALEFYT: Well, we've seen them
5 span the Grand River between Canada and the Grand
6 Island. I think over a mile, you know, is what we've
7 seen that --

8 JUDGE STOCKHOLM: Just curious. Thank you.
9 I'm sorry. Somebody else?

10 MR. BLOW: Your Honor.

11 JUDGE STOCKHOLM: Yes, Mr. Blow.

12 MR. BLOW: I guess my question just because
13 Ms. Leary brought it up, I want to make sure, is we had
14 a response to DEC-1 that had several parts to the
15 answer. I'm just asking whether -- whether you were
16 going to -- if I may ask, Your Honor, whether Ms. Leary
17 is going to provide a copy of the entire response to --
18 to DEC-1 or -- or simply the report that was provided as
19 a -- as a part of that response.

20 MS. LEARY: I had intended to provide a copy
21 for the record of the entire response.

22 MR. BLOW: That's fine. I was just -- I was
23 just wanting to make sure that -- that we were all on
24 the same page there. Thank you.

1 JUDGE STOCKHOLM: Okay. We are.

2 We're going to take about 20 minutes. We'll be
3 back at 10 of 12.

4 (A brief recess was taken.)

5 JUDGE STOCKHOLM: We've decided to go ahead
6 with DEC's cross-examination. And we will return to the
7 Attorney General. Ms. Wilkinson.

8 MS. WILKINSON: Okay. Thank you. If I could
9 just ask -- thank you. I can see Mr. de Waal Malefyt.

10 BY MS. WILKINSON:

11 Q Mr. de Waal Malefyt, did you conduct any site
12 visits along the route, and if so, where? What portions
13 of the route did you see?

14 A Well, we did site visits all along the route.

15 Q Okay. I mean, so did you take a railcar
16 through --

17 A No. We -- we drove the vehicle and stopped at
18 different locations. That's how we did it. I didn't
19 fly it. And I didn't go up in a hot-air balloon.

20 Q That's a good suggestion for a site visit.

21 A And I didn't take a -- I didn't take a train.

22 Q So in the area of the Nine Mile Swamp then, you
23 did not -- your observations of the Nine Mile Swamp were
24 limited to what you could see through a vehicle and

1 getting out --

2 A No. In Nine Mile Swamp area, I walked down the
3 railroad.

4 Q You walked down the railroad.

5 A Right.

6 Q Okay.

7 A And I walked into the swamp.

8 Q Okay. Now, you indicated, I believe, that in
9 your testimony, and I apologize for not having the exact
10 citation, but there were -- you observed tall trees in
11 the wetland property in the area of the Nine Mile Swamp?

12 A That's correct.

13 Q And would you say those trees were greater than
14 24 feet in height?

15 A Oh, yes. Some are -- there are a number of
16 White Pines that are, you know, 80 -- probably 80-feet
17 tall in that area.

18 Q And those trees that you observed, would they
19 be within the limits of the vegetation clearing for the
20 NYRI right-of-way?

21 A They -- they would have to be cleared for
22 the -- the different zones that NYRI's proposed, yes.

23 Q And do you have any idea or do you see any
24 indication in NYRI's application on the extent of that

1 clearing of tall trees that will have to occur in the
2 swamp area?

3 A There's representative diagrams of the zones
4 and the, you know, the heights and the distances that
5 they go out for the -- that area of the swamp, yes.

6 Q And in terms of the density of the clearing?

7 A It's not quantified. It's just a diagram,
8 again, showing the -- the width of what's proposed along
9 the -- the northern railroad area there in the swamp.

10 Q Is there an indication of the alteration of
11 canopy that will occur once those tall trees are removed
12 for the NYRI right-of-way?

13 A There -- again, there's the details, you know,
14 of -- of where it will occur and when, you know, it
15 would be put off until the EM&CP. But the diagram gives
16 us an idea of generally what amount of clearing that
17 will, you know, have to be done in the swamp, you know,
18 based on their clearance requirements, you know.

19 Q Now, Mr. de Waal Malefyt, your expectation is,
20 though, that with respect to those tall trees, they
21 would not be allowed to revegetate?

22 A Right. In the close to the -- just beyond --
23 you know, the right-of-way is 66 feet right now. And
24 pretty much the railroad has maintained that 66-foot

1 clearance. And so they would need to clear, you know,
2 some 12 or 17 feet beyond that. And then they have to
3 take danger trees beyond that. So that would be a
4 site-specific determination about those danger trees.
5 So there will be clearing in the -- in the wetland.

6 Q If I could ask you to turn -- and I think it's
7 Exhibit 124. It was Mr. DePriest's ecological
8 assessment of the Nine Mile Swamp.

9 A If you'd give me a minute, I think I have it in
10 the folder over here.

11 Q Sure.

12 A No, I didn't -- don't have it in this folder.
13 I thought I had some of them, but maybe an example
14 wasn't given out.

15 MS. WILKINSON: Your Honor, may I hand
16 Mr. de Waal Malefyt a copy of that assessment, which I
17 think is Exhibit 124?

18 JUDGE STOCKHOLM: Yes.

19 MS. WILKINSON: Thank you.

20 A I have it.

21 Q Okay. Thank you. Mr. de Waal Malefyt, would
22 you generally agree with Mr. DePriest's assessment of
23 the resources in the swamp?

24 A Yes, I've -- I've read it and I don't have any

1 objection, you know, to the way he's characterized it or
2 the resources he states are in it.

3 Q And on page 3 at the top, Mr. DePriest observed
4 that, based on his observations, which I believe the
5 document indicates were developed during a site visit,
6 it appeared to him that the railroad did not
7 consistently maintain a 66-foot wide right-of-way free
8 of woody vegetation.

9 Did you observe areas along the right-of-way
10 that you would say were not cleared to 66 feet?

11 A My -- my assessment was that they pretty
12 much -- you know, and I measured some of these, that
13 they pretty much have maintained a 30-you-know-3-foot
14 distance on either side of the center line of the
15 tracks, you know, based on my observations. You know,
16 you may not have trees, you know, out to 40 feet just
17 because they haven't grown there, but if you look at
18 where they've cut trees in the past, it's pretty much
19 they've maintained an entire 60-foot-wide width.

20 It might be on some curves that they -- you
21 know, maybe they didn't go as far, you know, into the
22 curve on a railroad, but my observation is they pretty
23 much maintained 33 feet on the center line of the
24 tracks.

1 Q Well, when you say that, are you referring to
2 trees -- I mean, Mr. DePriest refers to woody
3 vegetation. Would you agree that there are some areas
4 along the track where the railroad has not cleared woody
5 vegetation to the limits of 66 feet?

6 A They do periodic maintenance, and so,
7 obviously, there's wood -- you know, a lot of shrubs
8 that are starting to grow in some areas, you know, since
9 the last round of maintenance. But when I was there,
10 there was -- after a storm and there was a number of
11 trees had fallen down, and they had actually come back
12 and cleared them.

13 Q Does the photo -- does photo 2, what
14 Mr. DePriest included, does that -- especially on the
15 right, does that look like it was maintained to --

16 A That's hard to -- it's very dark on the photo I
17 have. I can't really discern the vegetation, but it
18 looks similar. But I think if you actually measured it,
19 it probably would be 33 feet, you know, from the center.

20 Q Now, Mr. DePriest also notes in this report
21 that there are areas in the Nine Mile Swamp where he
22 believes the mapping does not show the extent of
23 wetlands, and that a delineation would establish that
24 the wetland area is greater than mapped. Would you

1 agree in the Nine Mile Swamp area that there are
2 probably areas that are not currently shown on DEC's
3 mapped wetlands?

4 A Well, the mapped wetlands, you know, that DEC
5 shows, I don't -- I mean, if we're talking about
6 exhibits in this case, I haven't seen the actual DEC
7 official map. I think the maps that -- the overlay that
8 the applicant is showing in Exhibits 37 and 33 aren't,
9 you know, entirely accurate. That's because of this GIS
10 and trying to match them up with the aerial photography.
11 But I would think that we, again, need to have an
12 on-site assessment to determine exactly where the
13 wetland edges are in this area.

14 Q And is it possible once that on-site assessment
15 is done, that we would find wetland areas within the
16 railroad right-of-way?

17 A I think -- yeah. I know of some areas where
18 you have the streams coming down on the easterly side,
19 and has tag alder, and has the water. I'm sure it's got
20 the, you know, the hydro -- you know, the hydrology and
21 the hydrophytic plants and the hydric soils, and that
22 probably would be determined to be, you know, regulatory
23 wetlands.

24 So I think once an on-site assessment is done,

1 you'll find more wetlands than what is currently
2 depicted.

3 JUDGE STOCKHOLM: Have you ever seen the
4 opposite happen, Mr. de Waal Malefyt, that is to say
5 where wetlands are shown on the maps that, in fact, are
6 not wetlands?

7 MR. de WAAL MALEFYT: Especially where fill has
8 occurred. If someone has piled in fill into a regulated
9 wetland, that kind of ceases to become a wetland very
10 quickly.

11 Q Mr. de Waal Malefyt, have you, in your
12 experience at DPS, seen a project such as NYRI, which
13 is -- which is proposed to be constructed utilizing the
14 railroad for construction and maintenance activities?

15 A I have never seen actual construction by the,
16 you know, the railroad. There are projects where, you
17 know, they've been proposed along the railroads, but I
18 haven't actually seen construction right along -- I
19 mean, myself, I mean, the -- I haven't seen it, but the
20 Rochester case, you know, has a railroad involved in it.

21 I haven't seen it, but the Commission has
22 certified transmission lines on railroad property or
23 former property like in the Rochester case.

24 Q And have you seen any examples of where the

1 proposal included using railcars to bring equipment in
2 and construct from railcars rather than using access
3 roads?

4 A I've only seen I guess some of the equipment
5 brought in by rail, something like -- but not used for
6 construction along the proposed -- you know, or
7 certified facility. I haven't seen actual railroad
8 construction.

9 Q So NYRI's representation in the application
10 regarding, for example, how it would install monopoles,
11 because I believe that's what would be used in the swamp
12 area, you haven't seen any other projects where they
13 were using cars to haul in equipment to install
14 monopoles?

15 A I haven't, no.

16 Q Have you seen examples where equipment to
17 maintain a right-of-way has been brought in vis-a-vis a
18 railroad car?

19 A Well, I've -- I've seen the railroad use their
20 equipment on railroad cars to maintain the right-of-way.
21 I mean, that's different, you know, but, again, the
22 similar purpose to -- I just assume the hydraulics would
23 extend further, you know, because the transmission line
24 requires a further clearing than the railroad does.

1 Q Right. And are you aware or do you know
2 whether that is the case, that the hydraulics could
3 extend further to facilitate --

4 A I don't know firsthand. I can imagine they've
5 seen hydraulics, you know, on any piece of equipment
6 that they can latch, I guess is the word, to a railroad
7 car. It's possible, but I've never seen it done.

8 Q Now, Mr. de Waal Malefyt, you're familiar with
9 the department's weighing standards in assessing permit
10 applications for Article 24 permits, wetland permits?

11 A Are you talking about DEC's?

12 Q Yes.

13 A Yes.

14 Q And you're familiar with the basic two-tiered
15 approach for decision-making under those standards?

16 A Yes.

17 Q And you're familiar with the first tier which
18 requires avoidance and minimization of impacts?

19 A That's correct.

20 Q And that the proposed activity has to be the
21 only practicable alternative that could accomplish the
22 applicant's objectives and have no practicable
23 alternative on a site that is not a --

24 I'll just quote from -- we'll refer to

1 Mr. Jacobson's testimony, lines 8 through 13 on page 15.

2 A I don't have that in front of me, but -- I
3 don't know if it helps, but I quote some of the
4 regulation on page 12 of my testimony about Class 1
5 wetlands.

6 Q Correct. And I guess my question is -- is, do
7 you have an opinion whether NYRI's application
8 sufficiently avoids and minimizes impacts inconsistent
9 with the first-tiered weighing standard as expressed in
10 Mr. Jacobson's testimony, lines 8 through 13 on page 15?

11 A I agree. I don't think NYRI's demonstrated
12 that -- that approach. I think that, you know, there is
13 an alternative, you know, to going through the swamp.
14 That's, you know, an alternative route. And I don't
15 think they've demonstrated that they need to stay on the
16 proposed route, you know, through Nine Mile Swamp.

17 Q And, Mr. de Waal Malefyt, with respect to the
18 second tier of conditions on page 16.

19 A I see that.

20 Q And we can take it one by one because the swamp
21 includes Class 1 and Class 2 wetlands, but do you have
22 an opinion whether the proposed activity satisfies the
23 compelling economic or social need that clearly and
24 substantially outweighs the loss of or detriment to the

1 wetland benefits?

2 A Well, Staff's position is that this project is
3 not needed. So I would say, you know, I agree, you
4 know, that it hasn't demonstrated, but that -- that it's
5 a compelling or economic or social need, but that's a
6 determination that needs to be determined by the
7 Commission.

8 Q But from your vantage point as a project
9 manager, you would say the answer would be?

10 A No, they haven't demonstrated a compelling
11 economic or social need to go into the swamp as
12 proposed.

13 Q And the same would apply to the Class 2
14 standards?

15 A Right.

16 Q Mr. de Waal Malefyt, I want to turn to Exhibit
17 4, Section 4.12 dealing with surface water bodies.

18 A What was that section?

19 Q 4.12. I think it beginning on page -- why
20 don't you turn to page 109.

21 A I'm there.

22 Q Okay. NYRI indicates here that exact
23 construction locations will be developed during the
24 EM&CP, and that plans to mitigate potential impacts

1 would be developed in the EM&CP.

2 Would you agree that in order to know what
3 plans -- what mitigation plans are necessary, you have
4 to know the nature of the probable environmental impact?

5 A Well, yeah, you do need to know that
6 information. And I think, you know, the company hasn't
7 gone, as I've testified, far enough. They could have
8 listed surface water bodies or streams and have given us
9 some additional assessment of what the impacts would be
10 to a group of streams, similar classification or similar
11 characteristics based on the data that they have. And
12 that wasn't forthcoming.

13 Q And in your opinion, is it clear, for example,
14 what the extent of vegetation clearing will be along
15 protected trout streams?

16 A No, we don't know the details of that. You
17 know, they do identify that there are sensitive areas,
18 and the details will be in the EM&CP, but we haven't
19 seen an actual assessment of a group of streams.

20 Q And do we know from the application what the
21 vegetation type is along the streams that may be removed
22 for right-of-way clearing, or disturbed during
23 construction?

24 A Not, you know, again, the details, but

1 generally with a description of the vegetation, you
2 know, types that they go through, you know, about
3 forest, wetlands that are in the general, you know,
4 corridor area.

5 Q Those descriptions are not attached to a
6 particular water body, are they?

7 A Right.

8 Q So in a particular case, you're not clear on
9 the particular resource that may be impacted?

10 A That's correct.

11 Q And would you also agree with trout streams
12 that a significant issue is temperature?

13 A Well, again, I know the literature, and I kind
14 of differ with -- again, with some of the assertions.
15 The studies that I have seen, reviewed, and we've been
16 doing this for quite a few years, is that there really
17 is no difference in the temperature of the water from
18 clearing transmission lines or pipelines across a trout
19 stream. There's just not enough distance for it to have
20 a significant impact relative to the temperatures that
21 trouts need.

22 Q Okay. But my question is, in terms of
23 assessing an application, you would agree that in terms
24 of the trout survival and propagation, the temperature

1 of the stream is important to the trout?

2 A In general, but not -- relative to a power line
3 project, unless for some reason it's being cleared of --
4 over a long length of stream that somehow the
5 transmission line is following the stream, which we
6 don't have in this case.

7 Q Okay. Can we turn to Appendix B?

8 MR. BLOW: Is that Exhibit 37?

9 MS. WILKINSON: Yes.

10 JUDGE STOCKHOLM: I think so, yes.

11 MS. WILKINSON: Yes. Exhibit 37.

12 MR. SINGER: Just so the record is clear,
13 Appendix B is Exhibit 17. Thirty-seven is the Appendix
14 B maps that were provided in response to the
15 Commission's deficiency layer.

16 MS. WILKINSON: And I apologize. I'm referring
17 to the maps. I am referring to Exhibit 37.

18 A Do you have a figure?

19 Q The other figures. Yes. Starting on page 30,
20 or Figure 30.

21 A Okay. I have that.

22 Q Okay. And the stream in that -- in the Figure
23 30 that is being crossed by the NYRI project is -- and
24 there's different ways to pronounce it, but the Sauquoit

1 Creek?

2 A Yeah, I see that.

3 Q And it's being crossed here, it looks like at
4 least -- at least once, but it's also being paralleled.
5 Would you agree, Mr. de Waal Malefyt, further is north
6 of the crossing?

7 A Yes. I see it's paralleling.

8 Q And going to Figure Number 30. And in the
9 vicinity of the paralleling, there's wetland C-41; is
10 that correct?

11 A That's correct.

12 Q And continuing on to Figure 31.

13 A Okay. I'm there on 31.

14 Q And we see another crossing and some more
15 paralleling?

16 A That's right.

17 Q And Figure 32?

18 A That's correct.

19 Q More of the same?

20 A Yes.

21 Q Figure 33, maybe a little bit less. Actually,
22 that's a big creek.

23 In this area of the Sauquoit Creek where, for a
24 number of photographs, these figures indicate crossings

1 and/or paralleling. Do you think there's a particular
2 concern to do some analysis to make sure -- or ensure
3 that the disturbances that are going to occur from the
4 project would not impact the stream in such a way as to
5 alter the temperatures?

6 A My assessment, I would say no because the
7 stream is open to -- it goes through a lot of
8 agricultural areas, fields that are open, ditches
9 alongside the railroad. It's -- you know, a lot of that
10 is, again, not due to it being on the railroad
11 right-of-way crossing underneath it.

12 So I think the temperature regime is going to
13 be modified, you know, mostly by, you know, the natural
14 areas that it goes through. And the construction and
15 removal of vegetation along the railroads is going to
16 have minimal impact, but I think it ought to be
17 minimized. You know, that's not to belittle it, but
18 wherever possible, the stream, you know, vegetation
19 should be, you know, cleared to the minimal possible.

20 And I would point out, you know, again,
21 depending on your look at this, the blue line does --
22 may represent the stream, but it's not the actual
23 stream, you know, that you can see if you look at the
24 aerial photograph.

1 Q Mr. de Waal Malefyt, on table -- referring to
2 Table 4.13.3.1-1.

3 A 4.13 --

4 Q .3.1-1.

5 A Okay. I'm there.

6 Q And with reference to the Station Numbers 22 to
7 25 in the acreage of forest clearing --

8 JUDGE STOCKHOLM: Counselor, I apologize. I
9 got lost. Would you give me that number again?

10 MS. WILKINSON: Sure. It's Table 4.13.3.1-1.
11 It's the potential wetland forest clearing on proposed
12 route transmission corridor. And even if we look --
13 let's take, for example --

14 JUDGE STOCKHOLM: Okay. I have it now. Thank
15 you.

16 Q Okay. Station Number 23 to 24, it was
17 indicated in the table there would be, you know,
18 approximately more than 2 acres of forest -- forest or
19 wetland clearing. Would you be concerned with this
20 acreage of clearing occurring along a trout stream?

21 A If it was, you know, all in one spot, maybe,
22 but the way I understand it, no. This is over a station
23 number, so it's over at least a mile distance.

24 Q So the two --

1 A But I wouldn't be concerned with it. I don't
2 think that amount of clearing would have an impact on
3 the temperature regime of the stream.

4 Q And that's based on?

5 A That's based on research that's been done over
6 the years. It's published. It's been in the
7 right-of-way, you know, supposings that we've gone to.
8 There's been research that we've asked that the
9 utilities do, especially NYSEG. So I would say, you
10 know, based on our research that, you know, has been
11 done over the years, that wouldn't be a major concern.

12 Q Okay. I want to turn to page 10 of your
13 rebuttal testimony.

14 A Okay.

15 Q And I guess page 10 and page 11 where it's your
16 testimony that the issuance to NYRI for a SPDES
17 storm-water permit, you concur that that is going to be
18 handled by the Department of Environmental Conservation?

19 A No.

20 Q Why don't we refer to your testimony at lines 4
21 through 9 on page 11.

22 A Right. I see that.

23 Q Okay. So do you -- is it your testimony that
24 DEC will be issuing the storm-water permit to NYRI?

1 A No, I'm not recommending that, you know, they
2 issue the permit. If it's determined, you know, that,
3 you know, the Commission doesn't have jurisdiction, I
4 can't negate that, but I think the storm-water plan
5 should be part of the EM&CP and, you know, it should be
6 something that should satisfy both agencies.

7 Q I understand, but my question is -- is -- and
8 maybe I don't understand your testimony, but it appears
9 here to say that there's recognition that DEC has the
10 jurisdiction to issue SPDES permits?

11 A Right. Under the federal program, it's my
12 understanding that DEC has, you know, jurisdiction for
13 SPDES permits.

14 Q Right. So if a permit is required for the NYRI
15 project, DEC would be issuing that permit.

16 A Right. If that's -- you know, if that's
17 determined.

18 Q Right. And I think DEC has testimony to that
19 effect. If we can just proceed with the assumption that
20 a permit would be required and that DEC would be issuing
21 the permit, would you agree that DEC's rules and
22 regulations would apply to the issuance of that permit?

23 A Yeah. The Commission has to abide by all the
24 laws, rules and regulations, but, again, to the extent

1 that they could be interpreted especially with respect
2 to the storm-water plan, you know, if that could be
3 approved by the Commission and approved -- you know,
4 reviewed by DEC in conjunction with the EM&CP, I would
5 rather see that so that there's one coordination under
6 one agency.

7 Q So if I understand what you're saying, you're
8 saying that with respect to the federal water permit,
9 that DEC would be relying on the Commission's review of
10 the SWPPP to make its regulatory determination?

11 A In conjunction with DEC, right.

12 Q But that DEC -- is it your testimony that the
13 SWPPP in the first instance should not be submitted to
14 DEC?

15 A For approval, no. It should -- the storm-water
16 plan -- you know, my testimony is that the storm-water
17 plan should be part of the EM&CP that's reviewed by all
18 the agencies so that we have one coordinated approach,
19 okay, that includes all soil erosion, sediment control,
20 and that it's satisfactory then, you know, in part to
21 DEC for their regulatory needs.

22 JUDGE STOCKHOLM: And approved by whom?

23 MR. de WAAL MALEFYT: The plan -- those plans
24 should be approved by the Commission.

1 JUDGE STOCKHOLM: Thank you.

2 Q Are you familiar with the -- and we'll start
3 with the general SPDES storm-water permit.

4 A I mean, I'm familiar with it, you know,
5 especially with the -- nationwide, you know, with
6 smaller projects. I mean, I reviewed the documents that
7 are on the web site from DEC. I'm just generally
8 familiar with it. You know, I don't -- I review them.
9 I don't actually, you know, make them up. I'm not in a
10 regulatory capacity here.

11 Q Do you understand that as a component of that
12 permit, it's a requirement to prepare and submit a, and
13 we'll call it a SWPPP, to DEC? Well, actually to
14 prepare a SWPPP?

15 A Yes. Yes. Right. That's part of -- of the
16 regulations, right.

17 Q And that that plan has to conform to DEC's
18 design standards, technical design standards?

19 A Well, that's if it -- I guess if it was going
20 to be approved by DEC. But if it was a storm-water
21 plan, you know, that's part of their Article VII
22 submission such that, you know, in the EM&CP, I would
23 like to see it conform to the needs of, you know, the
24 entire right-of-way as well as DEC's, you know, needs.

1 We've had storm-water plans designed that department DEC
2 has signed off on, hasn't objected to, put it that way,
3 in the EM&CP. Storm-water plans, you know, can be
4 specifically designed for transmission projects.

5 Q Mr. de Waal Malefyt, is it your testimony that
6 DEC, in issuing a storm-water permit, would be able to
7 rely on another agency's review and approval of a
8 document that's essential for the permit?

9 A I'm not testifying what this -- you know, what
10 DEC needs to do or rely on.

11 Q Okay.

12 A Okay. I'm just saying that the legislative
13 intent was that, you know, we have one-stop shopping
14 here, we have one certificate issued where all the
15 issues are addressed by the different state agencies,
16 municipalities and parties. And we should be able to
17 work together to get, you know, whatever needs, you
18 know, to be done to, you know, minimize the impact on
19 the environment and satisfy the regulatory requirements
20 of the different agencies.

21 Q And DEC would concur with that. But with
22 respect to the SPDES permit, I think this is a similar
23 situation to the Article 10 projects where DEC issued
24 SPDES permits to the electric generating facilities,

1 albeit a different one than is implicated here, but
2 nonetheless, a SPDES permit; is that correct?

3 A It's similar, but there, the SPDES permit, you
4 know, was issued, you know, before the siting board made
5 its, you know, its certification. And this is going to
6 be difficult in this case, you know, because, you know,
7 I've already heard from the Department of Environmental
8 Conservation witnesses that they don't have the
9 information to, you know, issue a permit. So I don't
10 see how that could work until we have the information
11 submitted in the EM&CP, which is post construction --
12 post certification. Excuse me.

13 Q Right. The process may be perhaps a different
14 process, but in terms of DEC issuing a permit, if DEC
15 has to issue a permit, you agree that DEC has to make
16 its own regulatory determinations --

17 A That's up to DEC.

18 Q -- on the application?

19 A I'm not -- I'm not --

20 Q So if -- if DEC has a requirement in its permit
21 for -- with respect to, for example, inspections, those
22 requirements would have to be followed and enforced by
23 DEC; is that correct?

24 A You're saying that as part of the federal

1 mandate that DEC has to inspect. I guess then they'll
2 have to inspect and do whatever they have to do.

3 Q Well, as part of the approved --

4 A But it should be -- you know, again, the
5 inspection process that I saw in the testimony of
6 different DEC witnesses, you know, to me, when they have
7 stop-work authority or direct work to be done, is going
8 to be a conflict with our stop-work authority and the
9 applicant. I think that just sets up a bigger problem.

10 Q But I mean, let me just -- maybe we can wrap
11 this up here and take a break. I mean, as far as you
12 know, there's no -- EPA has not recognized the Public
13 Service Commission as having the authority to issue a
14 SPDES permit; is that correct?

15 A That's correct.

16 MS. WILKINSON: Your Honor, this would be a
17 good breaking point.

18 JUDGE STOCKHOLM: How much more do you have?

19 MS. WILKINSON: About 15 minutes.

20 JUDGE STOCKHOLM: If you've only got 15
21 minutes, Counselor, why don't you proceed.

22 MS. WILKINSON: Okay.

23 Q Mr. de Waal Malefyt, I want to turn to your
24 proposed certificate conditions, and I believe your

1 EM&CP conditions.

2 A Okay.

3 Q And I just want to ask you, first of all, a
4 general question. With the scope and extent of work
5 that's contemplated for the EM&CP, you know, as outlined
6 in NYRI's application in Exhibit 4, can you tell me what
7 the process is going to be with respect to review and
8 approval of that work to ensure the minimization of
9 impacts?

10 A Well --

11 JUDGE STOCKHOLM: For all of the activities in
12 Exhibit 4?

13 MS. WILKINSON: Well, I can take example by
14 example.

15 Q In general, for example -- I'll take an
16 example. Okay. Staying with Section 4.12.3 in the
17 application, there's indication that the EM&CP will
18 include construction methodologies at particular site
19 locations, mitigation -- detailed mitigation techniques,
20 site-specific plans to mitigate the impacts of this
21 project on water bodies.

22 At what point in this process do those plans
23 and impacts get reviewed before final determinations are
24 made on how NYRI should proceed with its project? How

1 is that indicated in your exhibits? I'm just trying to
2 understand the process here.

3 A Well, I don't -- I think the applicant
4 identifies the process they've done. So they said the
5 detailed studies that would be needed to put together
6 their EM&CP and those details they will do before they
7 submit the EM&CP to the Commission for approval and to
8 the different parties for their review. Okay. So to
9 that extent, we, you know, outlined the conditions and
10 the general guidelines for the EM&CP and how the
11 applicant, you know, should proceed when it puts it
12 together and what topics we want covered.

13 So I think we need to take all of that
14 together. We've got to take their, you know,
15 obligations that they've stated in their application
16 together with our guidelines, or any other, you know,
17 recommendations, you know, from other witnesses that
18 would minimize the environmental impacts or studies that
19 need to be done, and make sure that they're done prior
20 to the applicant submitting the detailed final drawings
21 and mitigation measures.

22 Q Okay. But at what point -- and the process I'm
23 thinking of is the process for statutory parties to
24 review that detailed work.

1 A Generally it's, you know, a more simple case is
2 when they submit the EM&CP to the Commission, a certain
3 period of time is designated for the parties to comment
4 and submit their comments to the Commission for review.
5 And then if it gets -- if it's needed to be refined, the
6 applicant will take those comments, refine, again, the
7 second step the submitted EM&CP. And usually we try and
8 work it out so that it's satisfactory to everybody.

9 And then staff goes to the Commission and
10 recommends approval of it, and the Commission then
11 usually approves the final drawings. Then they're
12 submitted, you know, for construction.

13 JUDGE STOCKHOLM: What happens,
14 Mr. de Waal Malefyt, if after the circulation of the
15 EM&CP there's an issue, environmental issue of some
16 kind, where staff believes "X" should be done and
17 perhaps some other state agency believes "Y" should be
18 done, and the staff and the other agency cannot reach an
19 agreement? What happens then with regard to process?

20 MR. de WAAL MALEFYT: Generally an issue like
21 that is brought to the Commission's attention and the
22 Commission makes the final decision.

23 Q So the --

24 JUDGE STOCKHOLM: And the parties have an

1 opportunity to explain their position to the Commission
2 before that happens?

3 MR. de WAAL MALEFYT: Generally the different
4 positions are stated in, you know, a memorandum to the
5 Commission explaining what the parties' positions are,
6 and then it's ultimately decided by the Commission.

7 JUDGE STOCKHOLM: Thank you.

8 Q So is that the process -- because it seems to
9 me that that's a truncated process when information is
10 coming into the record that NYRI says it's going to
11 establish or -- why don't we take another example.

12 JUDGE STOCKHOLM: Counselor, I'm not -- not
13 sure that I understand --

14 MS. WILKINSON: My question?

15 JUDGE STOCKHOLM: Well, your concern is what I
16 don't understand, and specifically with regard to the
17 word you just used as "truncated".

18 MS. WILKINSON: Okay. Well, let me -- let me
19 explain. And I think in this application, there are
20 numerous examples where information is going to be
21 developed during a detailed design phase.

22 JUDGE STOCKHOLM: Correct.

23 MS. WILKINSON: And during that phase is when
24 NYRI is going to be developing mitigation plans and

1 measures, and I think we've seen it in several places in
2 the application that aren't as necessary, measures as
3 necessary to avoid impacts, or minimize impacts.

4 JUDGE STOCKHOLM: Understood.

5 MS. WILKINSON: So all those measures which are
6 being developed to minimize impacts, my question is,
7 what process exists for parties to review that
8 information and make that determination for themselves
9 whether impacts have been avoided and minimized or
10 additional measures need to be taken in order to
11 minimize and avoid impacts?

12 I'm trying to figure out what the process is
13 going to be, because it seems as if the EM&CP is
14 submitted. There's -- you know, our experience has been
15 a brief comment period. It goes to the Commission, but
16 there's not that intermediate step.

17 JUDGE STOCKHOLM: What intermediate step?

18 MS. WILKINSON: Where we have an opportunity
19 before an EM&CP is finalized to get the results of the
20 studies and the detailed surveys and -- that are going
21 to form the basis for NYRI drafting the EM&CP; for
22 example, when they do -- if they do field work for
23 threatened and endangered species, is the first time
24 we're going to see that field work is when we see an

1 EM&CP?

2 JUDGE STOCKHOLM: Let's assume arguendo. I
3 still don't understand your -- truncated usually means
4 something is cut short. And -- and I don't understand
5 what your concern is about cut short. The Staff
6 witnesses -- and I'm going to just get myself in trouble
7 I'm sure by saying this, but the Staff witnesses have
8 indicated that -- as a matter of fact, this witness
9 indicated that the information filed by this applicant
10 is about a three on a 10, where what you need to finally
11 construct the line, put the poles in the ground, et
12 cetera, et cetera, is a 10 level of data.

13 I would assume that the EM&CP approval process
14 would be longer in a case like this where the
15 information that's submitted up front may be less than
16 maybe an average application, but I don't understand
17 the -- the truncated piece. All of the parties in the
18 EM&CP process have the right to take their disputes to
19 the Commission.

20 MS. WILKINSON: And, Your Honor, with all due
21 respect, I understand that, but, you know, as we said,
22 it's three and not a 10. It's the seven that we're
23 going to have to review. And if the process is -- to
24 review that is going to be a 30-day comment period,

1 that's --

2 JUDGE STOCKHOLM: Now I understand your
3 concern.

4 MR. de WAAL MALEFYT: Yeah. I think I can help
5 you on that, too. I mean, I think the applicant, like
6 with threatening an endangered species, has said they'll
7 go out, you know, consult with the DEC, do the necessary
8 studies once they get access, and, you know, have the
9 agency review the results of that as it pertains to
10 avoidance or mitigation of the route. And I think DEC
11 can express that and make that a condition of the
12 certificate requirements for the EM&CP.

13 Then, you know, once the applicant -- you know,
14 the DEC and the applicant and Staff are satisfied, they
15 can probably submit it as part of the EM&CP formally to
16 the Commission for its approval, but a lot of the issues
17 will have been worked out, you know, ahead of time. I
18 think they've indicated they're willing to do that. And
19 I think that's within your rights to, you know,
20 recommend that.

21 BY MS. WILKINSON:

22 Q So as it stands right now, because I -- I think
23 our concern is the specificity with which that
24 consultation process is indicated in the Exhibits 4 and

1 5 of your testimony.

2 A Right. My exhibits are the general -- there --
3 you know, they have been worked out with DEC, for
4 example. You know, these are my exhibits. We haven't,
5 you know, talked about what your requirements would be.
6 We have other witnesses, you know, from Staff who have
7 testified, and they have some conditions they want to
8 see put in on their specific, you know, issues and
9 topics.

10 So I think this is a dynamic. You know, I
11 would like to, you know, use the word as kind of a fluid
12 and dynamic document. But to the extent, you know, that
13 DEC has concerns of, you know, stages where they want to
14 review information, I think they should express it.

15 JUDGE STOCKHOLM: Including the amount of time
16 they need to review it. It strikes me -- I should -- I
17 should add just for the record, and this doesn't come up
18 very often, but it is a possibility with regard to
19 process: Assuming the Commission issues a certificate
20 and we go into an EM&CP process, it is possible to go
21 back to hearings on evidentiary -- or on factual matters
22 if, in fact, there are factual disputes that need to be
23 resolved before the EM&CP is approved. I'm not aware of
24 that happening more than once or twice in the last 30

1 years, but it is a possibility in terms of process.

2 MS. WILKINSON: Thank you, Your Honor.

3 Your Honor, if I could just have one minute.

4 JUDGE STOCKHOLM: Sure.

5 BY MS. WILKINSON:

6 Q Mr. de Waal Malefyt, I'll refer you to Exhibit
7 4 and Proposed Condition 52.

8 A I see that. Preconstruction meetings?

9 Q Right. Do you think that the DEC should also
10 be included in that condition as DOT has been included
11 for -- with respect to the preconstruction meetings?

12 A If they so desire. You know, I don't see --

13 Q I think the answer is yes.

14 A It depends on what role you want to play.

15 Q I think the answer would be -- to that would be
16 yes.

17 JUDGE STOCKHOLM: What question -- are you
18 asking -- answering, Counsel?

19 MS. WILKINSON: No. I'm asking
20 Mr. de Waal Malefyt, if DEC -- this is environmental
21 supervision preconstruction meetings.

22 JUDGE STOCKHOLM: Yes.

23 MS. WILKINSON: And I'm asking him if he thinks
24 DEC should also be included among the invitees of those

1 meetings.

2 JUDGE STOCKHOLM: Are you willing to invite
3 DEC, Mr. de Waal Malefyt?

4 MR. de WAAL MALEFYT: I'm willing, you know, if
5 the applicant is.

6 JUDGE STOCKHOLM: Is this language the
7 applicant has agreed to --

8 MR. de WAAL MALEFYT: Yes.

9 JUDGE STOCKHOLM: -- to your knowledge? Yes,
10 it is?

11 MR. de WAAL MALEFYT: Well --

12 JUDGE STOCKHOLM: Will you take -- will you
13 take counsel's cross-examination as an indication that
14 DEC may not agree with the exact wording of this
15 provision?

16 MR. de WAAL MALEFYT: Yes.

17 JUDGE STOCKHOLM: Do you have any -- and I
18 think you said you had no objection to including DEC; is
19 that correct?

20 MR. de WAAL MALEFYT: No, I don't.

21 MS. WILKINSON: Thank you.

22 JUDGE PHILLIPS: I also just want to check.
23 You keep saying Exhibit 4. I'm assuming you mean 178.

24 MS. WILKINSON: I apologize. Yeah.

1 JUDGE STOCKHOLM: Malefyt 4.

2 MS. WILKINSON: Malefyt 4. I apologize.

3 MR. de WAAL MALEFYT: I think the -- well, just
4 for clarification, the applicant, you know, their
5 proposed, you know, condition just had, you know -- you
6 know, it just had DOT and any other state officials, you
7 know, as it says.

8 MS. WILKINSON: Okay. Thank you,
9 Mr. de Waal Malefyt.

10 Your Honor, if I could direct a question to
11 you. It appears that Mr. de Waal Malefyt has proposed
12 certificate conditions and general guidelines for the
13 EM&CP. Other DPS witnesses have also made proposals,
14 and there have also been representations made on the
15 record with respect to certain items NYRI would -- would
16 do in the -- in the application.

17 JUDGE STOCKHOLM: Yes. Correct.

18 MS. WILKINSON: So I guess my question is --
19 is, would it -- does it make sense to have one document
20 with all those proposals for everyone to comment on so
21 the Commission understands what it is we're all
22 proposing and -- or not proposing?

23 JUDGE STOCKHOLM: Yes, of course, which is not
24 the answer that was running through my head, but yes, of

1 course, that would be better.

2 One of the things that -- that we have on a
3 continuing list up here to talk to the parties about is
4 briefs. And with regard to that, one of the aspects of
5 briefing -- well, one of the primary aspects of briefing
6 is page limitations and what can be included in
7 appendices, because I'm going to allow appendices in
8 appropriate circumstances, but they can also be abused.
9 And I don't intend to allow the opportunity to be
10 abused.

11 However, it seems to me that maybe the best
12 way -- and I'll -- I'll listen to other suggestions, but
13 maybe the best way is to ask each party in an appendix
14 to their brief, initial brief, to set forth terms or
15 conditions of ordering clauses that they believe should
16 be included assuming the Commission were to certify the
17 project.

18 Does anybody have any immediate reaction to
19 that?

20 MS. LEARY: I do.

21 JUDGE STOCKHOLM: Yes, ma'am.

22 MS. LEARY: I think Mr. de Waal Malefyt's
23 testimony, if anything, today was a clear indication
24 of -- well, I'll sort of summarize it by saying his

1 ranking at a three level of information that is
2 contained in this application. If we are -- as I
3 understand Your Honors' directive or request to include
4 conditions that would be in an EM&CP, it misses a
5 fundamental point that at least the Attorney General's
6 Office has viewed this matter in, and that has to do
7 with whether the Commission can make the statutory
8 findings under Section 126 of the Public Service Law.
9 Those findings predate any EM&CP.

10 So to the extent that Your Honor is requesting
11 that we provide conditions, it implicitly signals that
12 somehow those conditions make the findings which
13 probably will postdate the certification sort of not
14 necessarily consistent with Section 126. In other
15 words --

16 JUDGE STOCKHOLM: Your recommendations about
17 certificate conditions are inconsistent with Section
18 126, is that what you're arguing?

19 MS. LEARY: I'm suggesting that if we are to
20 put conditions as a group in the briefs --

21 JUDGE STOCKHOLM: I'm not asking as a group.
22 I'm talking about individuals. Individual briefs.

23 JUDGE PHILLIPS: Yeah. And also, I think it's
24 a suggestion, and it does not assume that you agree that

1 the certificate should be issued. It's just a way of
2 suggesting ways to have your concerns addressed if the
3 Commission were to grant a certificate. If you don't
4 want to do that, you don't have to.

5 MS. LEARY: Well, I understand.

6 JUDGE PHILLIPS: If you do want to do it and
7 you still want to make clear that you don't think a
8 certificate should be issued, you can simply say that.
9 So this is just a suggestion. And you can participate
10 or not, or condition your participation in any way you
11 want.

12 MS. LEARY: I guess the fundamental question is
13 whether the app -- whether the Commission has enough
14 information to make the statutory findings of impact,
15 minimization of impact and compliance with law.

16 JUDGE STOCKHOLM: Exactly right.

17 JUDGE PHILLIPS: Right. We -- and we
18 understand that. And we're not suggesting that you
19 waive your right to argue that they don't. This is
20 merely a suggestion of ways to address any concerns that
21 you may have if the Commission does not agree with your
22 position, for example, and they grant a certificate. If
23 they don't grant a certificate, then you don't have
24 anything to worry about, I guess, from your perspective.

1 MS. LEARY: Well, I think --

2 JUDGE PHILLIPS: This is merely a suggestion.

3 MS. LEARY: And I think the suggestion --
4 suggestion signals to the Commission some level of
5 acceptance by this tribunal that -- that condition --
6 that that's where we are in this process, that we're at
7 the point where we're talking about conditions when we
8 jump over the --

9 JUDGE PHILLIPS: I -- I understand where you're
10 coming from, but --

11 MS. LEARY: -- fundamental impact minimization
12 and compliance issues in Section 126.

13 JUDGE PHILLIPS: I understand where you're
14 coming from because you've said this several times, and
15 I -- I think we just don't agree. I think you can make
16 clear to the Commission what your position is. You can
17 decide whether or not you want to suggest conditions or
18 not. I don't think that prejudges the decision that the
19 Commission has to make in the first instance. And I
20 know you disagree, but that's I think where we are.

21 JUDGE STOCKHOLM: And in any event, that's
22 exactly where we are, because Staff says don't build the
23 facility, it's not needed; but if you have to, these are
24 the conditions that are necessary to protect the

1 environment of the State of New York. Now, you can
2 adopt a similar position to Staff. You can put things
3 in your brief if you want.

4 The appendices with regard to suggested
5 certificate conditions I am asking the parties, I'm not
6 requiring them to do anything, but I would suggest that
7 if the Attorney General's interest in this case is at
8 least in part to protect the watershed for New York
9 City, that it would be advisable. Again, it's
10 voluntary, but I would advise you to put whatever is
11 necessary in your view in a proposed certificate with
12 regard to protecting those interests. The fact that you
13 put it in, as -- as Judge Phillips said, the fact that
14 you put it in presupposes nothing with regard to whether
15 or not this facility is needed.

16 MR. BLOW: Your Honor.

17 JUDGE STOCKHOLM: Yes, sir.

18 MR. BLOW: If -- I would just add a little bit
19 to that. The reason staff has taken the position we
20 have is 126, Sub 2, specifies that the Commission
21 designates staff of the Department of Public Service to
22 represent the public interest in this proceeding. And
23 that's why we believe that we have a special
24 responsibility to, even if we don't think in this case,

1 for example, that the certificate should be granted. We
2 believe we have a responsibility to the record and to
3 the Commission to put in our recommended certificate
4 conditions.

5 I would also say that one of the things that we
6 will try to do, we may not be able to give to the extent
7 we'd like given the shortness of time for briefing, but
8 we are willing to work with other parties to try to come
9 up with, even in our initial brief, with conditions that
10 are more acceptable to other parties than -- rather than
11 waiting for reply briefs, because if we can do it in
12 initial briefs, it would -- and get the language closer
13 to what all the parties -- what several parties can
14 accept, then we'd be much better off. If we can do
15 that, we will do that depending on the timing.

16 JUDGE STOCKHOLM: I'm always in favor of
17 greater communications, especially among disputing
18 parties.

19 Mr. Klucsik.

20 JUDGE PHILLIPS: I -- I actually just want to
21 jump in. If you could make your comments brief, I'd
22 appreciate it, because we kind of did want to break
23 around 1:00. So I know Mr. Klucsik wants to speak and
24 Mr. Singer. So please proceed.

1 MR. KLUCSIK: Thank you, Your Honor. Just a
2 point of clarification. By my count, we have at least
3 four potential routes, any one of which might be the
4 object of a certificate. Does Your Honor envision
5 ordering conditions for each of those four potential
6 routes, in the suggested appendix?

7 JUDGE STOCKHOLM: To the extent that you
8 believe that different studies are required by different
9 routes, I would suggest yes. However, if you -- and I
10 would encourage you to do this, to look back in the
11 Commission's files at certificate conditions in other
12 Article VII cases. And I think you'll see that most of
13 them, not all of them, most of them are sufficiently
14 general in nature that they would cover virtually any
15 route.

16 Now, there are specific things involved here.
17 This is a very long line. There are some unique areas,
18 et cetera, that may need some different things, but I
19 would say just as a rough estimate, 80 percent of the
20 clauses will apply to any route, and maybe 20 percent of
21 the clauses may have to be specific about another route.

22 But, yes, if there is a specific issue on
23 another route, yes, I think that should be raised, yes.

24 MR. KLUCSIK: Thank you, Your Honor.

1 JUDGE STOCKHOLM: Mr. Singer.

2 MR. SINGER: I apologize if this is getting
3 into the weeds too much of this issue, but my question
4 is, if we're going to have a page limit on our briefs
5 and we're going to put certificate conditions in an
6 appendix, would we also be allowed to put arguments for
7 those certificate conditions in the appendix, because if
8 we have a dispute and we're arguing over different
9 certificate conditions, I think we would want to do
10 that.

11 And I think it would be better if we were able
12 to do that in the appendix when it -- when we list the
13 certificate conditions and what the dispute is.

14 MS. LEARY: Your Honor, if I could respond to
15 Mr. Singer. The appendix is used for purposes -- and I
16 would suggest that the parties could probably come up
17 with a joint appendix of things that they want to
18 include, whether they like those things or not, but that
19 would be one appendix for --

20 JUDGE STOCKHOLM: Well, that would be nice, but
21 time -- time presses and I can't necessarily count on
22 that coming -- coming about. I mean, to the extent it
23 comes about, that's great.

24 MS. LEARY: What I was going to say --

1 JUDGE STOCKHOLM: I'm going to defer on that
2 question, Mr. Singer, and let us think about it, because
3 there are a couple of other things that we may want to
4 designate for the appendix. And I'd also like the
5 parties to think about it because we've only just raised
6 it here today, in terms of what they want in the
7 appendix.

8 As I -- as I noted to Judge Phillips, this is a
9 slippery slope. We'll have 100, 150-page brief and a
10 400-page appendix. And that's, I think, what we were
11 trying to avoid in any event. But let us -- let us
12 think about that.

13 It's after 1:00. Let's break for lunch and we
14 will reconvene at 2:00.

15 (A lunch recess was taken. Thereafter, Exhibit
16 182 was marked for identification.)

17 JUDGE STOCKHOLM: Back on the record.

18 When we left after some intervening
19 discussions, we left off with DEC doing cross.

20 MS. WILKINSON: Thank you, Your Honor. A few
21 more questions.

22 BY MS. WILKINSON:

23 Q Mr. de Waal Malefyt, just for clarification. I
24 apologize if this is repeating a question. The

1 certificate conditions outlined -- you outline --
2 Certificate Number 7, the description of route, that
3 would just apply to the proposed route; is that correct?

4 A That's correct, that it just applies to the
5 proposed route, but I mean, obviously in a certificate
6 condition for the certified route, it might be a
7 different route, whatever the Commission decides.

8 Q Okay. And question -- a clarification. You
9 had testified earlier concerning two various studies
10 that were performed on the effect of stream crossings on
11 stream temperatures?

12 A Correct.

13 Q Can you tell me what those studies are and who
14 performed them?

15 A Well, some of them, you know, that come to mind
16 are done by -- were done by the utilities. Some were
17 done by NYSEG. Some were done by like Serco, the former
18 energy research, you know, corporation that was, you
19 know, I guess the seven utilities back in the '80s.
20 There's a number of papers you can find in the
21 right-of-way -- environmental right-of-way symposiums.
22 There's been about seven of them to date over the last
23 20 years.

24 Q And those symposiums are sponsored by whom?

1 A It's different organizations that have
2 sponsored them, but it's usually, you know, attended by
3 utilities and regulatory agencies involved in
4 transmission cases, transmission lines.

5 Q Okay. Thank you, Mr. de Waal Malefyt.

6 MS. WILKINSON: I'm done, Your Honor.

7 JUDGE STOCKHOLM: Thank you. Does that mean
8 that we go back to the Attorney General?

9 MS. LEARY: If you don't mind, Your Honor.
10 I'll hopefully be pretty quick.

11 JUDGE STOCKHOLM: Okay. Fine.

12 BY MS. LEARY:

13 Q Mr. de Waal Malefyt, I refer you to DEC-1 and
14 your responses along with David Macks' to that
15 information request that I provided you at the break and
16 have provided the court reporter, but I've not provided
17 the administrative law judges.

18 JUDGE STOCKHOLM: That's quite all right. We
19 have the original marked exhibit. It's been marked for
20 identification as Exhibit 182. That's fine, Counsel.

21 MS. LEARY: I apologize.

22 Q We were in the process of talking about some of
23 the information in this document. And I'd like to just
24 take you through your responses.

1 On page 1 of your response to what I believe is
2 Question 1 in which DEC asked you to provide the
3 enforcement actions taken on behalf of -- or as a result
4 of water quality certification violations, and they
5 would be DPS enforcement actions, your response
6 indicates 383 separate documents of non-compliance,
7 paren, non-compliance reports and violation reports. Of
8 that total, 128 have involved aquatic resources.

9 Would you explain the 128 non-compliance
10 reports or violation reports that involved aquatic
11 resources? What types of violations were they?

12 A I'm going to defer this to David Macks.

13 Q Okay. On page 3 of your --

14 A Do you want him to come up and answer the
15 question at this time?

16 MS. LEARY: Is that appropriate or --

17 JUDGE STOCKHOLM: That's -- that's appropriate
18 as far as I'm concerned. Unless you have an objection,
19 I think it would be best for the record.

20 MS. LEARY: That's fine with me, Your Honor.

21 JUDGE STOCKHOLM: Mr. Macks, welcome to the
22 witness stand. Mr. Macks, with your right hand raised,
23 is the testimony you're about to give the truth and the
24 whole truth?

1 MR. MACKS: Yes, it is.

2 DAVID MACKS,
3 after first having been duly sworn, was examined and
4 testified as follows:

5 JUDGE STOCKHOLM: Thank you. Please be seated.

6 MR. MACKS: As you can tell, I wasn't expecting
7 this. Let's go.

8 MS. LEARY: It's not my fault.

9 BY MS. LEARY:

10 Q Mr. Macks, can you answer the question that I
11 just posed to Mr. de Waal Malefyt with respect to the
12 128 violations or non-compliance incidents that involved
13 aquatic resources?

14 A (Macks) Not having all 128 pieces of paper in
15 front of me, I can tell you they ranged in -- in the
16 cause and effect to unauthorized clearing in wetlands,
17 unauthorized access roads in wetlands or across streams,
18 failure to install and maintain soil and erosion control
19 devices which led to sedimentation in streams and
20 wetlands, those kind of violations.

21 Q Were these violations of New York Law?

22 A (Macks) They were violations of the -- the
23 certificate or the approved EM&CP in those cases.

24 Q So they -- is it your testimony that they did

1 not involve violations of specific laws?

2 A (Macks) They involved violations of the
3 approved -- Commission approved environmental management
4 and construction plan and/or the certificate.

5 Q Are you aware of any New York Law that would
6 also govern those activities, for example, prohibitions
7 on activities in wetlands, for example?

8 A (Macks) In my 27 years working on electric and
9 gas line cases, in larger cases, those concerns, those
10 laws were discussed during the hearing phase. Any and
11 all concerns of sister agencies were rolled into the
12 certificate and into the EM&CP. I made no distinction
13 in our compliance work between what might be state law
14 and what was in the EM&CP because I assumed, based upon
15 my knowledge of the case, anything they did wrong that
16 was a violations of the EM&CP, as far as I'm concerned,
17 that document covered all applicable state and local
18 laws applicable to that particular case, that particular
19 pipeline or electric line.

20 Q And it's not clear of the other 383 separate
21 violations of which the 128 aquatic resource violations
22 were a subset what the remaining violations were. Were
23 they specifically environmental violations?

24 A (Macks) They could have been violations of not

1 necessarily all environmental violations. There was
2 instances where roads were used that didn't actually
3 have any environmental impact, but they weren't
4 authorized, or construction was started without a
5 certificate in some cases, or construction was started
6 prior to the approval of the EM&CP in some instances.

7 There are a vast variety of -- of activities
8 and violations that could lead to the issuance of either
9 a non-compliance report, a violation report, or the
10 initiation of an Order to Show Cause.

11 Q Thank you. Those examples were very helpful.

12 Of the 128 violations that involved aquatic
13 resources, in -- in any of those, were penalties
14 assessed for those violations?

15 A (Macks) At least two came to mind -- come to
16 mind, and they're listed in my response. One involved
17 Columbia gas transmission, Case 70350, I believe. And
18 the second one involved instances in -- excuse me,
19 Columbia gas 70345. They were two sister cases, 345 and
20 350. And the second instance was the Iroquois gas
21 transmission line, I think the 136 case.

22 Q Now, I see that one -- the Columbia gas
23 transmission was instituted by Order to Show Cause,
24 quote, "Order to Show Cause why a penalty action should

1 not be initiated." End quote. Can you explain the
2 process that was being initiated at that time? In other
3 words, there was no penalty or --

4 A (Macks) The way it works, we don't have
5 run-and-gun powers at the department. We don't have
6 people with badges and guns. If there's a violation
7 egregious enough for Staff to take to the Commission to
8 seek legal penalty about, we have to initiate what's
9 known as a proceeding whereby the company is asked to
10 respond why an Order to Show Cause should not be
11 initiated, why, in other words, the Department should
12 not go to court and seek penalty for what they did.

13 It's kind of a backwards way of doing it, but
14 that's the only way we can.

15 Q In Columbia or Iroquois, were penalties
16 ultimately assessed?

17 A (Macks) Yes, in both instances, both.

18 Q And you're referring to Mr. de Waal Malefyt?

19 A (de Waal Malefyt) In the -- in the Iroquois, it
20 ended up in a multi-million-dollar settlement, which was
21 a criminal matter. Okay. There was criminal intent,
22 you know, discovered by the FBI in that case.

23 Q That was not --

24 A (de Waal Malefyt) And that was a settlement

1 between, you know, the three state agencies including
2 the Attorney General, DEC and DPS.

3 Q But to characterize that particular action,
4 that was not a DPS penalty action solely?

5 A (Macks) No. They ran concurrently. There was
6 both.

7 Q I see. So it was sort of all combined together
8 into the federal action?

9 A (Macks) There was a judgment at the federal
10 level and a settlement at the state level.

11 Q A settlement. Okay. And what was the state
12 penalty or settlement amount?

13 A (de Waal Malefyt) On the Iroquois case, it was
14 about \$4 million.

15 Q And that was payable to the state?

16 A (Macks) I didn't get it.

17 (de Waal Malefyt) I didn't get it.

18 JUDGE STOCKHOLM: Did you say you got a cut of
19 that, Mr. Macks?

20 MR. MACKS: No. Still hanging. No money for
21 me.

22 Q So, pardon me, but of the 128 non-compliance
23 reports and violation reports, were there only two or --
24 that in which a penalty was assessed, or were these two

1 as examples?

2 A (Macks) Those two were the only two that were
3 taken to that phase. More often than not, we start
4 writing paper -- we start issuing violation reports,
5 non-compliance reports, it goes up the chain of command.
6 If I had a problem that I felt I couldn't handle in the
7 field, these people were completely recalcitrant, I
8 would go to my immediate supervisor, whoever he or she
9 was at that time, and bump it up the chain of command.

10 Eventually it would get -- at one point, even
11 on Iroquois, it got to the point where we had our
12 chairman, our secretary, our general counsel in a
13 boardroom with their president, Trans -- you know,
14 Trans -- who was that? The company president for -- for
15 Iroquois, and his vice-presidents and his general
16 counsel.

17 There are a lot of different ways of handling
18 this other than going to the mattresses, but in those
19 two instances, we couldn't get relief. They didn't
20 believe us. They wouldn't act right. We had to go to
21 court.

22 Q So of the 128 that involved aquatic resource
23 violations, can you tell me of those what the resolution
24 of most of those were? Was it a penalty paid? Was it

1 actions that were agreed to? What was the resolution of
2 those 128?

3 A (Macks) In the vast majority, the resolution
4 was actions taken or stopped and the protection of -- of
5 the resource or implemented protection of the resource
6 involved, for example, if you had open trench, you had
7 sediment flowing into --

8 Q Was there any remediation or restoration
9 required?

10 A (Macks) In some instances, yes.

11 Q Okay. But no penalty?

12 A (de Waal Malefyt) I think in most cases our
13 objective is not to assess penalties, but to get, you
14 know, the resources protected for the rest of the
15 project to make sure it works, and, you know, that the
16 company complies with the certificate conditions. You
17 know, a lot of our effort goes into making sure that it
18 happens correctly, not in just assessing penalties for
19 the sake of assessing penalties.

20 A (Macks) The penalties are generally assessed
21 after the fact. I'd rather get the hillside buttoned up
22 and keep the stream protected than go after a couple
23 hundred grand in court when the fish are dead. It makes
24 no sense to me. That's not how we operate. However,

1 the instances are recorded, they are documented in a
2 manner so as to be presentable in a court of law in all
3 instances.

4 Q Have you ever issued a stop-work order?

5 A (Macks) Several.

6 Q Can you identify any of -- any transmission
7 project, electric transmission project in which you have
8 issued a stop-work order?

9 A (Macks) The last stop-work order I issued
10 personally was the M-29 underground electric case from
11 Westchester to Manhattan.

12 Q And what was going on -- I'm sorry,
13 Mr. de Waal Malefyt.

14 A (de Waal Malefyt) If you want to continue it,
15 go ahead.

16 Q What was the purpose -- what was going on that
17 you had to stop?

18 A (Macks) Prior to the init -- prior to the
19 issuance of a certificate in that case, Con Edision had
20 gotten erroneous legal advice that somehow they would be
21 allowed -- they are now allowed, because the case had
22 started, to start work on the academy substation. I was
23 on my way to hearings and I saw the backhoes working.
24 And as soon as I was able to get out of the hearings and

1 find out exactly what they were doing and document it in
2 a sufficient, for me at least, we went to the site. We
3 called their counsel. We called the staff involved and
4 told them that what they considered to be work for
5 studies had gone way beyond the point, and they had
6 actually initiated construction, and they were to cease
7 and desist or I would be back with state troopers.

8 Q How long did it take you to get to the point
9 where you went to the site to issue a stop-work order?

10 A (Macks) About two or three days at most. I --
11 in most cases -- in all cases, I and my staff have
12 written authority from the Commission, from the
13 chairman, as designated representatives in the field, we
14 have specified designated stop and start-work authority.

15 Q And have you issued a stop-work order for any
16 post certificate situation?

17 A (Macks) Several.

18 Q Can you give me an example of that?

19 A (de Waal Malefyt) There's also the example in
20 your -- in Exhibit 182, about nine pages in, of a
21 stop-work -- you know, formal stop-work order issued in
22 the Iroquois case. Do you see that?

23 Q I was actually looking for something that was
24 post certificate on an electric transmission. I

1 apologize for not clarifying my question in that way.
2 Has there been stop-work orders issued for construction
3 of electric transmission projects?

4 A (Macks) There have been several. There was one
5 recently issued in a case here across the river, the
6 Besicorp case. There was a problem. I'm not
7 specifically in charge of that particular case, but one
8 of my colleagues is a guy that works with me. There was
9 a problem with construction of the towers, something
10 hadn't been cleared, they hadn't done the right thing.
11 And a stop-work was issued immediately, and work on the
12 electric line ceased until the problem was straighten
13 out.

14 Q What about in situations when you have an
15 environmental issue such as storm-water or wetlands
16 disturbance, or something like that, have you issued a
17 stop-work order solely for to stop work when you have
18 environmental violations?

19 A (Macks) I haven't done one of those recently.
20 I know that one of my -- Mr. Burell, who's -- was one of
21 the co-sponsors of the study we put in has done some --
22 has issued some stop-works on, I think the Rochester
23 electric line project. I don't know the case number off
24 the top of my head.

1 Q What was the nature of the violation he was
2 seeking to stop?

3 A (Macks) If I am not mistaken, the mats in the
4 wetlands were not getting the job done. They started
5 using these kind of plastic mats as opposed to the old
6 wood and steel. And unfortunately, when they were
7 running over those mats with construction equipment, it
8 wasn't getting the job done. We were getting soil
9 mixing and just general muck and mire. And it wasn't
10 getting the job done, so they said you got to punt, you
11 got to go back and do something different.

12 Q To your knowledge, are there any other
13 stop-work orders that have been issued for electric
14 transmission facilities as a result of environmental
15 violations?

16 A (Macks) I can't answer that off the top of my
17 head right now. I'd have to go back and look.

18 Q Okay. To your recollection, you don't remember
19 any?

20 A (Macks) I'm sure there have been, but I can't
21 tell you where, when or how many.

22 Q Mr. de Waal Malefyt, do you have any
23 recollection of --

24 A (de Waal Malefyt) It's so few, you know, my

1 experience and over so many years, that I couldn't
2 recall exactly when and where.

3 Q Not that many sounds like.

4 I just want to refer to the response you
5 provided to Question 5, the DPS process for
6 investigating and enforcing violations under the Clean
7 Water Act.

8 A (Macks) Yes.

9 Q Not to mischaracterize your testimony -- or
10 your response here, but I can quote: "At the conclusion
11 of construction of the Iroquois Pipeline project,
12 Department staff and counsel thought that, at a minimum,
13 closer coordination between DEC and DPS field personnel
14 was required."

15 A (Macks) Yes.

16 Q So is there a -- is there a recommendation you
17 would have on that closer coordination between the two
18 agencies, how that would be accomplished?

19 A (de Waal Malefyt) I think, you know, in that
20 case, we were -- we were thinking that we need to, you
21 know, for two agencies in the field together, we should
22 talk beforehand of how we're going to take action if
23 it's required together or separately, but at least talk
24 together and find out what our, you know, course of

1 action is going to be, you know, before an incident
2 happens. And then if it does happen, what we're going
3 to do afterwards rather than just have two agencies
4 operating independently in the field.

5 Q But it sounds like this would be some kind of a
6 written understanding or some understanding between the
7 two agencies?

8 A (Macks) If -- if you read my response, prior
9 to -- based upon -- let's be honest. Some problems that
10 occurred during the Iroquois gas transmission line
11 construction, appliant staff and counsel felt that we
12 needed to codify our relationship, our field personnel
13 with DEC personnel. In memorandum of agreement in this
14 response was formulated for the Empire gas line, which
15 was the next large pipeline to be built in New York
16 State.

17 Prior to the initiation of construction,
18 training was held between staff and the company in
19 Oklahoma, then additional training and preconstruction
20 coordination was held between staff, the company and DEC
21 representatives of that region.

22 Q And I think you're referring to another
23 attachment to this document. If I can send you back
24 several pages to that MOA. I believe it's a June 24th,

1 1993 document; is that correct?

2 A (Macks) Yes.

3 Q Is that the one you're referring to?

4 A (Macks) Yes.

5 Q I think it's a three-page document. Just a
6 couple of questions on this MOA.

7 The process here would be DEC -- would the
8 process here be DEC on site observing potential or
9 alleged violations of either the EM&CP or the
10 certificate, and then those would be referred to DPS
11 field staff representatives; is that right?

12 A (Macks) Yes.

13 Q And then what happens?

14 A (Macks) At which point appropriate action would
15 be taken. If stop-work needs to be used or directive
16 authority needs to be used in consultation with DEC
17 personnel, we would try to, on site, determine the best
18 course of action, whether it be arrestive or directive.
19 After that, if it needs to go up the chain of command or
20 something more needs to be done, it would be pursued at
21 that time. As long as it's on the right-of-way, we
22 would handle it.

23 Q So is it -- is it your understanding of what
24 happened with Empire that DEC and DPS staff would confer

1 about the violations, or alleged violations?

2 A (Macks) If the violation was brought to us, if
3 we saw something off the right-of-way beyond our purview
4 we felt should be forwarded to DEC, we did that. We've
5 continued to do that from that day forward.

6 Q I'm sort of referring just to what's in
7 paragraph 4 on pages 1 and 2 about the referral to DPS
8 field staff. Would that be your unit?

9 A (Macks) Yes.

10 Q Okay. And but you would have the ultimate
11 determination about whether action would be taken rather
12 than DEC?

13 A (Macks) It's our certificate.

14 Q And I just want to refer you to paragraph 7 in
15 that same document.

16 A (Macks) Um-hum.

17 Q Again, this is Exhibit 182 for the record.

18 A (Macks) Um-hum.

19 Q In situation -- quote: "In situations where an
20 alleged violation of the Environmental Conservation Law
21 constitutes an emergency, involving an immediate
22 (underscored) and substantive (underscored) threat to
23 life, health, property or natural resource, DEC field
24 staff may take direct action and then immediately notify

1 the DPS field staff and the DEC primary central office,
2 who will immediately notify DPS primary central office
3 contact."

4 So the only situation in which DEC would be
5 able to act would be emergency involving an immediate
6 and substantive threat to life, health, property or
7 natural resource?

8 A (Macks) In the absence of DPS staff. In other
9 words, that -- that paragraph deals with we're not
10 everywhere. We can't be everywhere. If some DEC
11 personnel saw something that needed to be addressed on
12 an Article VII project, immediate harm to the
13 environment, life, limb, safety, things that they're
14 charged with protecting as well, under this paragraph,
15 the auspices of this paragraph, they would act in the
16 absence of Department staff.

17 Q Now, I take it from your testimony that if
18 Department staff were there, DPS staff were there, they
19 would make the determination to act?

20 A (Macks) Yes.

21 Q So are you aware of any provision of the
22 Environmental Conservation Law where this is the
23 standard emergency -- for DEC to act in, quote, an
24 emergency involving an immediate and substantive threat

1 to life, health, et cetera?

2 A (Macks) I am not an expert in ECL,
3 Environmental Conservation Law. This was a paragraph
4 crafted in consultation with DEC management signed by
5 them. If it was a thwart to their -- their mandate, I
6 don't think they would have signed it.

7 Q Fair enough. I want to refer you, Mr. Macks,
8 to your report that was presented. And I apologize --

9 A (Macks) It's not a report. It is a research
10 paper. It's published.

11 Q I apologize. I believe it was presented to the
12 Sixth International Symposium On Environmental Concerns
13 In Right-of-way Management held in New Orleans in
14 February 1997; is that correct?

15 A (Macks) That's correct.

16 Q And I know this is primarily focused on gas
17 pipelines. And I asked Mr. de Waal Malefyt this morning
18 about how applicable these kinds of environmental
19 problems would be to other types of construction
20 projects such as the NYRI project here. Would you see
21 some of the same problems in the NYRI project that you
22 see in the gas pipeline project as a result of
23 construction activities?

24 MR. SINGER: Your Honor, I object to that

1 question. How can he provide any information about what
2 problems he might see regarding the NYRI project?

3 MS. LEARY: Let me rephrase then.

4 Q In your experience in observing construction
5 projects for electric transmission facilities, are there
6 environmental problems that you outline in this research
7 paper that may also occur foreseeably in electric
8 transmission facility construction?

9 A (Macks) Where the electric transmission
10 facility is wholly or partially underground, the
11 concerns are the same. They are all applicable.
12 Cleared right-of-way, completely cleared right-of-way is
13 cleared right-of-way whether it's for a gas line, water
14 line or underground electric line or telephone line.
15 The same physical concerns exist. The same
16 environmental concerns exist.

17 Q You outline at page 3 of that research paper
18 your observation or your team's observation that the
19 primary environmental problem, and I'm quoting, quote:
20 "The primary environmental problem occurring during
21 pipeline construction is inadequate temporary work space
22 on slopes, wetlands and at stream crossings. The lack
23 of adequate temporary work space creates situations
24 where there is insufficient space for separation of

1 topsoil and subsoils in wetlands, active agricultural
2 fields and insufficient area for effective spoil storage
3 in stream crossings."

4 On page 5 --

5 MR. BLOW: Is that a question, Your Honor?

6 JUDGE STOCKHOLM: I haven't heard one yet, no.

7 Q I'm sorry. You go on on page 7 to state,
8 quote: "After examining the data detailed earlier and
9 FCU staff field logs, we were able to conclude rather
10 quickly that an inordinate amount of staff time was
11 spent addressing the company's or contractor's need to
12 acquire and use extra work space or detailing its
13 unauthorized use." There then proceeds the discussion
14 of that -- that problem that I'm outlining in those
15 quotes.

16 And in your experience -- and I want to make
17 this -- obviously this is gas pipeline directed, but in
18 your experience with electric transmission lines, would
19 this also be a problem with construction of those lines,
20 that is inadequate work space?

21 A (Macks) It could be if the pipe -- if the
22 electric line were primarily underground in -- in
23 non-paved areas, it could be -- these problems could
24 very well arise.

1 My experience has been that when extra work
2 space was needed on overhead electric lines, it's
3 primarily to do with laydown areas or pulling zones or
4 pulling areas or construction staging areas that are of
5 insufficient size or location to get the job done.

6 Q In your experience, have you seen EM&CP or
7 other plans modified as a result of this problem of
8 inadequate work space?

9 A (Macks) Constantly.

10 Q And with respect to electric transmission
11 projects, do you see that problem as frequently?

12 A (Macks) We see -- primarily with electric
13 lines, it's of a much smaller scale. It's more
14 infrequent. It's more question of -- the changes
15 generally involve, as I said, laydown areas, or perhaps
16 an angle structure needs to be relocated, or conditions
17 in the field are such that a change needs to be made,
18 but it generally involves a wide variety of things.

19 Generally, because the engineering is so I
20 wouldn't say more exact, but so exact in most EM&CPs for
21 electric lines, it's very few -- far less number of --
22 of minor changes or major changes are necessary to
23 electric lines that I've worked on than the gas lines
24 involved.

1 Q Have you seen in electric transmission projects
2 the expansion of the size of the right-of-way from what
3 is initially proposed in an application?

4 A (Macks) Not electric lines. Not as a whole,
5 no.

6 Q Do you -- are you aware of what the
7 right-of-way size is in the NYRI project?

8 A (de Waal Malefyt) You know, for overhead,
9 generally, you know, with the horizontal configuration,
10 it's 150 feet. Okay.

11 Q Is that --

12 A (de Waal Malefyt) For, you know, trenching like
13 in the -- if we're talking about in the wetland was
14 50 feet, if it's on the -- an existing right-of-way like
15 the Marcy South Alternate.

16 Q Mr. Macks --

17 JUDGE STOCKHOLM: Is that right -- is that
18 right -- excuse me, Counselor. Is that right-of-way any
19 different if -- if you use HDD rather than trenching?

20 MR. de WAAL MALEFYT: Well, I imagine they
21 would acquire the -- a 50-foot right-of-way just in case
22 they have to, you know, do an open trench, but, you
23 know, you would obviously try and do it on a narrower --
24 you know, you wouldn't need to clear the area under

1 which you're boring, but I would imagine they would
2 acquire sufficient right-of-way, you know, in the case
3 they have to open trench.

4 JUDGE STOCKHOLM: Gotcha. Gotcha. Thank you.

5 Q Either gentlemen: Is -- is the right-of-way
6 you just discussed for the NYRI project what in the
7 terms of this report would call realistic? In other
8 words, you would probably not see a change to the EM --
9 to the right-of-way size later in the project after its
10 certified?

11 A (de Waal Malefyt) You wouldn't see a change.
12 150-foot-wide right-of-way for this type of facility is
13 very common like for 345 kV.

14 Q And in your experience, that is sufficient?

15 A (de Waal Malefyt) Yes.

16 Q I want to refer to the photos that are at the
17 very end of this document. And can you --

18 MR. BLOW: Exhibit 182?

19 Q I'm sorry. At the end of Exhibit 182.

20 MS. LEARY: Thank you, Mr. Blow.

21 Q Can you describe what the first photo is, which
22 I believe is of a yellow legal pad with information
23 written on it in black magic marker?

24 A (Macks) Yes. That's -- we use digital cameras.

1 Unfortunately, our budget doesn't allow for the
2 fancy-shmancy cameras where you can input text. So if
3 you're going to take a series of pictures about a
4 violation, and shy of having a newspaper, you have to
5 write down what the following pictures are of, in some
6 instances what direction depending upon the violation
7 involved or the incident involved.

8 This is SOP for -- for my field staff to state
9 what -- where they are and what they're taking a picture
10 of so we don't have just random pictures on a disc we
11 don't know what they're of or where they're from.

12 Q Does your staff have any form that they must
13 complete with respect to this kind of information?

14 A (Macks) We have non-compliance forms, I think I
15 provided examples thereof, and violation reports, which
16 I provided examples of, in addition to digital cameras
17 and a bound field log.

18 Q Now, this is the Noble Bus --

19 A (Macks) Bliss.

20 Q -- Bliss Wind Farm?

21 A (Macks) Yes.

22 Q And can you explain what we see in photo 2,
23 what I will call photo 2? It's the second photo.

24 A (Macks) Now, based on my -- go ahead.

1 (de Waal Malefyt) Are you talking about the
2 first photo or the second photo?

3 Q I think we just went -- oh, I was referring to
4 the legal note pad as the first photo.

5 A (de Waal Malefyt) Okay.

6 Q And the second photo I was referring to as an
7 area where you see on the left side of the photo, some
8 type of a black material that is --

9 A (Macks) Silt fence.

10 Q A silt fence. So what -- what -- can you
11 explain what this is?

12 A (Macks) Now, if I'm not mistaken, this is not
13 my case, this was John Strube's case. In this instance,
14 there was not an Article VII transmission line involved
15 with this particular case, if I'm not mistaken. Please
16 accept this subject to check.

17 John Strube in his compliance duties on the
18 wind farm proper came across an access road used in
19 construction of the wind farm that did not have
20 sufficient sediment and erosion control measures in
21 place. These pictures document the situation as he saw
22 it. This information was then gathered together and
23 forwarded to DEC regional personnel for them to take
24 further action.

1 Q Do you know whether the last three -- can you
2 turn to the last three photos and just -- do they
3 show -- what do they show?

4 A (Macks) Near as I can tell, they show chocolate
5 in the stream: Sediment, erosion.

6 Q Erosion, sediment in the stream?

7 A (Macks) Yes.

8 Q So the -- the erosion and sedimentation reached
9 a water body?

10 A (Macks) Yes.

11 Q Do you know whether the sediment and erosion
12 control plan was -- for this wind farm was contained in
13 an EM&CP?

14 A (Macks) We didn't -- we do not have that
15 authority. There was no similar document on wind farms
16 unless there is a transmission facility of sufficient
17 size and voltage to be --

18 Q Associated?

19 A (Macks) -- under Article VII attached to said
20 wind farm.

21 Q So you did not approve any type of erosion or
22 sediment control for this wind farm?

23 A (Macks) These facilities are approved under the
24 State Environmental Quality Review Act.

1 Q By?

2 A (de Waal Malefyt) Could be --

3 JUDGE STOCKHOLM: The lead agency.

4 A (de Waal Malefyt) Yeah, it could be the town.

5 Q Okay.

6 JUDGE STOCKHOLM: Could be DEC.

7 Q And DPS is not an involved agency?

8 A (Macks) We're an involved agency. We are not
9 the lead agency. We have purview under, what, Section
10 68? Section 68 of the Public Service Law.

11 Q Right. For this wind farm, did you review and
12 approve a storm-water management plan or other sediment
13 and erosion control plan?

14 A (Macks) That would not have been our purview
15 not being the lead agency.

16 Q So it's your testimony the lead agency would do
17 that approval?

18 A (de Waal Malefyt) Yeah, if it's required.
19 Yeah.

20 Q Would you not -- DPS would not require it?

21 A (de Waal Malefyt) DPS wouldn't, no.

22 Q Is there anything in Exhibit 182, your
23 responses to DEC-1, that you would like to add or change
24 with respect to any of the questions?

1 A (Macks) If you -- if you knew me better, you
2 would never ask that question.

3 JUDGE STOCKHOLM: Go ahead, Mr. Macks. She did
4 ask the question.

5 MS. LEARY: That's okay. I'll withdraw it.

6 A (de Waal Malefyt) No.

7 (Macks) I could say, but I won't say. The
8 answer is no.

9 Q Thank you.

10 I want to turn your attention to a separate
11 document, gentlemen, and I'm not sure that you can
12 testify about it, but I believe Mr. Harvey testified it
13 about -- about this yesterday. It is a Commission
14 Statement of Policy and a Commission Resolution
15 regarding the New York City watershed regulations. Are
16 you familiar with that document?

17 A (de Waal Malefyt) Yes, I am.

18 Q And what is your understanding of that
19 Statement of Policy and Resolution?

20 A (de Waal Malefyt) It's a statement, you know,
21 that we'll conform to the governor's directive -- you
22 know, the executive order as it concerns the
23 right-of-way vegetation management by the utilities and
24 to the vegetation management plans that are approved by

1 the Commission with respect to a watershed.

2 Q And is that in both Article VII and Article 10
3 proceedings?

4 JUDGE STOCKHOLM: There is no Article 10
5 anymore.

6 MS. LEARY: I'm well aware, but I'm just
7 reading from the document, Your Honor. So I've given
8 the witness the answer.

9 Q It's -- it's applicable to an Article VIII.

10 A It's applicable, right, Article 10, Article
11 VII.

12 Q Right. And are you aware that there's an
13 appendix attached to that document that lists certain
14 DPS, slash, Commission regulations?

15 A (de Waal Malefyt) Appendix A?

16 Q Yes.

17 A (de Waal Malefyt) Is that what you're referring
18 to?

19 Q Yes.

20 A (de Waal Malefyt) Yes.

21 Q And Appendix A also refers to particular
22 Department of Health and New York City Department of
23 Environmental Protection regulations; is that correct?

24 A (de Waal Malefyt) That's correct.

1 Q And would this doc -- would this Statement of
2 Policy and Resolution be applicable to the NYRI project?

3 A (de Waal Malefyt) Yes.

4 Q I neglected to ask you a question on the
5 stop-work orders. It's a fairly straightforward one.

6 In determining whether to issue a stop-work
7 order, do you consider the cost to the company holding
8 the certificate in -- in deciding whether a stop-work
9 order should be issued?

10 A (de Waal Malefyt) I think in most our stop-work
11 authority clauses that is stated.

12 Q It is stated that you must consider cost?

13 A (Macks) Yes.

14 (de Waal Malefyt) Yes.

15 Q As opposed to anything in the environment?

16 A (Macks) We --

17 Q Perhaps that's the wrong way of saying it, as
18 opposed to. I mean, what's -- what's the criteria?
19 Maybe that's my -- a better question.

20 A (de Waal Malefyt) Well, the criteria is the
21 resource first, but, you know, if it involves cost to
22 the utility or a stop, that changes the schedule, that's
23 got to be considered also.

24 (Macks) It's a balancing act. All regulation,

1 all utility regulation is a balancing.

2 Q You would balance the resource against the cost
3 to the company?

4 A (Macks) Yes. And the cost to the ratepayers of
5 the State of New York. There is a difference.

6 (de Waal Malefyt) I would just point out, you
7 know, these -- this -- you know, the clauses about stop
8 work had been crafted with utilities over many cases.
9 You know, this has been thoroughly, you know, thought
10 out, and it's not just something we came up with off the
11 top of our head.

12 Q Understood. Are you familiar with a United
13 States Government accountability office report to
14 Congress dated February 1, 2008 on transmission lines
15 and issues associated with HVDC lines?

16 A (de Waal Malefyt) I read it when it came out.

17 Q With respect to HVDC lines, do they typically
18 provide benefits to the residents or electric consumers
19 along the routes that they travel?

20 MR. BLOW: Object.

21 JUDGE STOCKHOLM: Yes. How does -- how does
22 this relate to the witnesses' testimony, or what point
23 are you trying to make?

24 MS. LEARY: I'll withdraw the question.

1 JUDGE STOCKHOLM: Okay.

2 MS. LEARY: I can go somewhere else with this,
3 I think. Mr. de Waal Malefyt may not -- I mean, he had
4 read the report. So that's -- I was hoping he had some
5 recollection of it having read the report. So I think
6 it's a proper question, but I have no problem
7 withdrawing it.

8 JUDGE PHILLIPS: You really have to tie the
9 cross to their testimony, though. So if -- unless you
10 can do that, it's not really proper.

11 Q I want to refer you to the stipulations that
12 were signed in this matter between DPS staff and the
13 applicant, NYRI. I think they're found in Exhibit --

14 MS. LEARY: I beg your pardon, Your Honor. If
15 I can get my list.

16 MR. BLOW: I believe, Your Honor, it's Exhibit
17 24, Appendix J.

18 Q Exhibit 24, Appendix J.

19 A (de Waal Malefyt) What appendix was that?

20 Q J.

21 A (de Waal Malefyt) J. Okay. I've got Appendix
22 J.

23 Q I believe at page 22, the stipulation regarding
24 the Marcy South Alternate is discussed, or that's where

1 it is found.

2 A (de Waal Malefyt) I don't see -- on page 22?
3 Are you just -- oh, you're talking about the mention of
4 Marcy South transmission corridor in the middle?

5 Q I have in front of me a document that at the
6 bottom has page 22 on it. And I may be wrong, but it
7 says, "Stipulation regarding scope and methodology for
8 studies of routing alternatives for the NYRI project."

9 A (de Waal Malefyt) Right. And the footnote
10 down, number 1, says, "The four parcels". The footnote
11 on page --

12 Q Yes.

13 A (de Waal Malefyt) Page 22. I think we have the
14 same document.

15 Q And if you'd look at page 26 in that document,
16 it discusses the Marcy South transmission right-of-way
17 alternative.

18 A (de Waal Malefyt) Right.

19 Q So, Mr. de Waal Malefyt, is it your
20 understanding that there's been full satisfaction by
21 NYRI with this stipulation?

22 A (de Waal Malefyt) It was accept -- you know,
23 the -- as a condition of the application as a
24 deficiency, it was accepted by the secretary, so.

1 Q Accepted by the secretary as being complete?

2 A (de Waal Malefyt) As being, you know,
3 satisfied.

4 Q Was that the only purpose to this stipulation?

5 A (de Waal Malefyt) No. Obviously the, you know,
6 the cond -- you know, the reason for the stipulation was
7 to provide information, you know, for our route, you
8 know, the Marcy South route.

9 Q And I want to go back to something you said
10 earlier today with respect to the secretary issuing a
11 notice of complete application. Is that --

12 MR. BLOW: Your Honor, actually, I'm going to
13 object even though the question hasn't been --

14 MS. LEARY: How about if I get the question
15 out?

16 MR. BLOW: Well, the concern I have is --

17 JUDGE STOCKHOLM: No, you can't have a concern
18 that I can do anything about until I have a question
19 pending. Mr. Blow, please wait.

20 Q Earlier today there was a brief discussion
21 about the secretary issuing a notice of complete
22 application for the NYRI project. Is there a difference
23 between a notice of complete application and what I
24 would term Staff's determination of whether there's

1 sufficient information for them to make their -- to
2 fulfill their own statutory roles in an application?

3 MR. BLOW: I object.

4 Q Are those two different things?

5 MR. BLOW: I object.

6 First of all, the secretary does not issue a
7 notice of complete application. The notice -- the term
8 "notice of complete application" is -- is a term
9 borrowed from I think the Uniform Procedures Regulations
10 of DEC. What the secretary issues, if you look at
11 Section 123, Sub 1 of the Public Service Law, is a
12 notice that the application is filed or otherwise in
13 compliance with the statute and regulations. So -- and
14 sometimes -- sometimes witnesses and lawyers will use
15 the term "complete", but they -- it's really a misnomer
16 to say that an application is complete.

17 If you look at the secretary's -- I believe
18 there's -- there's an exhibit with the secretary's
19 letter in it. And I believe if you look there, it will
20 say that the -- it will give the language that the
21 secretary uses in -- in making these compliance
22 determinations.

23 MS. LEARY: I -- I stand corrected. And I was
24 using the State Administrative Procedure Act kind of

1 nomenclature, which I believe governs all of us, but I
2 do think Mr. Blow is correct. It is a notice, I
3 believe, of compliance. Is that acceptable?

4 MR. BLOW: Yes.

5 The second part of my objection goes to the
6 vagueness of which the question related to -- which the
7 question partakes because it talks about -- it talked
8 about, A, is there a difference between a notice of
9 compliance and what staff might consider sufficient for
10 some purpose. And it may be -- maybe the question could
11 be rephrased to be more specific.

12 JUDGE PHILLIPS: I actually tend to agree. I
13 think you said something like there's statutory
14 purposes. So if you could be a little more specific in
15 your questioning and, also, I think avoid the term
16 "complete" as opposed to "comply". It might help if you
17 rephrase the question with those thoughts in mind.

18 BY MS. LEARY:

19 Q Mr. de Waal Malefyt, I'm trying to understand
20 if there is a distinction between what the secretary
21 does in issuing a notice of compliance and what you do
22 in reviewing an electric transmission project. Is there
23 a difference between those two things?

24 A (de Waal Malefyt) I think we take -- once the

1 application comes in and it's in compliance, we then try
2 and focus on the findings that the Commission needs to
3 make, and so we try to develop the record so that the
4 Commission can make those findings, you know, like what
5 is the, you know, the nature of the probable
6 environmental impacts. That's why we've had testimony
7 on the variety of different environmental impacts, you
8 know, by our witnesses to fill the record to that point
9 where we think it's, you know, enough information for
10 the Commission to make, you know, its determination.

11 Q So your -- would that also include your
12 assessment of whether those environmental impacts are
13 minimized?

14 A (de Waal Malefyt) That's another finding, you
15 know, that the facility represents the minimum adverse
16 environmental impact considering the technology costs,
17 economics of various alternatives. So we ask
18 interrogatories or we put in our own testimony to
19 develop that record.

20 Q And would that also include an assessment of
21 whether there is what I'll term compliance with state
22 and local laws and regulations?

23 A (de Waal Malefyt) Right. The facility has to
24 comply with those. So we need enough information like

1 we were talking about before with DEC about the
2 wetlands, you know, Class 1 wetlands.

3 Q You need enough determ -- information to
4 determine compliance?

5 A (de Waal Malefyt) That it complies with the
6 laws and regulations.

7 Q Yes. Thank you.

8 Okay. I don't have much more except I want to
9 ask you just a couple questions on your rebuttal
10 testimony. I'll refer you to your rebuttal testimony at
11 page 6.

12 A (de Waal Malefyt) I'm there.

13 Q Are you aware of what efforts, if any, NYRI
14 undertook to gain access to any areas in which they
15 otherwise would not have access because it is -- there
16 were privately-owned properties?

17 A (de Waal Malefyt) No, I'm not aware of any --
18 anything that NYRI did to gain access to properties. I
19 mean, I know they've talked to, you know, different
20 people and organizations along the route, but not, you
21 know, to my knowledge about gaining access. I didn't
22 have that information.

23 Q Did they seek any assistance from DPS staff in
24 obtaining infor -- in obtaining access, so asking for

1 your help, can you come out in the field with me and
2 assist -- or can you come out in the field with NYRI
3 personnel and assist them in gaining access? Did they
4 ask you to do that?

5 A (de Waal Malefyt) Not that I'm aware.

6 JUDGE STOCKHOLM: Does -- has Staff done that
7 in prior Article VII cases, or have companies asked
8 Staff to do that in prior Article VII cases?

9 A (de Waal Malefyt) Is your question about
10 gaining access to property or just to go look at the
11 facility?

12 Q No. Gaining access so that they can do -- they
13 can obtain more detailed information.

14 A (de Waal Malefyt) That's not usually, you know,
15 the case in any Article VII that I've dealt with.

16 Q That DPS -- it's not usually the case where DPS
17 is asked to assist an applicant --

18 A (de Waal Malefyt) No. We --

19 Q -- in gaining access?

20 A (de Waal Malefyt) I don't know that we have the
21 power to gain access to all the property denied by the,
22 you know, private landowner. You know, we can go on to
23 utility properties --

24 (Macks) Any utility properties, but that's it.

1 Q Well, I mean, there -- there are utility
2 properties involved in both the proposed route and the
3 Marcy South route, correct?

4 A (de Waal Malefyt) That's correct.

5 Q There are a number of places both in your
6 direct testimony and your rebuttal, and I would not risk
7 saying in answers to information requests, but in at
8 least your direct testimony and rebuttal in which you
9 discuss deferral of obtaining certain information until
10 the environmental management and construction plan
11 phase, that is post Commission certificate issuance
12 phase; is that fair in --

13 A (de Waal Malefyt) Yeah, in general, right.
14 There's some places.

15 Q So this is the fundamental, I guess, problem
16 I'm having with deferring to that post certificate phase
17 the acquisition of certain information on environmental
18 impacts and minimization.

19 Let me ask you this: Does your testimony defer
20 until the EM&CP phase the acquisition of information on
21 either impact or minimization of impact such as the
22 SWPPP, the storm-water pollution prevention plan, or the
23 endangered species survey, or delineation of -- of
24 wetlands, or identification of pesticides --

1 MR. BLOW: Your Honor.

2 Q -- specific pesticides?

3 MR. BLOW: I object because the testimony
4 speaks for itself. And I don't see the purpose of
5 asking a question that can be readily ascertained by
6 consulting the testimony.

7 JUDGE STOCKHOLM: And -- and I'm not sure
8 exactly what kind of information you're trying to get
9 out of these witnesses, Ms. Leary. Let me just -- just
10 try a little bit here.

11 The process that the Commission has set up and
12 run for 30 years or longer, almost 40 I guess, envisions
13 a certification proceeding here followed by an EM&CP
14 phase. Nothing gets constructed until the EM&CP is
15 approved.

16 And part of the confusion that -- that I
17 perceive sitting up here and listening to the parties is
18 a confusion be -- between a sort of typical certificate
19 which a government agency might give to approve
20 construction, which when you get the certificate, you
21 can go out and put a shovel in the ground. All the
22 plans are finalized, approved, et cetera.

23 When the Commission issues a certificate, it
24 has numerous, many-page conditions, many of which, if

1 not most of which, all have to be met before a shovel
2 goes into the ground. In a real sense, an Article VII
3 proceeding is in two stages. And until you get the
4 approval on the second stage, you don't start working
5 yet. And I think that may be some of the confusion that
6 we're having here.

7 I'm going to sustain Staff's objection to this
8 question the way it was worded. If you would like to
9 follow-up on the topic, you're more than welcome to.

10 MS. LEARY: Just in response, Your Honor. I --
11 I don't think I have any confusion whatsoever about what
12 the statutory findings in the Commission are.

13 JUDGE STOCKHOLM: And nor did I speak of those.

14 MS. LEARY: That's just where I'm going with
15 this. And with all due respect, my question to
16 Mr. de Waal Malefyt is, if you defer until after the
17 Commission issues a certificate, those critical pieces
18 of information that would provide you with an
19 identification of the probable impacts and minimization
20 of those impacts, including compliance with the law, how
21 can the Commission issue a certificate if there's this
22 deferral? So that's what I'm struggling with.

23 JUDGE STOCKHOLM: Ask -- ask the witnesses.
24

1 BY MS. LEARY:

2 Q So, Mr. de Waal Malefyt, because I see
3 throughout your testimony this kind of theme of -- of
4 some level of deferral until later, but I also see a
5 very clear statement in your testimony about the
6 insufficiency of the information in NYRI's application.
7 At what point -- what is the tipping point of there's so
8 little information that you cannot defer it to the
9 EM&CP? So -- so I'm trying to -- I'm trying to get a
10 sense from you in your experience about what --

11 A (de Waal Malefyt) Well, I think we would say
12 so. You know, we would say that it doesn't have
13 sufficient information, say, you know, to tell what the
14 probable environmental impact in some area and recommend
15 that it be denied.

16 Q And you've say -- said that.

17 A (de Waal Malefyt) Right.

18 Q Thank you.

19 MS. LEARY: I have nothing else.

20 JUDGE STOCKHOLM: Mr. Macks. Mr. Macks.

21 MR. MACKS: In one case, Case 70350, Judge
22 Vernue, who was the administrative law judge at the
23 time, after questioning by counsel, Mr. Blow at the
24 time, and myself, determined at that instant that the

1 company had not made a prima facie case. They put --
2 went back to ground zero. If that were the -- if that
3 were the case where there were insufficient data in the
4 application that we could even get started, judges have
5 done it in the past, it was done in front of me, it was
6 done in one of my cases, the judge will make a ruling
7 that the company had not provided prima facie case and
8 we go back to start.

9 JUDGE STOCKHOLM: Just from a historic
10 perspective, Mr. Macks, is that before the secretary
11 issued compliance letters?

12 MR. MACKS: Yes. That -- that Article 10
13 hadn't be even then written then. And it was not either
14 done as a matter of course or even in some of the larger
15 cases. It was before those letters started going out.

16 JUDGE STOCKHOLM: So is it sort of analogous to
17 the situation we have today, that is to say your factual
18 situation that you described in front of Judge Vernue is
19 sort of analogous to the secretary kicking the -- an
20 application out for being incomplete now?

21 MR. MACKS: I would agree with that statement,
22 yes.

23 MS. LEARY: I do have a question for Your Honor
24 on the two-phase approach that you referred to on the

1 EM&CP. My question is, unless this proceeding were
2 bifurcated, there would not be any adjudication later on
3 the EM&CP. In other words, wouldn't that just be --

4 JUDGE STOCKHOLM: No. I said to the contrary
5 this morning as a matter of fact. There is adjudication
6 as a normal procedure in the EM&CP, and they can include
7 evidentiary hearings if there are, in fact, factual
8 disputes. So yes, there's plenty of opportunity for
9 litigation after the certificate.

10 MS. LEARY: How would --

11 MS. WILKINSON: Your Honor, can I ask a
12 question then?

13 In terms of getting that adjudication --
14 adjudication of stage 2 or phase 2 of this, because from
15 our perspective -- and I understand 30 years of history,
16 but from our perspective today, there's a significant
17 amount of detail that's going to come in later that's
18 going to have a huge bearing on the extent of
19 environmental impacts.

20 So what is the process for asking for
21 adjudication of that phase 2? How do we set that up
22 should this thing get -- should this project be
23 approved?

24 JUDGE STOCKHOLM: Well, in the typical case,

1 and you obviously can argue for -- or ask for what you
2 think is appropriate, but in the typical case, the
3 applicant is ordered to do a couple of hundred different
4 things. I think there's more than a hundred ordering
5 clauses in many of these. And the applicant goes off to
6 do them. They have to be done in a certain way, often
7 to the satisfaction of either DPS staff or to
8 satisfactory other state laws, whatever the case may be.

9 When the applicant completes the assigned
10 tasks, the applicant circulates those documents to the
11 active party list. Staff reviews the filing as a
12 compliance filing. The views of the parties are
13 ultimately submitted to the Commission if that's
14 necessary. In order to approve the EM&CP, it is, of
15 course, necessary.

16 There are minor changes also, provisions for
17 minor changes in the EM&CP which can be approved by
18 staff, but those are usually during the construction
19 phase and -- and later down the road.

20 As I said, if there are factual disputes on
21 which an evidentiary hearing is required, an evidentiary
22 hearing can be held. Otherwise, the parties'
23 comments -- the parties have the opportunity to comment
24 and probably reply comments on whatever it is that the

1 company has filed.

2 If your question is how do you get to a
3 hearing, I would assume that -- that if there are
4 serious disputes, for example, between DEC and staff,
5 not that that would ever happen, but if there are
6 serious disputes between you on an environmental issue,
7 I would ask for a hearing and your comments. If you and
8 Staff can't agree as to how to respond to NYRI if you
9 have a disagreement, then ask for them -- if you think a
10 hearing is appropriate, ask for it in your comments.

11 MS. WILKINSON: And there's -- so there's not a
12 defined process, but the parties can request the process
13 if they want? Is that how it would work, comments on
14 the EM&CP?

15 JUDGE PHILLIPS: I think there is a defined
16 process. And Judge Stockholm has laid it out at least
17 twice. What he's saying and what he said earlier was
18 that evidentiary hearings on the second part were rare.
19 So you were asking, if I want hearings, what do I do?
20 At least that's what I heard.

21 Our suggestion to you is that at the time that
22 you file your comments, presumably you'll know whether
23 or not you feel that there's a need for hearings and
24 that you want such hearings. And what we are indicating

1 is that you should state so in your -- in your comments.
2 You should ask the Commission to hold an evidentiary
3 hearing if you believe that that's going to be
4 appropriate. And that would happen in the second stage
5 on whatever issues you feel could not be resolved
6 otherwise.

7 MS. WILKINSON: I -- I appreciate that. And
8 the reason why I'm asking is because we have in DEC
9 regulations a process set out for having adjudicatory
10 hearings. And so I'm trying to understand how, you
11 know, to match it up with this process on the EM&CP.
12 And I -- I appreciate what you're saying, but I just
13 want to make sure that we're doing it -- when the time
14 comes, that we correctly do this, that we're not missing
15 something. And I don't think I am from what you said.

16 Thank you.

17 JUDGE STOCKHOLM: Understand, of course, the
18 Commission is not going to grant your request for a
19 hearing unless you can convince the Commission there are
20 factual issues. Anything else can be briefed. If
21 there's legal issues, they can be briefed. If there's
22 policy issues, they can be briefed. But if there's
23 factual issues, and the Commission reaches that
24 conclusion, they will, in all likelihood, give you a

1 hearing.

2 JUDGE PHILLIPS: Ms. Leary, did you have more
3 questions?

4 MS. LEARY: I did not, Judge.

5 MS. HINTZ: DOT has one question --

6 JUDGE STOCKHOLM: Please proceed.

7 MS. HINTZ: -- for Mr. de Waal Malefyt.

8 JUDGE STOCKHOLM: If you had told me that
9 earlier, I could have gotten you out before lunch.

10 MS. HINTZ: This is Donna Hintz for DOT.

11 BY MS. HINTZ:

12 Q Mr. de Waal Malefyt, under questioning before
13 lunch from DEC you indicated -- you mentioned one-stop
14 shopping for permits and things. And does the intent of
15 one-stop shopping include securing any property rights
16 that might be required for the route?

17 A (de Waal Malefyt) Article VII doesn't grant
18 property rights.

19 MS. HINTZ: That was all, Your Honor.

20 JUDGE STOCKHOLM: Thank you.

21 Does CARI have cross?

22 MR. KLUCSIK: We do, Your Honor.

23 JUDGE STOCKHOLM: Okay.

24 JUDGE PHILLIPS: Can I just ask about how much

1 do you think you have, time-wise?

2 MR. KLUCSIK: I would hope to be finished in a
3 half hour's time.

4 JUDGE STOCKHOLM: We're going to take our
5 10-minute afternoon break. And, Mr. Macks, I hate to
6 ask you to sort of hang around, but if -- if questions
7 that -- you're doing such a good job of supporting
8 Mr. de Waal Malefyt. If questions come up on the report
9 that you helped -- it's not a report, is it? It's a
10 research study. Sorry.

11 MR. MACKS: Well, my research paper.

12 JUDGE STOCKHOLM: The research paper, yes. If
13 questions come up on that document again, I would like
14 to have you present, if that's possible, sir.

15 MR. MACKS: I normally am out of here by now
16 because I have a raging 15-year-old, and I don't like to
17 leave it home alone. However, since this is what they
18 pay me to do, I will be sitting next to Steve and
19 available should any questions --

20 JUDGE STOCKHOLM: I will ask CARI during the
21 break, please consider your cross and determine whether
22 or not you have any cross that gets into the research
23 paper.

24 MR. KLUCSIK: I can respond to that right now,

1 Your Honor. We do not.

2 JUDGE STOCKHOLM: You do not. You may go home.

3 MR. KLUCSIK: We would not inquire of
4 Mr. Macks.

5 JUDGE STOCKHOLM: Well, no. Wait a minute.

6 MR. MACKS: What about these guys?

7 JUDGE STOCKHOLM: I'm sorry. I'm sorry,
8 Mr. Macks. Mr. Macks, you might want to consider
9 calling home for a sleeping bag, sleeping bag or
10 something.

11 MR. MACKS: I'll stay as long as you need me,
12 Your Honor.

13 JUDGE STOCKHOLM: Off the -- off the record.

14 (A brief recess was taken.)

15 JUDGE STOCKHOLM: Mr. Singer,
16 cross-examination.

17 MR. BLOW: Your Honor, just --

18 JUDGE STOCKHOLM: Or was it -- I apologize. I
19 apologize. It was CARI, not NYRI.

20 MR. BLOW: Your Honor, just before we do that,
21 I wanted to state that I do not have any redirect for --
22 regarding Mr. Macks on the Exhibit 182 because Mr. Macks
23 is getting older and he does not remember one of the
24 cases that he was involved in, 70365, which is the Sound

1 cable case where DEC -- where a contractor allowed fill
2 to go into the Long Island Sound. And DEC and DPS staff
3 agreed that -- that the contractor would be subject to a
4 fine from DEC because it was more immediate and more
5 remedial rather than going through the Commission's
6 penalty process. But since Mr. Macks could not remember
7 that case, there's no redirect.

8 JUDGE STOCKHOLM: A very nice piece of
9 testimony, Mr. Blow. Are there any parties that would
10 like to question Mr. Blow about this statement?

11 MS. LEARY: I just need him sworn in, Your
12 Honor.

13 MS. WILKINSON: Mr. Blow, I'm sorry, what case
14 was that?

15 MR. BLOW: The Sound cable case was 70365. The
16 construction I believe took place starting in 1988, if
17 I'm not mistaken. And the -- so it was in the -- I
18 would assume that the incident happened in about '89.
19 We -- we couldn't find any records. I was kidding with
20 Mr. Macks about being old, but we couldn't find any
21 records on it, but that's --

22 MR. MACKS: Several purges took place between
23 then and now.

24 JUDGE STOCKHOLM: Like a different computer

1 system and stuff like that?

2 MR. MACKS: Like a different head of the office
3 who was Mr. Clean decided all those nasty papers didn't
4 need to hang around anymore.

5 MS. HINTZ: Your Honor, is it premature to
6 discuss tomorrow's schedule or today's schedule, like
7 what the goal is?

8 JUDGE STOCKHOLM: Well, today's schedule is to
9 get through this panel, if I can call them a panel.
10 And -- and I think that will be the end of today. We
11 have told Agricultural and Markets that their witness
12 would be put on first thing tomorrow morning. And then
13 we go from there.

14 MS. HINTZ: And what time would tomorrow
15 morning be starting?

16 JUDGE STOCKHOLM: We'll start tomorrow morning
17 at 9:00.

18 MS. HINTZ: Thank you, Your Honor.

19 MR. BLOW: So, Your Honor, if you wish,
20 Mr. Macks may be excused as far as I'm concerned.

21 JUDGE STOCKHOLM: And I think we -- we heard
22 that CARI has no questions with regard to the exhibit
23 that Mr. Macks was called to the stand for?

24 MR. KLUCSIK: That's correct, Your Honor.

1 JUDGE STOCKHOLM: And the same thing is true of
2 NYRI?

3 MR. SINGER: That's true.

4 JUDGE STOCKHOLM: Mr. Macks, you're excused.
5 Your beauty rest awaits.

6 MR. MACKS: No. I'm going to sit here and
7 watch the skinning for a while, then I'll go -- then
8 I'll go get junior.

9 JUDGE STOCKHOLM: As -- as you will, sir. We
10 can resume the testimony.

11 JUDGE PHILLIPS: CARI.

12 BY MR. KLUCSIK:

13 Q Mr. de Waal Malefyt, your direct testimony
14 gives a brief summary of your education and experience.

15 A Yes, it does.

16 Q Would it be fair to characterize that education
17 experience as that leading to your status as an
18 environmental professional?

19 A Yes.

20 Q You think of yourself as an environmental
21 professional?

22 A I think of myself as a biologist and
23 environmental science professional.

24 Q And how long have you worked as an

1 environmental professional?

2 A Thirty-five years.

3 Q And has that work involved the determination of
4 environmental impacts for various types of projects?

5 A Yes, it has.

6 Q And how long have you been engaged in the
7 determination of such environmental impacts?

8 A I would say my earlier years at a Ebasco 1974
9 through '77 were more in line with doing the
10 environmental assessment, making the documents, you
11 know, like Article VIII, Article VII, so whereas my more
12 recent experience has been in reviewing them. And so
13 that's the difference I would draw.

14 Q So that latter period of time would involve the
15 determination of environmental impacts; is that fair to
16 say?

17 A That's correct.

18 Q Would you agree with me that in order to
19 determine the environmental impact of an action, you
20 need to know what change in the physical world is
21 proposed? Would you agree with that statement?

22 A I would, yeah, to the part, yes, definitely.

23 Q Would you agree with me that in order to
24 determine the environmental impact of an action, you

1 need to know where the change in the physical world will
2 occur?

3 A You need to know it or, you know, you need to
4 have -- have the experience of that area. You don't
5 need to know exactly, you know, the location, but if
6 you've had the experience with many typical locations
7 that are representative of that area, then I would say,
8 you know, you don't need to know the exact, you know,
9 location.

10 Q Would you agree with me that in order to
11 determine the environmental impact of an action, you
12 need to know the existing environmental conditions in
13 the location where the change in the physical world will
14 occur?

15 A If you -- if that's your objective, if you want
16 to know the exact, you know, environmental impact for an
17 exact location, yes, then you need to know that or have
18 a representative of that area.

19 Q We spoke earlier today -- or you spoke earlier
20 today about the prospect that archaeological resources
21 might be encountered during the construction of the CARI
22 Marcy South buried cable alternative, correct?

23 A That's correct.

24 Q Could the use of horizontal direct drilling

1 eliminate the need to disturb any archaeological
2 resources that might be encountered during such
3 construction?

4 A If it's determined what the depth is of those
5 archaeological resources, yes.

6 Q And could the use of horizontal direct drilling
7 also eliminate the need to depart from the New York
8 State Power Authority right-of-way if such
9 archaeological resources were encountered during that
10 construction?

11 A Assuming all, you know, things -- all else
12 being true, you know, yes. Obviously if there was a
13 residence there or something you might -- you know, or
14 if you go on to different property, you might not be
15 able to.

16 Q Well, my question was whether the use of
17 horizontal direct drilling to avoid such areas or such
18 conditions would eliminate the need to exit the
19 right-of-way in order to avoid those resources?

20 A Right. As long as you had a way around it, it
21 was legal.

22 Q Let me ask it one more time. Could you drill
23 under it rather than going laterally to avoid it?

24 A Yes.

1 Q Thank you. During your consideration of the
2 NYRI project, did your review include a consideration of
3 the relationship between the line, the NYRI proposed
4 transmission line, and the development of generation
5 projects?

6 A Are you saying did we consider a generation
7 line -- or generation facilities in conjunction with the
8 NYRI line itself physically?

9 Q I'm asking you if your evaluation of the NYRI
10 proposal included some consideration of the construction
11 of generating facilities?

12 A You mean as I said in my testimony, right?

13 Q Yes.

14 A Is that what you're referring to?

15 Q Yes.

16 A Yes.

17 Q Does the NYRI testimony address the
18 relationship of the transmission line to the development
19 of new generating projects?

20 A I think that, you know, to some extent they
21 talk about it in relationship to upstate New York
22 generation, being able to deliver power from upstate
23 generation.

24 Q Do you have an understanding of NYRI's position

1 on the relationship between its proposed line and such
2 new generating projects?

3 A Yes. I think they're saying that there's a
4 benefit to their project for being able to deliver
5 generation capacity that's in upstate New York.

6 Q And are those upstate generating facilities, do
7 they include wind facilities?

8 A Yes.

9 Q As part of your review of the NYRI project --
10 let me rephrase.

11 Do you know whether NYRI has considered the
12 cumulative environmental impacts of such new wind
13 generating projects along with the impacts of
14 transmission line -- NYRI transmission line
15 construction?

16 A I haven't seen it in the Article VII
17 application, but I -- I don't know if they've considered
18 it.

19 Q But it's not in the application to the best of
20 your knowledge?

21 A It's not in the application to the best of my
22 knowledge.

23 Q Has DPS staff considered the cumulative
24 environmental impacts of such new generating projects

1 when considered together with the NYRI proposal?

2 A Only to the extent that we know about these
3 generating projects and we have them in our mind and are
4 working on them and know what the environmental impacts
5 are associated with them, but not a written analysis
6 that, you know, sums up the cumulative environmental
7 impact. No, we haven't done that. We are aware of them
8 and know what their impacts are.

9 Q In your direct testimony at page 26, you make
10 reference to two generation projects. One is the Mirant
11 Bowline project in the Town of Haverstraw?

12 A That's correct.

13 Q Is it correct to say that your testimony
14 reflects that a Public Service Commission certificate
15 was granted for construction of the Mirant Bowline
16 facility?

17 A No. That's -- it was the siting board.

18 Q I'm sorry. The siting -- did the siting board
19 grant a certificate that authorizes the construction of
20 Mirant Bowline 3?

21 A Yes.

22 Q Are you aware of any action by the siting board
23 or by the Public Service Commission that would revoke or
24 otherwise negate the authority granted by that

1 certificate?

2 A I'm not aware of any.

3 Q Let's turn our attention then to the second
4 project you mention on page 26, the Calpine project in
5 the Town of Wawayanda. Is it your understanding that
6 the siting board granted a certificate authorizing the
7 construction of that facility?

8 A Yes.

9 Q Do you know whether the siting board or the
10 Commission has taken any action to revoke or otherwise
11 negate the authority granted in that certificate?

12 A There's been some mentions of that closing, you
13 know, the proceeding or the case, whether Wawayanda
14 actually gave up the certificate. I don't recall the
15 exact -- exactly how it ended.

16 JUDGE STOCKHOLM: Do you know,
17 Mr. de Waal Malefyt, whether there are certificate
18 conditions that limit the time under which an applicant
19 can proceed?

20 MR. de WAAL MALEFYT: There's certainly
21 different limits to the air permits. So they could have
22 expired, whatever those dates are. And so the
23 certificate, you know -- they couldn't start
24 construction obviously.

1 JUDGE STOCKHOLM: Do you know what the status
2 of either one of these certified facilities is in terms
3 of whether or not the cases are being actively pursued?

4 MR. de WAAL MALEFYT: Well, they're not being
5 actively pursued that I know of, you know, the Article
6 10 ones, but like Wawayanda, another, you know, company
7 in a sense is trying to build, you know, as I alluded to
8 at the bottom of page 27, in the same general area, but
9 it's not the exact same Wawayanda facility that was
10 certified. But there is another active article -- I
11 mean, power plant called CPV Valley that is under -- you
12 know, it's in a process of being -- we just saw it this
13 morning. I guess the environmental impact statement,
14 the draft of the environmental impact statement was
15 issued and approved by the town.

16 JUDGE STOCKHOLM: And that is being certified
17 under what statute, if you know?

18 MR. de WAAL MALEFYT: That's under SEQRA. The
19 town is the lead agency.

20 JUDGE STOCKHOLM: Okay. And do you know what
21 the -- if the draft EIS has been, did you say accepted
22 by the town or approved?

23 MR. de WAAL MALEFYT: The -- the town has, you
24 know, formally, I guess, completed and accepted the DEIS

1 and has issued it, you know, for comment by interested
2 parties.

3 JUDGE STOCKHOLM: Do you know if -- if that
4 facility is in the NYISO que?

5 MR. de WAAL MALEFYT: I think Mr. Davis -- I
6 don't know if it was on that list yesterday --

7 JUDGE STOCKHOLM: I didn't know if it was on
8 that list either. That's really what I was kind of
9 asking.

10 I will ask, although NYISO is not here at this
11 point, but I will ask at some point for an up-to-date
12 list of that que.

13 Let me ask you to go back to this plant,
14 though. Do you know what the schedule is for reaching a
15 determination as to whether or not this plant would be
16 certified under SEQRA?

17 MR. de WAAL MALEFYT: I don't know the exact
18 schedule, I mean, for pursuing, you know, according to
19 the SEQRA regs, you know, issuing the draft,
20 environmental impact statement, et cetera.

21 JUDGE STOCKHOLM: What would you expect
22 assuming ordinary circumstances?

23 MR. de WAAL MALEFYT: It could be completed in
24 2011.

1 JUDGE STOCKHOLM: The application process?

2 MR. de WAAL MALEFYT: Right.

3 JUDGE STOCKHOLM: Thank you. Go ahead.

4 BY MR. KLUCSIK:

5 Q But for Commission approval under Public
6 Service Law 69, Section 69 or 70 having to do with
7 transfer of assets and licenses, do you know of anything
8 that would preclude a company other than the certificate
9 holder to obtain the rights to build a generation
10 facility for which the siting board has issued a
11 certificate?

12 A Assuming, you know, again, that the certificate
13 is valid, you know, they could -- and it was buildable,
14 you know, that nothing -- none of the other permits have
15 expired, yes.

16 Q Thank you.

17 MR. KLUCSIK: Your Honor, I have no further
18 questions.

19 JUDGE STOCKHOLM: And your last question,
20 Counsel, was except for the transfer approvals required
21 under 68, 69, 70, of the Public Service Law? Did I
22 understand your question correctly to be excluding those
23 things?

24 MR. KLUCSIK: That's correct. Assuming --

1 assuming that those requirements are satisfied, my
2 question was, is there any other barrier to someone
3 other than the current certificate holder to acquire
4 that certificate and build a facility.

5 And I appreciate your correction that the
6 relevant -- the relevant statutes or sections are 68, 69
7 and 70. I believe I referenced only 69 and 70.

8 JUDGE STOCKHOLM: Yeah, I know I did. Sorry.

9 MR. KLUCSIK: You may well be correct.

10 JUDGE STOCKHOLM: I may well be correct. I
11 wasn't -- that wasn't my intent.

12 Mr. Singer.

13 MR. SINGER: Thank you, Your Honor.

14 BY MR. SINGER:

15 Q Mr. de Waal Malefyt, I'd like to start by
16 asking you a couple of questions to follow-up some of
17 the issues that have been raised by some of the other
18 parties today.

19 Are you familiar with the NYRI Panel E rebuttal
20 testimony where the panel stated that NYRI would not use
21 pesticides or herbicides within the New York City
22 watershed if the Marcy South route were certified unless
23 that was approved by New York City DEP?

24 A Unless they were request -- I'm assuming it was

1 unless the request to use was asked and granted, they
2 would -- NYRI would not use herbicides.

3 Q That's correct.

4 A That's my understanding.

5 Q Yes. I hope I stated it that way. That's what
6 I intended to state.

7 Does staff have a position on that?

8 A Well, again, we have a concern that it's going
9 to set up -- if no herbicides are used and it's parallel
10 to the Marcy South facility, that there will be some
11 visual contrast when you do different vegetation
12 management on the same, you know, right-of-way now
13 including both facilities. And if you have different --
14 you know, the same landowner, you're going to have two
15 different operations going on.

16 They might be confused by it, it might not be
17 desirable, but it's going to, you know -- there's going
18 to be some visual contrast that, you know, should be
19 considered.

20 Q I'm a little bit confused by your answer. And
21 my -- I guess the way I see it is you have -- you have
22 an applicant who's indicating that it's not going to use
23 pesticides or herbicides and within a certain specific
24 area. And is it -- is it correct to state that Staff

1 would rather see them use those?

2 A I think in the interest of cost and safe,
3 reliable electric power, we have advocated the use of
4 herbicides because of those factors and to develop
5 low-growing, stable right-of-way shrub communities that
6 in the long-term might not, you know, need a lot of
7 herbicides to maintain them and be a productive wildlife
8 habitat and have a visual -- long-term visual impact
9 that's minimal.

10 You're going to have -- you'd be cutting, you
11 know, the trees down. They're going to sprout up and
12 regrow, and at some point you're going to have to either
13 cut them down or mow them down. And you're going to
14 have a lot of trees that you're going to have to
15 control. And so that sets up a contrast with the stable
16 Marcy South right-of-way.

17 Q But in any event, this area is only 18 miles of
18 the total Marcy South route that was proposed by NYRI,
19 correct, in the New York City watershed?

20 A Right. Eighteen miles is not insignificant.

21 Q Okay. Could you take a look at Appendix E of
22 NYRI's application, which is Exhibit 20 in this
23 proceeding? I believe it is the vegetation management
24 plan. Do you have that?

1 A Yes, I have Appendix E, Exhibit 20.

2 Q Okay. If you could turn to Section 4.0, which
3 is on page 8.

4 A Okay.

5 Q And the last paragraph of that section that
6 starts "Herbicides will be used", could you read that,
7 please?

8 A "Herbicides will be used to maintain vegetation
9 as specified in Section 2.0 for Zone A and Zone B along
10 the proposed route except in areas designated for no
11 herbicide use such as wetlands, streams and other water
12 bodies, threatened and endangered species habitat, and
13 public water supplies. Herbicides will be applied in
14 accordance with state and federal regulations and
15 guidelines."

16 Q Now, Mr. de Waal Malefyt, does that sentence
17 indicate to you that NYRI will not use any herbicides
18 unless they're approved through state and federal
19 regulations and guidelines?

20 A Well, I'm assuming you'll use herbicides in
21 conformance with state, you know, guidelines and
22 regulations, but when you're talking about public water
23 supplies, it could be talking about it in proximity to
24 water supplies. A lot of the utilities plans talk about

1 a reservoir not using herbicides, say, within 300 feet
2 or a hundred feet of the water, of a reservoir, or
3 directly in the stream. They don't say it applies to
4 the watershed. Like here, you're not talking about the
5 watershed. You're talking about water supplies, which
6 could be the body of water in my mind.

7 Q Are you familiar with state and federal
8 regulations and guidelines that govern the use of
9 herbicides?

10 A To some extent, you know.

11 Q Based on your familiarity, do they generally
12 have areas in which the use is prevented?

13 A Well, the label says where you can't use them.
14 You start with the label.

15 Q Okay. And -- fine.

16 Earlier in your testimony today, you indicated
17 that the environmental impacts of the construction of an
18 underground gas pipeline are different than the
19 environmental impacts for the construction of an
20 electric transmission line. Is that a correct or an
21 accurate statement?

22 A That's correct.

23 Q With respect to environmental impacts of
24 underground gas lines, would you agree with me that the

1 environmental impacts associated with the construction
2 of an underground electric line would be similar?

3 A To some extent they're similar and to other
4 extents they're not. A gas line a lot of times,
5 especially a major one, they need to grade the land, you
6 know, to accommodate the machinery that they're using
7 and to make sure it's, you know, a different grade so
8 they can sling the pipe, weld it together in long
9 sections, and then put it in, you know, the trench and
10 bury it, whereas trenching for an underground electric
11 line does not involve having long sections of pipeline
12 aboveground that need to be slung over into the trench.

13 So there's different requirements for, you
14 know, the different machinery that's used to put, you
15 know, the cable for an underground cable into the trench
16 versus a pipeline.

17 Q Now, you just indicated to the -- the extent to
18 which the two construction activities would be
19 different. Could you give us a general answer with
20 respect to how the two construction activities would be
21 similar?

22 A Well, they're similar in that they're a linear
23 transmission line as a certain width, clearing, you
24 know, to some degree or another is needed. Access roads

1 are needed for both projects to get to the right-of-way.
2 So similar -- some of the equipment obviously is
3 similar, but there are differences.

4 Q Do you consider yourself to be an expert in
5 construction?

6 A I'm not -- I'm, again, a biologist, an
7 environmental, you know, resource person, not an expert
8 in construction.

9 Q Have you ever been involved in the construction
10 of electric -- of an electric transmission line other
11 than in your capacity of a member of the DPS staff?

12 A Again, you know, my early years as a
13 consultant, you know, working with engineers designing
14 electric transmission facilities, power plants.

15 Q So the answer to my question is what? Have you
16 ever been involved in the construction of an electric
17 transmission line?

18 A That was, again -- no. That was not my job to
19 construct the facility.

20 Q Have you ever developed a construction plan for
21 an electric transmission line?

22 A Not one that I would sign my name to.

23 Q With respect to the testimony that you gave
24 earlier regarding the information in NYRI's application,

1 are you aware of any electric transmission lines or have
2 you ever been involved as a DPS staff member in an
3 Article VII case for an electric transmission line in
4 which the applicant did not have access to the proposed
5 right-of-way?

6 A Yes. There is many cases where the -- an
7 applicant doesn't have access to the right-of-way.

8 Q And how about have you been involved in any
9 other cases in which the electric transmission line was
10 of a similar length to what's proposed here?

11 A Well, like Marcy South was similar, you know.

12 Q Was that the only one?

13 A As an electric that was similar, I mean, I've
14 been involved in longer -- I mean, at the tail end of
15 the 765 kV construction, again, by the Power Authority
16 from Massena down to Marcy, some shorter ones, again,
17 from Niagara Mohawk from Volney to Marcy area.

18 Q How long was that?

19 A That was like 80, I think 80 miles.

20 Q How about the Iroquois Pipeline that you
21 mentioned, did the applicant there own all of the land
22 rights?

23 A No, they did not. They're very similar to what
24 NYRI's situation is. They didn't have access to the

1 land and had to rely on, you know, large regional
2 datasets.

3 Q Now, when you gave your answer with respect to
4 the three out of 10, do you recall that?

5 A Yes, I do.

6 Q You also indicated that there was an instance
7 where the Commission certified a section of the Marcy
8 South line. And correct me if I'm wrong, but I believe
9 you just indicated that someone drew a line on a
10 topographic map?

11 A It was very similar, you know, to -- to that.
12 I mean, obviously it was more than just drawing the
13 line. You know, they gave, again, similar to what you
14 did, you know, enough information about what the
15 resources were along the line, enough that the
16 Commission made a decision, you know, to build, you
17 know, the facility along that route.

18 Q So based on the information that was provided,
19 the Commission decided to grant a certificate?

20 A Yes, they did.

21 Q I want to ask you some questions about the
22 relationship between the secretary's compliance
23 determination and your testimony today. When -- when
24 the secretary makes a determination regarding whether a

1 Article VII application complies with the regulations,
2 does any staff member provide an analysis of what was
3 included in the application?

4 A Generally they do, yes..

5 Q And with respect to this particular case, were
6 you involved in that?

7 A Yes, I was.

8 Q And prior to the secretary's August, I believe
9 24th letter finding the application compliant as of
10 August 8th, did you provide any advice to the secretary
11 as to that the sufficiency of the application?

12 A Yes, I did.

13 Q Did you inform the secretary at any point prior
14 to the August 24th decision that the NYRI application
15 was deficient? And by that, I want to limit that to
16 after NYRI filed its third supplement.

17 MS. LEARY: I'm going to object to this
18 inquiry, or this question, because I think what
19 Mr. de Waal Malefyt testified to on questioning from me
20 is the difference between a compliance determination by
21 the secretary and deficiencies in that context, and his
22 role in reviewing, assessing, evaluating the application
23 for purposes of compliance with Section 126.

24 So if you're going to say "deficiencies", if

1 you can characterize it in one of those two ways,
2 because I don't want the record to be muddy that this
3 is -- if you are talking about the secretary's
4 deficiency, fine, but if you're talking about a
5 deficiency with respect to Mr. de Waal Malefyt's role in
6 reviewing the information, that's completely separate.

7 MR. SINGER: Your Honor, this is my
8 cross-examination. It's not recross.

9 JUDGE STOCKHOLM: I -- I agree. I also think
10 in listening to the question that it was a little bit
11 convoluted. And I wanted to ask you, Counselor, is your
12 question to this witness about what advice he may have
13 given between the -- to the secretary between
14 August 8th, 2008 and August 24th, 2008?

15 MR. SINGER: Yes, it is.

16 JUDGE STOCKHOLM: Is that the question?

17 MR. BLOW: Your Honor, actually, it was August
18 27.

19 JUDGE STOCKHOLM: Okay. August 27. I stand
20 corrected. I'll always believe your corrections,
21 Mr. Blow.

22 MR. SINGER: That is my question.

23 JUDGE STOCKHOLM: Is -- is the question
24 apparent to the witness? Do you understand the

1 question?

2 MR. de WAAL MALEFYT: I think -- I think I
3 understand -- I mean, my role it was to say whether what
4 was submitted was -- cured the deficiencies that were
5 previously identified. And, you know, that went up to
6 the secretary. I mean, I wasn't, you know -- you know,
7 the direct -- you know, through counsel's office. But
8 we reviewed that information, you know, pertaining to
9 our area of -- you know.

10 BY MR. SINGER:

11 Q And did you make a recommendation to the
12 secretary as to whether those deficiencies were cured?

13 A That they had been cured, right. Yes.

14 Q Mr. de Waal Malefyt, if you could turn to page
15 3 of your direct testimony. And I believe in that
16 section, you start to discuss the environmental effects
17 of the proposed facility on Timber Rattlesnakes.

18 A That's correct.

19 Q Could you refer to Exhibit 4, NYRI's
20 application, Section 4.10.4.4?

21 A Do you have a page number? It makes it easier
22 rather than --

23 Q Yeah, I'll get it for you. Starts on page 92.

24 A Okay. I'm there.

1 Q Now, this is the section that you refer to in
2 your direct testimony at page 3, line 20?

3 A Right.

4 Q Now, this Section 4.10.4.4 that you refer to in
5 your direct testimony, that doesn't contain all of the
6 information that's provided in the application by NYRI
7 with respect to potential impacts on Timber
8 Rattlesnakes, does it?

9 A No, I don't think that's all the information
10 right in this section. Right. There's some tables and,
11 you know --

12 Q Well, could you also turn --

13 A -- you know, listing of species, you know,
14 earlier in the exhibit, Section 4.

15 Q Yes. Why don't we just refer to one of those
16 on page 89.

17 A Right.

18 Q Do you see there that it references that
19 multiple records of the state threatened Timber
20 Rattlesnake were identified?

21 A Right.

22 Q Within -- and I won't read the whole thing, but
23 within the proposed route transmission corridor and
24 within the 2,400-foot study-wide area?

1 A I see that.

2 Q Okay. And could you also -- or if you have it
3 with you, turn to Appendix O, which is Exhibit 29 in
4 this proceeding?

5 A I have that.

6 Q Now, there's a section of this report that
7 specifically refers to the Timber Rattlesnake, correct?

8 A That's correct.

9 Q Could you turn to that section?

10 A Only if I find it sooner than you.

11 Q I know we're both racing to find it first. So
12 I think you're going to win.

13 A It doesn't have page numbers, but it's between
14 the -- before the bats and after the Bald Eagles.

15 Q Right. So if you could take a look at Section
16 1.0, the second paragraph. I won't have you read it
17 into the record, but does that not identify other areas
18 where NYRI identified Timber Rattlesnake dens within the
19 proposed route 1,200-foot study corridor?

20 JUDGE STOCKHOLM: Counselor, I apologize, but I
21 would like to be able to follow this. And I can't find
22 where you are.

23 MR. SINGER: I am in --

24 JUDGE STOCKHOLM: We've got -- I've got

1 Appendix O, and I'm at the beginning of that.

2 MR. SINGER: If you turn to the -- I'm sorry.

3 MR. de WAAL MALEFYT: There's like a fold-out
4 map. When you come to that, it's about two pages after
5 that.

6 JUDGE PHILLIPS: We got it.

7 JUDGE STOCKHOLM: Now we're with you. Thank
8 you very much.

9 Q So the question pending to the witness was, in
10 the second paragraph, under Section 1.0, NYRI identifies
11 that Timber Rattlesnake dens were documented in several
12 areas within the proposed route 1,200-foot study
13 corridor. Do you see that?

14 A Yes.

15 Q And the next sentence also states additional
16 correspondence from DEC stated that the center line of
17 the proposed route passed directly across one
18 rattlesnake den in Town of Deposit and one den in the
19 Town of Highland. Do you see that?

20 A Yes.

21 Q And you were aware at the time you wrote your
22 direct testimony that this information that I just
23 identified both in Appendix O as well as in Exhibit 4
24 was included in NYRI's application?

1 A Yes.

2 Q Are you aware of any other rattlesnake sites,
3 Timber Rattlesnake sites other than those that are
4 referred to in the application and in Appendix O?

5 A I'd have to compare it with the confidential
6 information that was on the maps that were submitted by
7 DEC.

8 Q I was going to ask you about that also, so
9 thanks for bringing that up. You read the testimony of
10 Mr. Nye in this proceeding?

11 A That's correct.

12 Q And would you agree with me, and you're
13 certainly welcome to check it, but at page 6, lines 2
14 through 4 of his testimony, he discusses rattlesnake
15 sites located within a thousand feet of the proposed
16 transmission corridor?

17 A Right.

18 Q So other than the rattlesnake sites that are
19 identified by NYRI in Exhibit 4 and Appendix O, and the
20 testimony of Mr. Nye, are you aware of any other
21 rattlesnake sites that have not been identified?

22 A No.

23 Q In Section 2.0 of the same Appendix O regarding
24 Timber Rattlesnakes, NYRI discusses potential impacts to

1 Timber Rattlesnakes, right?

2 A Like mortality and displacement from dens, yes.

3 Q Yes. And Mr. Nye also discusses potential
4 impacts in his testimony. You're certainly welcome to
5 check it, but the reference is page 9, lines 7 through
6 9.

7 A Yeah, I'm familiar.

8 Q Are you aware of any other potential impacts to
9 Timber Rattlesnakes other than those discussed here in
10 Appendix O and those discussed by Mr. Nye?

11 A Well, I think some of the impacts that were not
12 discussed that are like the migration routes between den
13 sites and summer areas, I think Mr. Nye alludes to that,
14 talks about that. You know, that is, you know, again,
15 hopefully would be some of the part of the study done by
16 the applicant, you know, by NYRI before the final EM&CP
17 is submitted. So additional studies are needed to, say,
18 identify where there are migration areas that cross the
19 proposed route and what that impact will be to
20 rattlesnake populations in those areas. So to that
21 extent, we don't have that information yet.

22 Q Again, though, what I asked you about was
23 whether you were aware of any potential impacts to
24 Timber Rattlesnakes that aren't identified in either the

1 information provided by NYRI in Exhibit 4 and Appendix O
2 or the testimony of Mr. Nye?

3 A I'm not aware of impacts that we -- any --
4 either party or, you know, all three of us know.

5 Q Okay.

6 A I think what I'm alluding to was impacts that
7 we don't yet know that are probable that will be
8 forthcoming when NYRI does the studies that it says it
9 will do.

10 Q Well, if you don't know what the impacts are,
11 how do you know they're probable?

12 A Well, not probable -- I think the -- you know,
13 I'm talking about probable, you know, we need, you know,
14 for the Commission to make the findings, you know, one
15 of them is what are the probable environmental impacts.
16 And I think experts can predict what those probable
17 impacts would be so that the Commission has an adequate
18 record.

19 Q And that was my question. Are you aware of any
20 probable impacts other than those that are identified in
21 the application and in Mr. Nye's testimony?

22 A And what I just talked about.

23 Q And your answer was again, please?

24 A It's about the migration, you know, whether the

1 corridor, you know, that's created will cut into the
2 migration paths and separate populations of
3 rattlesnakes, you know, from their denning sites, you
4 know, to where they summer, you know, where they breed
5 and, you know, reproduce.

6 JUDGE STOCKHOLM: How do you find that out,
7 Mr. Malefyt?

8 MR. de WAAL MALEFYT: Well, you can do detail
9 studies like with telemetry. I mean, this is done in
10 several --

11 JUDGE STOCKHOLM: Is it like putting a color on
12 a snake?

13 MR. de WAAL MALEFYT: You insert a transmitter
14 into the body of the snake with a veterinarian who knows
15 how to do this, and you follow the snake's movements to
16 find out when they come out of the den. Usually you
17 find them when they come out of the den. You insert the
18 transmitter, follow them during the summer to see where
19 they bask, where the likely, you know, reproduction
20 areas are, where their feeding areas are, and follow
21 them back to their den sites, and then remove the
22 transmitter before they go in for winter hibernation.

23 JUDGE STOCKHOLM: Is a study like that -- are
24 you recommending that a study like that be done?

1 MR. de WAAL MALEFYT: I'm not recommending that
2 in this, you know, case. I think enough can be found
3 about the den sites in some of the information that we
4 have. I mean, I would consult with DEC, you know,
5 experts on it, again, but that's something that was
6 recommended near the Ramapo and Torne Valley generation
7 cases. And we did those. And it was one of the reasons
8 the applicants folded up.

9 JUDGE STOCKHOLM: Thank you.

10 BY MR. SINGER:

11 Q Mr. de Waal Malefyt, if I -- can you site to
12 any Article VII case in which the Commission required
13 such a study prior to certification?

14 A I don't know that the Commission required it.
15 It's I think in some cases where the applicant has gone
16 out to gather more information where it felt, you know,
17 it might jeopardize its case. Generally the Commission
18 hasn't gotten involved in Article VII cases like that
19 and specified that certain studies be carried out. This
20 is kind of rare that, you know, even in this proceeding,
21 you know, that we got involved in stipulating to certain
22 studies, you know, that were directed by the secretary,
23 the Commission.

24 Q Now, continuing on with Appendix O, there's a

1 section there regarding mitigation. Do you see that?

2 A Yes.

3 Q Other than what's stated there with respect to
4 potential mitigation measures, do you have any
5 recommendations regarding mitigation measures that
6 should be considered?

7 A Not at the present time. I think we need to
8 see, you know, the results of your study and talk about
9 them, and then see what mitigation might be appropriate.
10 But those are the most, you know, common ones, you know,
11 the blasting, monitor, you know, making sure the snakes
12 stay out of the right-of-way.

13 Q In general, can you think of any other
14 mitigation measures that might apply?

15 A Well, again, depending on whether you get into,
16 you know, having to do any blasting for structures or
17 stuff like that. If you end up having rock, you might
18 need to -- you know, you do move it, you do need to look
19 obviously with the monitor to see if the snakes are
20 underneath it. You know, several times we've had
21 instances where snakes were crushed or harmed by moving,
22 you know, rocks that they were, you know, underneath.

23 Q Okay. But doesn't this section state should
24 any blasting be necessary within a thousand feet of a

1 known snake den, the applicant will consult with DEC to
2 determine techniques to protect snake dens?

3 A Yeah. I'm assuming -- I don't know if that
4 would cover it, but --

5 Q Then says, prohibition of blasting will also be
6 considered in these areas? Do you see that?

7 A Yes.

8 Q And also the snake monitor?

9 A That's right.

10 Q Okay. So, again, I want to ask you the
11 question, can you think of any other mitigation measures
12 that you would normally suggest?

13 A Other than -- nothing other than what I've
14 stated. I -- I would prefer, you know, we see the
15 details of any studies. If we find out there's snakes
16 in the vicinity of the proposed route during the EM&CP
17 stage, consult with experts on it.

18 Q Moving on in your testimony. On page 4, you
19 discuss impacts to fish and wildlife. And starts on
20 page 4, line 18, and carries over to page 5, line 16,
21 correct?

22 A That's right.

23 Q Are there mitigation techniques or measures
24 that you would recommend that have not been proposed by

1 New York Regional Interconnect in Exhibit 4?

2 A Again, the only thing I would recommend is that
3 you keep the facilities close to -- you know, adjacent
4 rather than deviating, you know, to avoid fragmentation.
5 And I guess that's an EM&CP, again, matter or, again,
6 some of the routing concerns along Marcy South where
7 we've recommended that you go back to the Marcy South
8 facility right-of-way. But there's not much you can do,
9 you know, from mitigation. This is more about
10 environmental -- you know, about impact to the wildlife.

11 Q Moving on to a different subject. I believe on
12 page 13 of your testimony, you discuss undergrounding in
13 the Nine -- yeah, undergrounding in the Nine Mile Swamp?

14 A Right.

15 Q In deciding between undergrounding and overhead
16 in this area, should the Commission consider the costs,
17 the comparative costs of the two techniques?

18 A Yes.

19 Q Do you know what the cost difference is?

20 A Not off the top of my head. I mean, we asked
21 questions about the cost per mile, you know, for
22 undergrounding versus overhead. You know, the
23 neighborhood of \$8, you know, million, \$10 million more
24 per mile. You know, it was a rough calculation.

1 Q Okay. Now, with respect to your recommendation
2 regarding undergrounding in the Nine Mile Swamp, is that
3 recommendation made with consideration of cost in mind?

4 A That's the -- you know, the question I posed
5 there was, you know, to minimize the wetland impacts.
6 That was directed mostly at the environmental impacts,
7 not the cost.

8 Q So in considering cost and --

9 A Which I don't know exactly for this, you know.
10 No one's estimated what the cost would be for Nine Mile,
11 so I couldn't answer that.

12 Q Well, you do have information that was provided
13 by New York Regional Interconnect that stated the
14 difference between overhead and underground --

15 A Right.

16 Q -- construction, right?

17 A But I'm not prepared at this point in time to
18 weigh all that cost. I would need to talk to our
19 engineers, our economists. You know, if we want to talk
20 about whether it's worth it for this facility, you know,
21 I think we would have to do some consultation. I
22 couldn't answer your question now.

23 Q I haven't even asked a question yet, but I was
24 getting there. Do you -- do you have any reason to

1 believe that the cost estimate provided by New York
2 Regional Interconnect that set forth the difference
3 between overhead and underground construction is
4 erroneous?

5 A Generally not -- you know, I have no reason to
6 suspect that it's not.

7 Q In determining whether to underground -- to
8 approve underground construction or overhead
9 construction, should the Commission consider the
10 reliability impacts of underground versus overhead?

11 A Definitely.

12 Q So I'm a little bit confused by your
13 recommendation in your testimony regarding
14 undergrounding in the Nine Mile Swamp. If you could
15 explain that, I would appreciate it, because a minute
16 ago, and I believe your testimony states, that you're
17 only making a recommendation with respect to
18 environmental impacts.

19 Am I correct that your recommendation is not a
20 recommendation to the Commission to approve
21 undergrounding in the Nine Mile Swamp?

22 A I think, you know, our -- that will be our
23 final position, but I think my testimony, you know, it
24 is about the environmental impacts. I mean, let's be

1 straight about that. Okay.

2 JUDGE STOCKHOLM: Does staff have a position,
3 Mr. Blow, as to whether or not, assuming this route is
4 certified, whether the construction along the Nine Mile
5 Swamp should be overhead or underground?

6 MR. BLOW: No, Your Honor.

7 Mr. de Waal Malefyt, as he stated, some of his
8 testimony, and I can embellish just a bit, but some of
9 his testimony is as the -- as an environmental expert in
10 the case, some of his testimony starting I think on
11 around page 55 or 56 is as a project manager. And to
12 that extent, he summarized Staff's position. Because we
13 hadn't yet seen rebuttal testimony, nor had the
14 evidentiary hearings, nor -- nor wrote our initial
15 brief, et cetera.

16 There was only so much that Mr. de Waal Malefyt
17 could say as the project manager in summary -- in
18 summarizing the testimony of the -- of the various
19 witnesses. And we thought it was helpful to state
20 Staff's position to the extent we could, but obviously
21 Staff's position as a final matter won't be stated until
22 our reply brief.

23 JUDGE STOCKHOLM: I would hope your initial
24 brief.

1 MR. BLOW: Well, we're going to try -- I mean,
2 we'll do the best we can in our initial brief, but if it
3 has to be tweaked in our reply brief, we'll have to do
4 that.

5 JUDGE STOCKHOLM: Okay.

6 BY MR. SINGER:

7 Q So then, Mr. de Waal Malefyt, I'd like to have
8 you confirm. Is that -- Staff's position is not that
9 the Commission should order New York Regional
10 Interconnect to underground the facility within the Nine
11 Mile Swamp?

12 A As an overall position right now?

13 Q Yes.

14 A No, we haven't reached that conclusion. We've
15 stated it as far as I have as, you know, environmental
16 impacts to the wetland, you know, from a vegetation
17 wildlife point of view, and Andy Davis has stated it,
18 you know, according to the visual cultural, you know,
19 concerns.

20 Q But in both of those instances, your
21 recommendation with respect to the environmental point
22 of view and Mr. Davis' recommendation regarding visual
23 and cultural, those are recommendations based only on
24 those concerns and are not the Staff's ultimate

1 recommendations to the Commission?

2 A At that -- at this point, those are both
3 environmental statements. We haven't stated that it's
4 the overall Staff recommendation. It's just as counsel
5 Steven Blow has stated.

6 Q Got it. There's also an alternate that
7 completely avoids the Nine Mile Swamp. I believe you
8 mentioned that in your testimony, and that's Alternate
9 D?

10 A That's correct.

11 Q And would you agree with me that Alternate D
12 generally for the majority of its route parallels a 115
13 kV -- already existing 115 kV transmission line?

14 A Yes.

15 Q What is Staff's recommendation with respect to
16 Alternate D and overhead construction within the Nine
17 Mile Swamp? Does Staff have a preference?

18 A Again, an overall preference whether we go
19 through the swamp or through -- or D?

20 Q Or Alternate D.

21 A I thought you said "D" somehow and connected it
22 to Nine Mile Swamp.

23 Q Alternate D avoids the Nine Mile Swamp.

24 A Right, avoids it. I mean, we -- you know,

1 we've stated that that would, you know, in my opinion,
2 comply with the regulations for a wetland by avoiding a
3 Class 1 and Class 2 wetland, but we do have a concern of
4 it going through the wind farm area, you know, that you
5 need to be a certain distance from the wind generators.

6 Q And so you would recommend a slight deviation
7 in Alternate D to avoid that?

8 A Yes.

9 Q Do you --

10 A We don't identify it.

11 JUDGE STOCKHOLM: With that deviation, is
12 Alternate D preferable to Staff from construction to --
13 along the railroad to the swamp?

14 MR. de WAAL MALEFYT: I think you'd have to --
15 you know, if you're talking about construction
16 technique, you'd have to direct that to, you know,
17 Mr. Schrom.

18 JUDGE STOCKHOLM: No. I'm asking for an
19 overall Staff position. Is there one? There may not
20 be. That's fine. But do you prefer "D" with the tweak
21 around the wind mills to the company's proposed overhead
22 construction along the railroad?

23 MR. de WAAL MALEFYT: Yeah. I think we've
24 talked about it that we would prefer Alternate D to the

1 proposed route the way the company is prosing it.

2 Q Now, earlier in your testimony today, you
3 mentioned the construction techniques for building
4 underground in the Nine Mile Swamp and whether
5 additional right-of-way would be required.

6 A Right.

7 Q And the discussion was in some parts regarding
8 whether that construction could be done from the
9 railroad?

10 A That's correct.

11 Q And whether additional right-of-way would be
12 needed for certain parts of that construction activity?

13 A That's right. I was talking about underground
14 construction, that if you're in a wetland, I've seen
15 this in several cases where it's very wet. And if
16 you're into the water table, the trench gets a lot
17 larger sometimes than what is planned. And then you
18 need additional clearing and you need additional area
19 for spoil. And so it can get very -- a little more --
20 you know, more impacts than what was anticipated.

21 Q Are you aware that NYRI addressed that
22 particular issue in Exhibit E-3 of its application?

23 A No, not -- not for the Nine Mile Swamp
24 underground.

1 Q With respect to construction from the railroad
2 and underground areas, were you aware that NYRI
3 addressed the technique that it was going to use -- be
4 used -- it was going to use for that?

5 A From the railroad underground? I mean,
6 that's -- you know, above -- I understood that the
7 underground section to be above Nine Mile Swamp where
8 NYRI proposed undergrounding along the railroad. That's
9 in the application.

10 Q Right. Now, you're talking about an additional
11 underground area potentially --

12 A That's right.

13 Q -- within the railroad property and the Nine
14 Mile Swamp?

15 A Right.

16 Q Okay. I'd like you to turn, if you have it, to
17 Exhibit E-3, and specifically E-3.4.2, which is page 5
18 of that exhibit.

19 MS. LEARY: Would you give the citation again,
20 Mr. Singer?

21 MR. SINGER: Yes. It's E-3.4.2, page 5 of
22 Exhibit E-3.

23 A I have it.

24 Q This particular section is entitled

1 "Underground Installation within Railroad Properties";

2 Is that correct?

3 A That's correct.

4 Q Okay. Could you read the sentence, the
5 third -- or could you read the third paragraph, please?

6 A "Where possible", is that it?

7 Q Yes.

8 A "Where possible during cable installation, the
9 excavated material from the trench will be placed in
10 railcars alongside the trench or at approved temporary
11 storage area -- sites. Remainder of excavated soils --
12 excavated soils not needed for backfill, but will be
13 removed by railcar or truck to a predetermined approved
14 disposal site."

15 Q Do you have any reason to believe that the
16 construction methods set forth therein would not -- NYRI
17 would not be able to achieve that or to follow that?

18 A My only concern is that it's -- you know, it
19 might be, you know, a very wet situation with the water
20 table, and that you might not be able to pick up all of
21 the excavated material in total and put it in railroad
22 cars. It's going to be wet with -- mixed with water.
23 And this doesn't address that concern. I think this is
24 a general statement about construction in upland soil

1 areas.

2 Q Well, if the soil was very wet, would that be
3 an issue regarding the -- the volume?

4 A It would be an issue with trying to contain the
5 soil and separate the water out before you put it in
6 that the, you know, in the railcars and bring it off the
7 site. You're going to have a lot of wet, muddy soil
8 coming out and slopping all over, you know, unless you
9 can come up with a technique that I don't know that
10 contains everything and will retain the dimensions of
11 the trench.

12 Q Well, could a mitigation technique be to not
13 engage in that type of construction if the soil had a
14 certain level of moisture in it?

15 A Definitely, yeah. That's where maybe
16 horizontal drilling might help, or, again, doing it in
17 special -- you know, like in the winter maybe if it's
18 frozen, or, you know, waiting for an extra dry season.

19 Q Yes. There could be a certificate condition or
20 something in the EM&CP that directed time periods for
21 construction, right?

22 A There could be. I don't know if you want to
23 wait years, though.

24 Q Well, if it was seasonal, most seasons come up

1 every year, don't they?

2 A Unless it's a wet summer.

3 Q Regarding your discussion in the testimony
4 regarding the scout camps that starts at page 14 of your
5 direct.

6 MR. SINGER: I'd like to mark as an exhibit
7 your response to NYRI-130.

8 JUDGE STOCKHOLM: The document will be marked
9 for identification as Exhibit 183.

10 (Exhibit 183 marked for identification.)

11 Q Mr. de Waal Malefyt, this response was prepared
12 by you; is that correct?

13 A That's correct.

14 Q Now, when you say revise its proposed route in
15 the area of the girl scout facilities in the EM&CP
16 stage, do you have a proposed route in mind?

17 A The only route I contemplate is something that
18 moves it off the athletic field. The current proposal
19 crosses the athletic field. And the Girl Scouts have
20 said they would like to see it moved someplace else
21 other than that, but they obviously want to know where
22 because they have facilities obviously down by the lake
23 where the main camps are, and they have access roads
24 into the lake.

1 So I think that's something that NYRI needs to
2 talk to them about to find out where it should be
3 located. That's why I recommended I think a quarter,
4 you know, mile deviation be allowed or actually be
5 allowed on the entire property of the Girl Scouts. If
6 you have to be on their property, I think you ought to
7 talk to them where they would like to see it if you have
8 to be on their property.

9 Q So I think you anticipated my question, but now
10 I'm a little bit more confused. The NYRI has proposed
11 that the Commission authorize a corridor of a quarter
12 mile, correct?

13 A That's correct.

14 Q And is it your position with respect to the
15 Girl Scout camp that NYRI, in the EM&CP, propose a route
16 that stays within that quarter-mile corridor?

17 A I think as I said in my testimony, it should be
18 inclusive of all their property. So, you know, to the
19 extent your -- west, there's more land in this Girl
20 Scout property that's west of the facilities than there
21 is to the northeast. So I would, again, stay with my
22 testimony, my recommendation that the Commission allow
23 you to work with all their property for a potential
24 route if it's certified.

1 Q So in the instance where the Girl Scout camp
2 wanted the NYRI facility off of their property if that
3 was outside of the quarter-mile corridor, then you would
4 recommend that NYRI be allowed to do that and to
5 identify the route in its EM&CP?

6 A Well, I think that's going to take you on to
7 state land, if you do that.

8 Q So then we'd have to remain on the Girl Scout
9 property?

10 A I think -- you know, unless you can work out
11 something with the state, I think you're going to have
12 to stay within the Girl Scout property.

13 JUDGE PHILLIPS: Do you mind? I actually --
14 I'm a little confused now, too.

15 Is it possible -- if you know, is it possible
16 to avoid all three of the Girl Scouts camps and still
17 stay within the quarter-mile corridor?

18 MR. de WAAL MALEFYT: Yeah. You can go on
19 state land.

20 JUDGE PHILLIPS: The scout camps that are
21 referred to on pages, I don't know, 14 to about 18?

22 MR. de WAAL MALEFYT: Right.

23 JUDGE PHILLIPS: If you know, is it possible to
24 stay within the quarter-mile corridor and avoid all

1 three of the camps, or no? Do you know?

2 MR. de WAAL MALEFYT: No.

3 JUDGE PHILLIPS: No, you don't know?

4 MR. de WAAL MALEFYT: No, you can't -- you --
5 if you stay within a quarter mile -- you know, an eighth
6 of a mile either side, you'll still impact I think, you
7 know, some of the camp's property. There's three of
8 them.

9 JUDGE PHILLIPS: Right. I understand that.
10 Now -- I'm sorry. Were you done?

11 MR. de WAAL MALEFYT: All I was going to say is
12 that you can't -- you know, my estimation of the
13 distance, you can't avoid, you know, within an eighth of
14 the mile.

15 JUDGE PHILLIPS: Okay. And then the other
16 thing I just wanted to clarify. The way I read your
17 testimony is that you only made a recommendation to move
18 it that would affect, I think it was the second of the
19 three; is that correct, on page 17?

20 MR. de WAAL MALEFYT: Right. It's -- the
21 second one is the Girl Scouts, that NYRI has proposed
22 putting it directly across their athletic field, which
23 they, you know, just couldn't believe --

24 JUDGE PHILLIPS: Okay.

1 MR. de WAAL MALEFYT: -- and would like to see
2 it moved from there, but obviously they didn't know what
3 the outcome was going to be, you know, with the
4 Commission.

5 JUDGE PHILLIPS: And now, your testimony today
6 is a suggestion to NYRI that they talk to the scout
7 groups about how they might affect all three of them or
8 avoid affecting all three of them, if that's your --

9 MR. de WAAL MALEFYT: They should definitely
10 talk to all the landowners --

11 JUDGE PHILLIPS: Okay.

12 MR. de WAAL MALEFYT: -- especially to
13 organizations who have recreation facilities like trails
14 and lakes, you know, and, you know, field -- athletic
15 fields that are near the, you know, the route.

16 JUDGE PHILLIPS: Okay. I just wanted to make
17 sure I understood.

18 JUDGE STOCKHOLM: And -- and just so I
19 understand, the recommendation to allow the applicant to
20 have -- well, if I understand your recommendation
21 correctly, and assuming this route was chosen and all
22 those other assumptions would have to come first, is
23 your recommendation that the route be certified for an
24 area that would include all of the property of the Girl

1 Scout camp?

2 MR. de WAAL MALEFYT: Yes. That's correct.

3 JUDGE STOCKHOLM: And -- okay. And what about
4 the other two scout camps?

5 MR. de WAAL MALEFYT: I haven't made that
6 determination.

7 JUDGE STOCKHOLM: Okay. So as things stand
8 right now, they're -- the two scout camps would be a
9 quarter mile?

10 MR. de WAAL MALEFYT: It would be a quarter
11 mile, an eighth of a mile on either side.

12 JUDGE STOCKHOLM: Thank you. I just wanted to
13 make sure that was clear.

14 BY MR. SINGER:

15 Q I'm going to move to a different subject. Just
16 continuing on with your direct, the next section has to
17 do with electromagnetic fields and starts at page 18.

18 MR. SINGER: I'd like to have marked as the
19 next four exhibits the responses to NYRI-132 through
20 NYRI-136.

21 MR. BLOW: That would be 135, would it?

22 JUDGE PHILLIPS: Those numbers don't add up.
23 You said 132 through 136?

24 MR. BISSELL: It's five.

1 JUDGE STOCKHOLM: Off the record.

2 (Discussion off the record.)

3 JUDGE STOCKHOLM: The interrogatory responses
4 to NYRI interrogatories 132 through 136 have been marked
5 for identification as Exhibits 184 through Exhibit 188.

6 (Exhibits 184 through 188 marked for
7 identification.)

8 BY MR. SINGER:

9 Q Mr. de Waal Malefyt, each of these, Exhibits
10 184 through 188, the responses were prepared by you; is
11 that correct?

12 A That's correct.

13 Q Could you turn to Exhibit 184, the response to
14 NYRI-132? My question is, are you aware of any studies
15 by the Public Service Commission regarding EMF fields
16 associated with DC transmission lines?

17 A Only to the extent, again, DC lines were
18 considered in the power lines project.

19 Q Any specific studies by the Public Service
20 Commission regarding EMF effects of DC transmission
21 lines that you're aware of?

22 A Not by the -- you know, the Commission being
23 the author, no.

24 Q Is it your understanding that the electric

1 field associated with the DC transmission line is
2 different than the electric field associated with an AC
3 transmission line?

4 A Yes. Physically, you know, an AC is an
5 oscillating field and a DC is static, constant.

6 Q And the same would be true for the magnetic
7 field associated with a DC and AC, that one is
8 magnetic -- pardon me.

9 A Both are magnetic, and one is from an
10 oscillating field and the other is --

11 Q Static?

12 A -- constant, static, right.

13 Q The study that you refer to at page 22 of your
14 testimony by Mr. Draper.

15 A Yes, I see that.

16 Q Did that consider DC transmission lines?

17 A I think that was A -- that's AC.

18 Q How about the NIEH report that you refer to at
19 page 23 of your testimony, is that considered DC
20 transmission lines?

21 A I think it did. You know, if you read through
22 the literature, there is some mention of it.

23 Q And do you --

24 A But it's very minor sections. You know, most

1 of the experience, you know, with the NIEH was with AC
2 fields, you know, either 50 hertz or 60 hertz.

3 Q Let's turn to -- let me just ask you the
4 question. Again, as the -- as the project manager, am I
5 correct that if I had specific questions about
6 electromagnetic fields associated with New York Regional
7 Interconnect facility, that I should ask them to
8 witnesses Quimby and Schrom?

9 A If you're talking about the physical
10 properties, you know, the physics of the electrical
11 properties, you know, you should direct them to them.
12 You know, if you're talking about health or community --
13 or about policy, you should direct them to me.

14 Q Let's turn to page 25 of your testimony where
15 you talk about the electric generation alternatives.

16 MR. SINGER: And I'd like to have marked your
17 response to NYRI-15 and NYRI 60 as the next exhibits.

18 JUDGE STOCKHOLM: Counsel, I apologize, but the
19 question you asked just prior to this one, I'd like to
20 get something else on the record at this point.

21 At page 25, Mr. de Waal Malefyt, on lines 16,
22 the sentence begins before that actually, but at the end
23 of the sentence that is on 16, 17 and 18, you indicate
24 that -- you are talking about a WHO, that's all caps,

1 W-H-O, report about cancer risk from exposure to static
2 magnetic fields. Do you see the language, sir?

3 MR. de WAAL MALEFYT: Yes.

4 JUDGE STOCKHOLM: Do you know how the magnetic
5 field of a high-voltage DC line compares in strength to
6 the magnetic field of the earth? Or is that one of the
7 engineering questions?

8 MR. de WAAL MALEFYT: No. It's -- well, I
9 mean, it's generally, you know, like we're talking about
10 200 milligals, and the earth's magnetic field borders a
11 magnitude higher.

12 JUDGE STOCKHOLM: So the earth's magnetic field
13 is actually a stronger static magnetic field than the
14 magnetic field that would be created by this line?

15 MR. de WAAL MALEFYT: That's correct.

16 JUDGE STOCKHOLM: Thank you.

17 JUDGE PHILLIPS: NYRI-15 has been marked for
18 identification as Exhibit 189. And NYRI-60 has been
19 marked for identification as Exhibit 190.

20 (Exhibits 189 and 190 marked for
21 identification.)

22 BY MR. SINGER:

23 Q Mr. de Waal Malefyt, Exhibits 189 and 190, were
24 the responses prepared by you?

1 A Yes, they were.

2 Q All right. Let's focus on Exhibit 189 first.
3 This gets back to the question that Mr. Klucsik just
4 covered with you a few minutes ago.

5 The Mirant Bowline facility, do you know why
6 that was not built?

7 A Mirant went into bankruptcy and sold the
8 generators that were at the site that were going to be
9 in the new facility, and then kept starting -- based --
10 continued to say they were under construction for a
11 number of years, but we haven't heard from them since
12 2005. Counsel, you might know more about it than I do.

13 Q I can't testify to those. I was asking you
14 whether you know.

15 So if the last construction report was filed in
16 2005, as you indicate there, and that is correct as far
17 as you know, right?

18 A That's as far as I know.

19 Q Right. Do Article 10 certificates typically
20 require that the certificate holder maintain the
21 validity of its air permits?

22 A I guess I don't know what you mean by
23 "validity". There's -- you know, they need an air
24 permit to operate, and then it usually has an expiration

1 date or they have to seek an update, you know, some
2 obvious legal word for that, but --

3 Q Are you aware whether air permits remain valid
4 if construction ceases for a period of 18 months or
5 longer?

6 A I'm not aware, you know, aware of the exact
7 language about the length of time.

8 Q Are you aware that there is such a restriction
9 in air permits with respect to cessation of
10 construction?

11 MS. LEARY: I'm going to object. I don't think
12 that this witness is the appropriate witness to make
13 this -- to make this inquiry, because this is a DEC air
14 permitting program. As I understand it, the Commission
15 does not issue the permits. I mean, to the extent of
16 his knowledge, I don't have a problem with that, but I
17 think Mr. Singer is probably better off asking a DEC
18 witness this question.

19 JUDGE STOCKHOLM: I believe he did ask this
20 witness specifically the extent of his knowledge. Do
21 you know?

22 MR. de WAAL MALEFYT: There is a time frame,
23 you know, because we've had several applicants come back
24 to us and ask whether their permits are valid. You

1 know, it's been less than; you know, a couple of years.
2 So I don't know if it was 18 months or what, but I don't
3 know the exact, you know, language of the statute, of
4 the condition of the certificate that says that's 18
5 months.

6 Q Am I correct that you do not know as you sit
7 here today whether that permit, the Article 10 permit
8 for the Mirant Bowline facility is still valid?

9 A I don't know whether it's valid or not.

10 Q The Mirant Bowline facility required a new
11 transmission line to be built; is that correct?

12 A Required two transmission lines. One was the
13 electric and one was the natural gas, which, you know,
14 the natural gas facility was built, but the electric
15 hasn't been built, to my knowledge.

16 Q Did it receive an Article VII certificate?

17 A It did.

18 Q Did that certificate have any conditions that
19 required that it be constructed within a certain amount
20 of time?

21 A Again, I can't -- I can't remember if it did or
22 not.

23 Q Would the construction of the transmission line
24 have environmental impacts?

1 A Yes, it would.

2 Q Now, the Mirant Bowline facility as permitted
3 was permitted to use natural gas as its fuel, right?

4 A That's correct.

5 Q Would you expect that burning natural gas in
6 that facility would increase greenhouse gas emissions?

7 A The plant itself, you know, just burning
8 natural gas increases natural -- yes, it does, but the
9 net effect might be not -- you know, it might back off
10 some other generation that was dirtier, and so you might
11 have a net reduction in greenhouse gas.

12 Q We'll get to that. Would the facility have an
13 impact on fish life in the Hudson River?

14 A It was -- the attempt was to minimize it with
15 Gunderboom technology at the intake structure so that it
16 would be very minimal impact on fish life.

17 Q Would it have an impact, though?

18 A It would have some impact on drawing in some of
19 the, you know, the eggs and lar -- or, you know, that
20 couldn't be screened by the Gunderboom. But that -- the
21 Gunderboom, if it was proposed, if it worked, is pretty
22 remarkable.

23 Q The facility did propose to use Hudson River
24 water for cooling, right?

1 A That's correct.

2 Q Would the 286-foot exhaust stack next to the
3 Hudson River have a visual impact?

4 A Yes, it had a visual impact that was assessed
5 and it was considered, you know, when the siting board,
6 you know, granted the certificate.

7 Q Now, staying with Exhibit 189, you mention the
8 Calpine Wawayanda plant.

9 A Right.

10 Q You state there that it relinquished its
11 certificate in 2005, right?

12 A That's what it -- yes.

13 Q And that's your answer, right?

14 A That -- yes. That's my answer.

15 Q Did you do anything to verify that? I mean,
16 you didn't just make it up, right?

17 A No. I looked up the records that we had on it.
18 And that's what is stated. There's, you know, some --
19 obviously there's some paperwork that says that, that
20 they relinquished it.

21 JUDGE STOCKHOLM: Is that paperwork in the
22 Commission's public files?

23 MR. de WAAL MALEFYT: Yes, it is.

24 JUDGE STOCKHOLM: Thank you.

1 Q If you know, what impacts would that plant have
2 had on wildlife?

3 A From what I recall, it's very kind of minimal.
4 It's out in the middle of several fields, open fields,
5 pasture land -- former pasture area. You know, there's
6 a stream nearby. So it was very minimal, you know, when
7 you're talking about wildlife.

8 Q Would the plant have had a visual impact?

9 A Yes.

10 Q Would the plant have needed an electric
11 transmission facility?

12 A Very small, you know, short one, yeah.

13 Q Would it have needed a gas interconnect?

14 A A small gas interconnect, yup.

15 Q Let's turn to the CPV Valley plant. Do you
16 know whether the plant would have a visual impact?

17 A Well, I'm assuming it would have a visual
18 impact based on the size, you know, the scope, you know,
19 some of the concerns that, you know, we've raised, you
20 know, being an interested and involved agency in the
21 SEQRA process.

22 Q What concerns have you raised?

23 A I don't know -- we've -- again, we've -- we've
24 told them they need a Section 68, so we're involved to

1 that extent. I don't know all the details that we've
2 told them. Another colleague of mine has been covering
3 that case. I haven't read the letter.

4 JUDGE STOCKHOLM: Is the Department a party in
5 that case?

6 MR. de WAAL MALEFYT: Well, we're an involved
7 agency.

8 JUDGE STOCKHOLM: Okay.

9 MR. de WAAL MALEFYT: Okay. Under SEQRA.

10 JUDGE STOCKHOLM: Yup.

11 Q And the plant would need a new electric
12 transmission interconnect facility; is that correct?

13 A Right. I think I address some of that on page
14 28.

15 Q Right. And you say that it would connect to
16 the Marcy South transmission line?

17 A Right.

18 Q Would it need to build a substation in order to
19 connect to that line?

20 A Yeah. One mile north of the site it would
21 need, you know, some type of interconnection site. If
22 you want to call it a substation, yeah.

23 Q And the -- the connection to the gas pipeline,
24 that would be a 7-mile-long gas pipeline?

1 A That's what they proposed.

2 Q Would there be environmental impacts associated
3 with building that gas pipeline?

4 A Sure.

5 Q Do you know what the impacts would be from that
6 facility on transmission interfaces?

7 A No, I don't.

8 Q Now, on page 30, lines 9 through 16 of your
9 testimony, you discuss improvements in air quality by
10 displacing older, more-polluting plants. Do you see
11 that?

12 A Yes, I do.

13 Q Have you done any studies regarding whether
14 that would occur for the CPV Valley plant?

15 A I haven't done any studies, no.

16 Q Are you generally aware of how the New York
17 Independent System Operator dispatches electric
18 generating facilities?

19 A No.

20 Q You have no idea?

21 A Well, I have some idea, you know, they -- they
22 get lowest bidder and stuff like that, and, you know,
23 whoever comes up, you know, with the power and near the
24 load center and they figure out how much is needed on

1 the day ahead or the different markets and two-day-ahead
2 market.

3 Q Would you agree with this statement that taking
4 into account transmission constraints, the New York ISO
5 typically dispatches the lowest bid first?

6 A Yes.

7 Q Do you know whether natural gas plants have
8 lower fuel costs than coal plants?

9 A I don't know. I don't know.

10 Q So as far as in a least-cost dispatch system,
11 you don't know whether, all else being equal, a coal
12 plant would be dispatched prior to a natural gas
13 facility?

14 A Well, generally all things being equal, you
15 know, coal, you know, according to the industry is
16 cheaper than, you know, gas. A lot of them are older
17 plants and cheaper to run.

18 Q I'm just trying to explore the statement that
19 you have about improving air quality by displacing
20 generation from older, more-polluting plants.

21 Are you aware of any case in New York where the
22 Commission required an older plant to be shut down in
23 order to issue a certificate for a new plant?

24 A In some cases, the older plants have been, you

1 know, replaced, okay, repowered in some cases. So the
2 condition of the certificate was that the older plant
3 cease to exist and the new plant, you know, be
4 constructed in its place.

5 Q And wouldn't that typically occur in the
6 situation where the owners of the two plants were the
7 same?

8 A Or it being taken over by a new owner in some
9 cases, new owners taking over -- you know, obviously
10 where the old owner was willing to sell the plant to the
11 new one.

12 Q Right. But where the ownership is different,
13 and let's try an example here, would you expect that in
14 the CPV Valley case that the Commission could order the
15 shutdown of Dynegy's danskammer plant as a condition of
16 certifying the CPV Valley plant?

17 A I wouldn't know, you know, the -- that's beyond
18 my expertise.

19 Q Well, unless the older, more-polluting plant is
20 actually shut down, there's no guarantee of what you
21 state in your testimony that a new power plant would
22 offset or displace generation from older, more-polluting
23 plants. Wouldn't you agree with that?

24 A This is just, you know, a general statement

1 that the Commission has stated in the certificate. The
2 ISO has stated, you know, like in the new Power Trends
3 209 report, you know, says that new power plants built
4 since the inception of electricity markets in New York
5 run primarily on cleaner-burning natural gas, which is
6 helping the reduction on emissions that contribute to
7 global climate change.

8 Q That would depend on the dispatch, though,
9 right?

10 A Obviously.

11 Q Right. And so if the higher, more-polluting
12 plant was lower cost and was dispatched first, then it
13 wouldn't be displaced by the newer plant, correct?

14 A As long as it could burn, you know, in that
15 emission area, meet the air pollution, you know,
16 conditions.

17 Q Now, if it gets certified, the NYRI facility
18 wouldn't have any control over which plants get
19 dispatched by the ISO; would you agree with that?

20 A If NYRI does not get built?

21 Q If NYRI gets built --

22 A Oh, if it does get built.

23 Q -- NYRI would not have any control over which
24 plants get dispatched; is that correct?

1 A That's correct. Not unless there's, you know,
2 some conditions and some contracts that NYRI's made, you
3 know, with any generators.

4 Q You're not aware of any, right?

5 A But I'm not aware of any.

6 Q Going back to the CPV Valley proposal. You
7 state that that plant would take gas from the Millennium
8 Pipeline 7 miles from the site. We already covered
9 that, right?

10 A Right.

11 Q Do you know what impact, what environmental
12 impact building that 7-mile gas pipeline would have on,
13 let's say, soil erosion?

14 A No, not -- I mean, you know, the area isn't --
15 is in an open, you know, setting. I suspect it's, you
16 know, it's kind of a sloped area. It's not very steep,
17 you know, compared to some of the areas that we've
18 talked about in the New York City watershed area along
19 the Marcy South. So I don't expect to see much in the
20 weight of sediment or erosion.

21 Q Do you know what impact building that 7-mile
22 facility would have on forest clearing?

23 A Not exactly, you know.

24 Q How about on wildlife?

1 A I haven't seen the final report, but I expect
2 that, you know, in that area knowing, you know, the
3 terrain and the wildlife situation there right around
4 Middletown, I don't expect it to be very significant.

5 Q Do you know what impact it would have?

6 A No, I don't. I mean, it's a possibility, you
7 know, it could run into Indiana Bat, you know, trees or
8 something like that that they're not aware of.

9 MR. SINGER: I'd like to have marked as the
10 next exhibit the response to NYRI-16.

11 JUDGE STOCKHOLM: Off the record.

12 (A brief recess was taken. Thereafter,
13 Exhibits 191 through 197 were marked for
14 identification.)

15 JUDGE PHILLIPS: During the break, several IRs
16 were handed out that NYRI plans to use. I'm going to go
17 through them quickly. They have been marked as
18 followed: NYRI-16 is Exhibit 191. NYRI-17 is Exhibit
19 192. NYRI-58 is Exhibit 193. NYRI-18 is Exhibit 194.
20 NYRI-19 is Exhibit 195. NYRI-62 is Exhibit 196. And
21 NYRI-139 is Exhibit 197.

22 Counsel, when you're ready, I believe we can
23 proceed.

24 MR. SINGER: Thank you, Your Honor.

1 BY MR. SINGER:

2 Q Mr. de Waal Malefyt, with respect to Exhibit
3 191, which is NYRI-16, that was prepared by you,
4 correct?

5 A That's correct.

6 Q And is the answer still correct, that DPS staff
7 did no analysis of the availability of gas to supply
8 1,200 megawatts of gas-fired generation in the lower
9 Hudson Valley?

10 A Only to the extent that we know it's not -- the
11 gas is usually not contracted by firm contracts. It's
12 on-the-spot market.

13 Q I'm sorry. Is the answer to NYRI-16, 191,
14 correct?

15 A We didn't perform an analysis because it's an
16 acquired on-the-spot market.

17 Q The question here in the interrogatory wasn't
18 how the gas was acquired, it was whether you did an
19 analysis of the availability of natural gas supply.

20 A I'm just adding to that's the way it's
21 available, on-the-spot market.

22 Q Okay.

23 JUDGE STOCKHOLM: So it's -- so it's your
24 testimony that there is adequate capacity in the natural

1 gas system to supply natural gas for a 1,200 megawatt
2 facility in the lower Hudson Valley?

3 MR. de WAAL MALEFYT: Generally, yes, speaking,
4 that's what my understanding, talking to our gas
5 engineers and electrical engineers about the
6 availability, yes. We didn't perform an analysis. We,
7 you know -- but just in general.

8 JUDGE STOCKHOLM: Mr. Blow, is there anyone on
9 remaining Staff witnesses who might have an expert
10 opinion on this matter?

11 MR. BLOW: No, Your Honor. We did not have
12 somebody from our gas policy section.

13 JUDGE STOCKHOLM: Thank you.
14 Mr. Singer.

15 BY MR. SINGER:

16 Q Okay. Turning to Exhibit 192, NYRI-17. That
17 answer was prepared by you, correct?

18 A That's correct.

19 Q Do you know what fuel diversity is,
20 Mr. de Waal Malefyt? Do you know what is meant by that
21 term?

22 A You know, the mixture of fuel, you know, types
23 that generate electric, like coal, gas, nuclear.

24 Q Okay. And, again, you did no analysis of the

1 impact of adding a 1,200 megawatt gas-fired plant in the
2 lower Hudson Valley on fuel diversity in New York?

3 A Right. You know, again, only to the extent
4 that it's going to primarily be a natural gas. That's
5 what all the power plants in probably the last 10 years
6 that, you know, have been certified have been.

7 Q Given that, would you agree that southeastern
8 New York relies heavily on gas and oil-fired generation
9 to meet electric demand?

10 A And some part, a nuclear.

11 Q And that would be true especially in
12 high-demand hours, that southeastern New York relies on
13 gas and oil and, in some part, nuclear?

14 A Yes.

15 Q Do you know what is meant by the phrase "fuel
16 price volatility"?

17 A No.

18 Q Did you read the October 2008 NYISO white paper
19 on fuel diversity that's attached to the testimony of
20 Dr. Lesser and Mr. Puga in this proceeding?

21 A I've just got -- you know, I went over it, you
22 know, leafed through it to see what it was about.

23 Q Would you agree with me that that document
24 states that building more gas-fired generation in

1 southeastern New York would reduce fuel diversity and
2 increase ratepayers' exposure to volatile fuel prices?

3 A I don't recall that statement.

4 Q Would you accept, subject to check, that that's
5 what the document says?

6 A I will.

7 MR. BLOW: Could you give us a page number?

8 MR. SINGER: Yes. It's on page 3-6 of the
9 white paper. And it states, "The comparatively limited
10 downstate fuel diversity poses certain risks for the New
11 York City and Long Island areas. For obvious reasons,
12 the wholesale prices in these areas are inextricably
13 tied in the short run to price conditions in the natural
14 gas market. Without changes in the transmission
15 infrastructure allowing power from other fuel
16 technologies to become available to the downstate
17 regions, prices will continue to be shaped in relatively
18 expensive fossil fuels -- continue to be shaped by
19 relatively expensive fossil fuels in the downstate
20 area."

21 MR. BLOW: Thank you.

22 JUDGE STOCKHOLM: I apologize, Counsel. What
23 was that document?

24 MR. SINGER: It's the NYISO white paper on fuel

1 diversity, October 2008, attached to the testimony of
2 Dr. Lesser and Mr. Puga.

3 JUDGE STOCKHOLM: Thank you.

4 JUDGE PHILLIPS: Can I just ask point of
5 clarification? Did -- does the witness still need to
6 accept that subject to check given that it is going to
7 be attached to a witness testimony that's coming in
8 later, I think, or --

9 MS. LEARY: Your Honor, I would object to that
10 because I don't believe Mr. Singer's initial question
11 quoted that document. He's paraphrased it. We've now
12 heard the quote. The quote is significantly different
13 than what was asked of Mr. de Waal Malefyt.

14 So just in the interest of keeping the record
15 straight, I think the appropriate thing would be for
16 Mr. Singer to ask now that that quote is in the record
17 for Mr. de Waal Malefyt's opinion about it.

18 MR. BLOW: Your Honor --

19 JUDGE STOCKHOLM: He accepted it subject to
20 check. Would you accept that quotation that counsel
21 just put into the record subject to check?

22 MR. de WAAL MALEFYT: Yes, I would.

23 MS. LEARY: But not what was -- my point is
24 simply that it was paraphrased.

1 JUDGE STOCKHOLM: Yes, I understand that. And
2 then it was also quoted. And now the record is clear
3 that the witness has accepted the quoted part subject to
4 check.

5 BY MR. SINGER:

6 Q Mr. de Waal Malefyt, if you know, would
7 building 1,200 megawatts of additional gas-fired
8 generation in southeastern New York reduce fuel
9 diversity and further expose ratepayers in southeastern
10 New York to volatile electric prices?

11 A It would assuming, you know, that those
12 statements, you know, and the assumptions, you know,
13 under -- you know, that we just heard are true and
14 continue to be true into the future. I mean, if fuel
15 becomes cheaper, like it might not be subject to that
16 volatility. And if the supply is such that there's an
17 abundance because of the economy, it might not have that
18 same, you know, fuel diverse -- spike that was quoted.
19 We've seen some --

20 Q Right. Do you have any reason to believe that
21 the statements in the NYISO white paper that I just read
22 to you are wrong?

23 A I just heard some statements today that, you
24 know, because of lower gas prices, fuel gas. So, again,

1 if the prices go down, maybe that statement would not be
2 true, you know, in the future.

3 Q Would you agree with me that prices of natural
4 gas fluctuate periodically?

5 A They do fluctuate periodically.

6 Q Sometimes they're down, sometimes they're up,
7 same thing with oil prices?

8 A That's correct.

9 Q So just because they might be down now, that
10 doesn't mean that they will stay down?

11 A That's correct.

12 MR. BLOW: Your Honor, I hate to object
13 because --

14 JUDGE STOCKHOLM: Good, because we got an
15 answer on the record.

16 MR. BLOW: I know, but I'm objecting to the
17 line. Once -- once something's in the record that --
18 and the witness takes something subject to check, going
19 much beyond that is just counterproductive it seems to
20 me --

21 MR. SINGER: I'm moving on.

22 MR. BLOW: -- in the interest of time.

23 JUDGE STOCKHOLM: Counsel's agreed to move on.

24 MR. SINGER: To the same subject, actually.

1 Q If you could refer to Exhibit 193, and the
2 response to 58-F. Do you see that?

3 A I see it.

4 Q Do you agree with that response?

5 A It wasn't prepared by me, right?

6 Q No. It was prepared by your colleagues on
7 staff.

8 A The question is, do I agree with them? I don't
9 know too much about hedged, you know, what they mean
10 there. So I don't --

11 Q So you have no opinion on that answer?

12 A I have no opinion.

13 Q All right.

14 A It sounds like an economic term that they're
15 using.

16 JUDGE STOCKHOLM: Isn't that a landscaping
17 term?

18 MR. de WAAL MALEFYT: Hedged.

19 Q Could you refer to Exhibit 194, the response to
20 NYRI-18?

21 A I have that.

22 Q That document was prepared by you, right?

23 A That's correct.

24 Q Mr. de Waal Malefyt, in determining that

1 building 1,200 megawatts of gas-fired generation in
2 southeastern New York was a better alternative than
3 NYRI, is it correct that you did not consider the impact
4 of such generation on the state's participation in the
5 regional greenhouse gas initiative?

6 A That's correct.

7 Q Do natural gas-fired plants create more
8 greenhouse gas emissions than wind plants?

9 A For the same amount of generated electricity?

10 Q Yes.

11 A If -- in production, there's a difference, but
12 if you considered all the greenhouse gases and the
13 production, I don't know, you know, if it would be the
14 same, if you're talking about building the towers,
15 building the wind farm, all of that.

16 Q I'm talking about operation.

17 A Operation. Okay. Yes.

18 Q Do you agree that building more wind generation
19 instead of gas-fired generation would help to reduce
20 greenhouse gas emissions?

21 A It would help, right.

22 Q If you could turn to Exhibit 195, NYRI-19.

23 A Yup.

24 Q Was that document prepared by you?

1 A Yes.

2 Q And then Exhibit 196, the response to NYRI-62,
3 was that document prepared by you?

4 A Yes.

5 Q It's been pointed out during the break that
6 there was no response to paragraph F. We've already
7 checked. And is it correct that the response to that is
8 "See D above"?

9 A That's correct.

10 MR. SINGER: I apologize, Your Honor. I might
11 have misstated. It appears that DPS staff did respond
12 to that with "See D above." It just didn't get printed
13 out in this document. I didn't mean to imply that they
14 did not respond.

15 JUDGE STOCKHOLM: Understood.

16 Q So given the response to NYRI-62 in Exhibit
17 196, and specifically NYRI-62-A, am I correct that you
18 did not perform a study that compared environmental
19 impacts of NYRI to the environmental impacts of new
20 gas-fired generation in the lower Hudson Valley?

21 A I'm sorry. What -- you're referring to A,
22 the --

23 Q Yes.

24 A And what was your question?

1 Q Well, the question under 62-A asked you to
2 provide all environmental evaluation studies performed
3 regarding the gas-fired generation plants identified in
4 your testimony. Do you see that?

5 A That's right.

6 Q Now, you didn't provide any studies in response
7 to this interrogatory, did you?

8 A That's right.

9 Q Okay. So is it correct that you didn't perform
10 any studies?

11 A Well, we performed, you know, the analysis that
12 I, you know, referred to using our experience with, you
13 know, electric generation might, you know, last 30 years
14 here. You know, that's what I based the testimony on.

15 Q But did you prepare --

16 A And I didn't prepare --

17 Q -- did you perform a study that compared
18 environmental impacts of NYRI to gas-fired generation
19 alternatives?

20 A It's in my testimony. It's not a written
21 study. It's in -- in my prepared testimony.

22 Q So the entire analysis that you performed is in
23 your testimony?

24 A That's correct.

1 MS. LEARY: Excuse me. Can I ask for
2 clarification from Mr. Singer, Your Honors, on what the
3 foundation is on the environmental valuation study?
4 I -- and then he -- Mr. Singer used environmental
5 impact. So are you using those terms synonymously, or
6 are these two separate things?

7 MR. SINGER: I'm just referring to the response
8 and the question.

9 MS. LEARY: I'm still asking for a foundation
10 of whether an environmental valuation study is an
11 environmental impact study.

12 JUDGE STOCKHOLM: I don't think that
13 Mr. Singer's opinion on that matters, but the witness'
14 might.

15 Mr. de Waal Malefyt, do you see a -- do you see
16 a distinction between those terms?

17 MR. de WAAL MALEFYT: No, I didn't see -- I
18 thought it was like an evaluation, you know, valuation.
19 That's why I took it an environmental evaluation. If
20 valuation is something different, then I misunderstood
21 the question.

22 MS. LEARY: I've just never seen the term.
23 I -- I mean, unless you're in a natural resource damages
24 context, there's -- that's --

1 MR. SINGER: Well, Your Honor, the witness
2 answered question.

3 JUDGE STOCKHOLM: Yes, the witness did answer
4 the question.

5 MR. SINGER: Both here and in the
6 interrogatory.

7 JUDGE STOCKHOLM: You can continue.

8 MR. KLUCSIK: Your Honor, before Mr. Singer
9 continues, I'd like to ask a question for clarification.

10 JUDGE STOCKHOLM: You may.

11 MR. KLUCSIK: Mr. Singer has made reference in
12 his questioning to the lower Hudson Valley. I'd like to
13 know whether he means by that exclusively NYISO load
14 Jones G, H and I and no other.

15 JUDGE STOCKHOLM: In -- I don't think that
16 issue has come up with regard to this interrogatory.
17 You're going back an interrogatory or two, yes?

18 As a matter of fact -- as a matter of fact,
19 Exhibit 194, not 195, we happen to be dealing with -- or
20 196 we happen to be dealing with at the moment, but 194
21 I believe it is, NYRI-18 specifically defines lower
22 Hudson Valley as NYISO Zones G, H and I. And -- and
23 that's the interrogatory that talks about lower Hudson
24 Valley.

1 MR. KLUCSIK: If that's what Mr. Singer means
2 when he refers to lower Hudson Valley, I will be
3 grateful for that explanation.

4 MR. SINGER: That is what I mean when I refer
5 to lower Hudson Valley. It's actually a defined and
6 very well used term within the New York Independent
7 System Operator studies, as is southeastern New York,
8 which includes load zones G through K.

9 JUDGE STOCKHOLM: Thank you.

10 BY MR. SINGER:

11 Q Could you turn to page 32 of your direct
12 testimony, please?

13 A I'm there.

14 Q Okay. There's a statement that appears at
15 lines 3 through 7 -- 3 through 5, actually, that quotes
16 a section of Exhibit E-4. Do you see that?

17 A Yes.

18 Q Could you turn to Exhibit E-4, please, and
19 specifically page 6?

20 A Okay. I'm there.

21 Q The sentence that you refer to in your
22 testimony, could you refer to the way that's referred --
23 could you read that sentence as it appears in Exhibit
24 E-4?

1 JUDGE STOCKHOLM: And tell me where on that
2 page it is, too.

3 A On the bottom -- the last paragraph on page 6.

4 Q It's in the middle of the paragraph. It
5 starts, "In addition".

6 A It says, "In addition, upgrading of selected
7 138 kV transmission elements in the
8 Shoemaker-Chester-Sugarloaf area between Rock Tavern and
9 Ramapo were alternatively a special protection system,
10 paren, SPS, to trip the NYRI HVDC line would be required
11 to mitigate overload of this 138 kV path for the loss of
12 the Rock Tavern-Ramapo 345 kV line."

13 Q So your testimony that appears at page 32 where
14 you quote Exhibit E-4 left out the portion of Exhibit
15 E-4 that talked about the special protection system,
16 right?

17 A That's correct.

18 Q So would you agree with me that your testimony
19 is misleading?

20 A No. I think my testimony is that there's
21 additional undocumented environmental impacts or
22 whatever upgrades are required that's talked about here
23 of selected 138 kV transmission elements, which I
24 don't -- I'm taking to mean transmission lines, unless,

1 you know, that's a misunderstanding in my area that it's
2 only as this, you know, refers to the special protection
3 system. But in talking to our engineer, I thought, you
4 know, he -- he validated that there was a need to
5 upgrade some of the transmission lines.

6 Q But you -- all right. But you left out the
7 portion of the sentence that talks about the special
8 protection system, correct?

9 A Correct. It's like a choice here. We don't
10 know what's going to happen.

11 JUDGE STOCKHOLM: Do you know what an SPS is?

12 MR. de WAAL MALEFYT: Electrically, you know,
13 no. I know it's -- you know, I've heard -- it's been
14 discussed, but I don't know electrically that, you know,
15 what the apparatus is.

16 JUDGE STOCKHOLM: Or how big it is or anything
17 like that?

18 MR. de WAAL MALEFYT: No. It's smaller than --
19 it could be -- it's on a site. It's not something
20 that's a large, you know, piece of apparatus like a
21 transmission line.

22 JUDGE STOCKHOLM: Understood.

23 MR. SINGER: We can answer that question
24 specifically when Panel C testifies.

1 BY MR. SINGER:

2 Q Mr. de Waal Malefyt, do you know if the New
3 York Independent System Operator approved the
4 alternative use of a special protection system when it
5 approved the NYRI system reliability impact study?

6 A No, I don't.

7 Q On page 32, you discuss the CARI Thruway buried
8 cable alternative route. Do you know what the electric
9 system benefits of that -- of using that alternative
10 would be?

11 A There's a number of assumptions, you know, that
12 go into that. If we could transfer 1,200 megawatts down
13 into New York City, which I guess was the first goal of
14 this project, that's the place that I understand, you
15 know, the project wanted to go, to West 49th Street, and
16 that was where the biggest, you know, bang for the buck
17 would be. And then it was scaled back, you know, to
18 Ramapo. And then from there, it was scaled back to Rock
19 Tavern.

20 So my understanding that the greatest
21 electrical benefit would be to that -- you know, to New
22 York City. And going underground, it would have the
23 least environmental impact if it was along the Thruway.

24 Q I'm sorry. My question was, do you know what

1 the electric system benefits would be of CARI's Thruway
2 buried cable alternative? And I think you were
3 referring to something else.. So could you answer that
4 question?

5 A Well, the system benefit, you know, I don't
6 know what the -- you know, how to put it in electrical
7 terms, but the goal was to bring 1,200 megawatts down
8 into New York City.

9 Q Whose goal?

10 A Well, it's CARI's goal, and it's also NYRI's
11 goal -- was NYRI's original goal.

12 Q Do you know what the impact of the CARI Thruway
13 buried cable alternative on transmission voltages would
14 be?

15 A No, I don't.

16 Q Do you know what the impact of that alternative
17 would be on system stability?

18 A No, I don't.

19 Q Do you know whether there are any open breaker
20 positions at the substations that the CARI buried
21 Thruway cable alternative is proposed to interconnect
22 at?

23 A No, I don't.

24 Q So you don't know whether expansion of

1 substations would be required for that particular
2 alternative?

3 A All I know is, you know, if this is similar to
4 what was proposed in conjunction, it would go to a
5 converter station. Then you would have to run AC lines
6 to the different substations that were in the Con Ed
7 system.

8 Q And do you know if any of the substations that
9 the alternative proposed to run to in the Con Ed system
10 have open breaker positions?

11 A No, I don't.

12 Q Was Exhibit 197, NYRI-139, prepared by you?

13 A Yes, it was.

14 Q Thank you. Do you agree with Staff Witness
15 Powell's testimony at page 27, line 14 through 18,
16 regarding the potential use of the New York Thruway as a
17 right-of-way?

18 A I'd have to look at that again. I don't have
19 it in front of me.

20 JUDGE STOCKHOLM: Mr. de Waal Malefyt, if I can
21 ask you while counsel is getting you this document, with
22 regard to your testimony on page 32 that counsel was
23 asking you about, the conclusions that you reached in
24 your testimony with regard to the ranking of the various

1 possibilities that this -- which is discussed, in part,
2 on this page, what was the assumption that you made with
3 regard to the Hudson transmission partners' transmission
4 line, which I believe is in the NYISO que and is in
5 Article VII pending before the Commission?

6 Did you assume that line was going to be built
7 in reaching these conclusions, or did you assume that it
8 was not going to be built, or did you assume it would be
9 an alternate project to NYRI, or did you have any
10 assumptions?

11 MR. de WAAL MALEFYT: I didn't assume -- I
12 assumed it was, you know, its own project and, you know,
13 not an alternative to NYRI.

14 JUDGE STOCKHOLM: Did you assume that it was
15 going to be in service or not?

16 MR. de WAAL MALEFYT: Yeah. Not -- not for in
17 answer to this question, no. I didn't -- I didn't
18 factor that in.

19 JUDGE STOCKHOLM: Well, I mean, just as a very
20 general matter, the -- the benefits of "A" line going
21 into New York City depend, in part, on what other lines
22 are going into New York City.

23 MR. de WAAL MALEFYT: Right. There's several
24 proposals, right, going into New York City in addition.

1 There's Cross Hudson. There's HDP. There's Bay Young.
2 So --

3 JUDGE STOCKHOLM: Under --

4 MR. de WAAL MALEFYT: -- a number of them to
5 our understanding is whoever gets there first, you know,
6 or second, you know, is going to be the winners, and
7 those who don't get there are going to be the losers and
8 will have to wait.

9 JUDGE STOCKHOLM: Well, you testified that
10 building the line down to the 49th Street substation --

11 MR. de WAAL MALEFYT: Right.

12 JUDGE STOCKHOLM: -- would get the biggest bang
13 for the buck.

14 MR. de WAAL MALEFYT: That was the original
15 proposal I understand for the NYRI project.

16 JUDGE STOCKHOLM: Okay. And my question is, in
17 order to determine the bang for the buck that you're
18 going to get, you have to make some assumptions about
19 what else is going to exist. And my question is, did
20 you assume that the Hudson transmission partner line was
21 going to exist or not going to exist, because that could
22 affect the size of the bang, no?

23 MR. de WAAL MALEFYT: Right, but I -- I'm
24 not -- I didn't get into that detail.

1 JUDGE STOCKHOLM: Okay. If you don't know,
2 that's fine.

3 BY MR. SINGER:

4 Q Just to go back so that we're all on the same
5 page. Page 27 of Mr. Powell's testimony.

6 A Right.

7 Q Lines 14 through 18. Why don't you just read
8 that out loud.

9 A Starting with "because"? "Because other
10 reasonable alternatives including non-routing
11 alternatives are being identified in this case, it is
12 unlikely in my opinion that FHWA would grant an
13 exception and allow the underground placement of the
14 proposed facility on the Thruway right-of-way."

15 Q That's the sentence. Do you agree with it?

16 A I agree with that.

17 Q In that -- in that same book that you have
18 there, could you turn to the testimony of Staff
19 Witnesses Quimby and Schrom on page 5?

20 A Okay. I'm there.

21 Q Lines 7 through 8.

22 A "The Staff estimated costs utilizing costs from
23 NYRI's work papers in this case is \$3 billion."

24 Q Yes. That's the staff estimated cost of

1 constructing an underground line along the Thruway from
2 Utica to the Oak Point Rail Yard in New York City,
3 correct?

4 A That's correct.

5 Q Do you agree with that?

6 A Yes.

7 Q Should the Commission consider cost in deciding
8 this case?

9 A Yes.

10 Q Would a \$3 billion project be cost-beneficial
11 to electric customers of the state?

12 A I think we'd have to look at that in the
13 proceeding that's separate from this one. We think
14 that's a reasonable alternative to this proceeding. So
15 I think that would be the ultimate decision from another
16 proceeding, not in this one.

17 Q Have you done a cost-benefit analysis for
18 CARI's underground Thruway alternative?

19 A I haven't. You know, we've just looked at
20 costs, looked at the benefits, you know, in general, not
21 a detailed cost-benefit study I think that you're
22 referring to.

23 JUDGE STOCKHOLM: Mr. de Waal Malefyt, now I'm
24 very confused. Do I understand your testimony correctly

1 on pages 31 and 32 that Staff is recommending as its
2 first choice the choice of the CARI buried Thruway route
3 alternative project? Is that correct?

4 MR. de WAAL MALEFYT: That's correct. If we
5 were looking just at routes, okay, then that's our first
6 choice.

7 JUDGE STOCKHOLM: I think the issue to ruling
8 that it is not a route, and I think the Commission
9 affirmed it, it's an alternative project which can be
10 considered in this case, and which I think testimony
11 is -- or rebuttal testimony is due on Monday.

12 MR. de WAAL MALEFYT: That's correct.

13 JUDGE STOCKHOLM: But what I'm confused about
14 is that if you are recommending the CARI Thruway as an
15 alternative project to NYRI because it goes into New
16 York City and all the other things that have been
17 written about it, how can you make that recommendation
18 if you haven't looked at the cost-benefit of that
19 project?

20 MR. de WAAL MALEFYT: We've looked at -- you
21 know, I said that if he's asking for -- did I do, you
22 know, a detailed cost-benefit analysis, no. I'm not the
23 witness, you know, that's done that.

24 JUDGE STOCKHOLM: Okay.

1 BY MR. SINGER:

2 Q Did any member of Staff do a cost-benefit
3 analysis?

4 A Well, the costs, you know, were looked at by,
5 you know, Richard Quimby and Edward Schrom. Okay. We
6 considered, you know, going along the Thruway. And as,
7 you know, Dick Powell said in his testimony, we think if
8 there's another reasonable alternative like the
9 different routes along the Marcy South or the
10 applicant's proposed route, those need to be explored by
11 the Commission.

12 And, you know, if it's determined that they're
13 denied, then the applicant could go to the Federal
14 Highway Administration, propose the facility on the
15 Thruway. We don't think you can do that now. We think
16 it's got to be determined by the Commission that this
17 project can't be built on the route that's been proposed
18 by the applicant or a reasonable alternative.

19 Q If NYRI proposed a project that cost \$3 billion
20 and ran along the Thruway, would staff recommend that
21 the Commission approve that?

22 A Again, we would, you know, have -- assuming we
23 could look at the impacts of the proceeding, and that if
24 it was something that the -- was feasible, viable.

1 Q So you haven't made a determination whether
2 it's feasible or viable?

3 A That's right. We're saying until we go through
4 this proceeding, we can't go through that -- you know,
5 we can't certify this on the Thruway. We have to wait
6 until the Commission renders, you know, a decision about
7 this project on the two, you know -- basically on the
8 proposed route or reasonable route.

9 Q Am I correct that Staff hasn't done any
10 analysis of the potential benefits of the CARI
11 underground Thruway alternative in comparison to the
12 cost?

13 A Again, we've looked at the benefits of going
14 into New York City area with the -- with this facility
15 if -- and, again, there's different assumptions about
16 the number of, you know, megawatts that can be, you
17 know, transmitted. And those were looked at by Witness
18 Schrom. And so the economic analysis, you know, and
19 that extent by, you know, Tom Paynter and the other
20 panel, Gjonaj and Wheat.

21 Q Could you show me in their testimony where they
22 discuss the benefits of the CARI underground Thruway
23 alternative?

24 A No, I don't think they discuss them, you know,

1 in that terms of a Thruway alternative. I think they
2 discuss in general, you know, generation down in New
3 York City, in that area.

4 Q We're not talking about generation in New York
5 City. We are talking about a proposed underground
6 transmission line costing \$3 billion. Is there anything
7 in the testimony of the Staff witnesses --

8 A No, I don't think that's in their testimony.

9 MR. SINGER: I need to retrieve my binder.

10 MS. LEARY: Your Honor, we've been in this room
11 for almost nine hours, probably some of us more than
12 nine hours. Can we get an idea of -- I'm just trying to
13 communicate to my evening obligation what the story is.

14 JUDGE STOCKHOLM: How are we doing, Mr. Singer?

15 MR. SINGER: I have about five minutes.

16 MS. LEARY: And I hope Judge Phillips has the
17 stopwatch for Mr. Singer going.

18 JUDGE PHILLIPS: Do you want me to do it? I'll
19 do it.

20 Q Could you turn to your testimony on page 32,
21 please?

22 A I've been there.

23 Q Thirty-two, 33, you discuss the Marcy South
24 conversion alternative; is that correct?

1 A Yep. That's the bottom of 32, top of 33.

2 Q Right. Do you know if there's such a project
3 in the NYISO que?

4 A No, I don't know.

5 Q Has Staff determined the electric system
6 benefits of such a project?

7 A I think that question is probably best answered
8 by Witness Schrom. I'm not aware.

9 Q Do you know if Staff determined whether that
10 project would increase transmission interface limits?

11 A No, I don't.

12 MS. LEARY: Your Honor, I mean, it's late and
13 I'm sorry, but this is not the witness.
14 Mr. de Waal Malefyt is the environmental person on this
15 project. His testimony is clear talking about cost
16 benefit and interfaces and all of that. This is not his
17 testimony. He's not the witness. So I would ask that
18 counsel confine his questions so we can get out of here
19 to those issues that are directly related to
20 Mr. de Waal Malefyt's direct or rebuttal testimony and
21 not go outside of the scope of that. He's an
22 environmental witness.

23 MR. SINGER: Your Honor, the fact --

24 JUDGE STOCKHOLM: He's also -- he's also in

1 charge of the Staff team here and has a larger
2 management role. And he has summarized testimony here
3 putting all of Staff's recommendations together, or such
4 as the record shows, that he has put together
5 recommending other projects to be considered as
6 alternatives to NYRI.

7 I think it's entirely appropriate for counsel
8 to examine or cross-examine the basis on which this
9 witness made this particular listing on page 31, 32, 33,
10 and I guess it goes over on to 34, which gives a very
11 specific ordered preference on the part of Staff. And I
12 think counsel can explore that. And you get one extra
13 minute for that argument.

14 JUDGE PHILLIPS: I stopped the watch.

15 JUDGE STOCKHOLM: Objection overruled.

16 Never mind. That's not out of your time.

17 BY MR. SINGER:

18 Q Mr. de Waal Malefyt, do you know what the
19 impact of the Marcy South conversion would be on
20 production costs?

21 A No, I don't.

22 Q Do you know what the impact would be on
23 locational base marginal prices?

24 A No, I don't.

1 Q Do you know if Marcy South would have to be
2 taken out of service to affect the Marcy South
3 conversion project?

4 A I imagine at some point it would to get the
5 converter stations on both ends, and to, you know, to
6 interconnect with the facility.

7 Q Do you think it would need to be taken out of
8 service to string the lines on the existing poles?

9 A No. The project as I understand it would be to
10 use the existing conductors on the existing poles as
11 they are.

12 Q Regarding Staff's Marcy South Alternative, has
13 Staff done a cost estimate? I'm talking about -- I
14 switched subjects. I don't know if you caught that. I
15 moved from the Marcy conversion project of NYPA that you
16 talk about in your testimony to Staff's Marcy South
17 proposed route.

18 A I mean, again, we've -- the only -- the only
19 parts that are part -- are I guess that we looked at the
20 cost of were the deviations that are in my exhibit, what
21 was it, 6, and panel -- your panel.

22 Q You relied on the cost estimates of that that
23 were provided by NYRI, correct?

24 A That's correct.

1 Q Do you have any reason to believe that those
2 cost estimates are not accurate?

3 A No.

4 Q Do you believe that cost should be considered
5 in the Commission's decision?

6 A Yes, definitely.

7 Q I just have one other question. I probably
8 should have asked this earlier in my testimony, but
9 could you describe what's --

10 JUDGE STOCKHOLM: In your testimony?

11 MR. SINGER: Well, kind of.

12 JUDGE STOCKHOLM: Okay.

13 Q In your testimony. In my cross-examination.
14 Could you define what's meant by the term "danger
15 trees"?

16 A Danger trees are outside the normal width of
17 the right-of-way, say, in this case, you know, it's
18 150 feet. So danger tree is a tree that could have the
19 characteristics that it might fall into the wire
20 security zone and would need to be removed.

21 And so you would have to either get rights
22 to -- in a larger area to remove trees if you're on
23 private land, you know, because they're -- you know,
24 they have a disease or they're bending a certain way and

1 it's outside your normal right-of-way. And so those are
2 usually called danger trees.

3 MR. SINGER: Thank you. That's all I have.

4 MR. BLOW: Your Honor, may I have just a minute
5 to -- or two to consult?

6 JUDGE STOCKHOLM: You may, Mr. Blow.

7 (A brief recess was taken.)

8 MR. BLOW: Your Honor, we're ready.

9 JUDGE STOCKHOLM: Please proceed, Mr. Blow.

10 REDIRECT EXAMINATION

11 BY MR. BLOW:

12 Q Mr. de Waal Malefyt, just a couple of
13 questions.

14 In the last few minutes, we've been exploring
15 pages 30 and following of your testimony, your direct
16 testimony. Now, does page -- does page 30 of your
17 testimony start this discussion of the various projects
18 by referring to an environmental preference?

19 A I think it starts on 32, the transmission
20 routes with the least environmental impact. Is that
21 where you're referring to or --

22 Q That's part of it, but if you go back -- if you
23 go back to page 30 --

24 JUDGE STOCKHOLM: I believe --

1 MR. BLOW: Is it line 16? Or do we have
2 different --

3 JUDGE STOCKHOLM: We have different pagination.
4 I think that what you're referring to is a section
5 entitled "Alternative Routing Recommendations". And on
6 my copy at least, it's the top of line 1 -- it's line 1
7 on page 31. And the question, just to see if this is
8 the question you're thinking about, Mr. Blow, does DPS
9 staff have any alternative routing recommendations? Is
10 it the testimony subsequent to that that you're
11 referring to?

12 MR. BLOW: Yes.

13 JUDGE STOCKHOLM: Okay. We're with you.

14 Q Does your answer to that question relate to an
15 environmental preference?

16 A Right. It relates to the environmental
17 preference.

18 Q Now, one more question. There was questioning
19 by I believe Mr. Singer about your role in making some
20 recommendations to the secretary before -- before the
21 secretary issued her letter of August 27, 2008 saying
22 that the application is filed and otherwise in
23 compliance with the Public Service Law.

24 In making such recommendations, were you

1 conducting an advisory staff function or a trial staff
2 function?

3 A I was conducting an advisory staff function in
4 that regard.

5 MR. BLOW: No further questions, Your Honor.

6 JUDGE STOCKHOLM: Thank you. Any recross?

7 MR. KLUCSIK: Yes, Your Honor.

8 JUDGE STOCKHOLM: Mr. Klucsik.

9 MS. WILKINSON: Your Honor, before that, could
10 I ask for clarification just because the difference
11 between advisory staff and trial staff, is that
12 possible?

13 MR. BLOW: I could ask the witness if you want.

14 JUDGE STOCKHOLM: We can -- yeah. I think
15 given that -- that counsel posed the question to the
16 witness and the witness answered it, perhaps it would be
17 best to understand what the witness understands as that
18 distinction.

19 BY MR. BLOW:

20 Q Mr. de Waal Malefyt, is it your
21 understanding --

22 JUDGE STOCKHOLM: No, that's a leading
23 question. Thank you.

24 Mr. de Waal Malefyt, what is the distinction

1 between trial staff and advisory staff in your
2 understanding, sir?

3 MR. de WAAL MALEFYT: In my understanding,
4 advisory staff advises the Commission and includes the
5 secretary, whereas the trial staff are assigned to
6 represent, you know, the interests of the people of the
7 State of New York in a specific case. And there's, you
8 know, basically a firewall to, you know -- between the
9 trial staff and the Commission.

10 JUDGE STOCKHOLM: Thank you. Counselor, is
11 that adequate?

12 MR. BLOW: Yes. Thank you.

13 JUDGE STOCKHOLM: No, I didn't mean you,
14 Counselor. I meant Ms. Wilkinson. Is that adequate?

15 MS. WILKINSON: Thank you.

16 JUDGE STOCKHOLM: Go ahead, Mr. Klucsik.

17 RE CROSS-EXAMINATION

18 BY MR. KLUCSIK:

19 Q Mr. de Waal Malefyt, does the secretary's
20 letter of compliance have any bearing on whether the
21 terms of a mediated stipulation between the parties have
22 been satisfied?

23 MR. BLOW: If you know.

24 Q If you know.

1 JUDGE STOCKHOLM: It is about 23 minutes of 7
2 in the evening, Mr. de Waal Malefyt.

3 A I don't know off the top of my head.

4 Q Does the secretary's letter of compliance have
5 any bearing on whether there is sufficient information
6 before the Commission to make the findings required of
7 it by Section 126 of the Public Service Law?

8 A As I think I stated earlier in my testimony,
9 the findings that the Commission needs to make, is that
10 what you're referring to, you know, are based on the
11 record, not just based on an application. Otherwise, we
12 would not be having proceedings. So it's based on, you
13 know, complete, you know, a record -- or I mean, an
14 application that complies with the regulations and any
15 subsequent hearings and the testimony of the witnesses
16 and, you know, resolution of any of the issues that
17 are -- you develop in the proceeding. Then the
18 Commission can make, you know -- if it has enough
19 information, it can make those findings based on the
20 complete record. Then they could, you know, grant or
21 deny the certificate.

22 Q So is it your testimony that the secretary's
23 letter of compliance with Section 122 has no bearing on
24 the determination of whether there is before the

1 Commission sufficient information to make the findings
2 required by Section 126?

3 A I think I've just said that.

4 MR. KLUCSIK: Thank you.

5 JUDGE STOCKHOLM: Before we get back to you.

6 Mr. Malone.

7 MR. MALONE: Judge, just one question.

8 JUDGE STOCKHOLM: Go ahead.

9 BY MR. MALONE:

10 Q Mr. de Waal Malefyt, Judge Stockholm asked you
11 to rate on the scale of one to 10 the information
12 provided by NYRI in the proposed route and you said
13 three. Can you tell me on a scale of one to 10, one
14 being the least, 10 being the most, what the level of
15 information for the Marcy South Alternate was?

16 MR. BLOW: I object, Your Honor, on two
17 grounds. One, asked and answered previously in his -- I
18 think earlier this afternoon, maybe even late in the
19 morning, and also beyond the scope of redirect.

20 MR. MALONE: It's a follow-up question to your
21 question, Your Honor. And I don't ever believe that he
22 was asked about on a scale of one to 10 what the Marcy
23 South Alternate would be.

24 MR. BLOW: My recollection is that he stated it

1 was similar. And the record will bear out whether
2 I'm --

3 JUDGE STOCKHOLM: Whether you're right or
4 whether you're wrong, and I don't honestly remember. If
5 it's repetitive, I apologize to the parties. I'm going
6 to allow the question.

7 A I would say slightly less than three because
8 they do a comparative analysis with the Marcy South, but
9 it was not the proposed route where a lot of detail --
10 more detailed information about the visual assessment
11 was done, but there is, you know, a detailed comparative
12 analysis between the proposed route and the Marcy South
13 Alternate.

14 MR. MALONE: Thank you. That's it, Your Honor.

15 JUDGE STOCKHOLM: Thank you.

16 Anything else before I go back to NYRI?

17 Go ahead, Mr. Singer.

18 BY MR. SINGER:

19 Q Mr. de Waal Malefyt, if there's a firewall
20 between advisory staff and trial staff, how are you able
21 to advise the secretary and also be a member of trial
22 staff?

23 A I think we were talking about before I was
24 assigned to this case as trial staff after a complete

1 determination about the application was made. Trial
2 staff is assigned after that.

3 Q So the firewall doesn't come into effect until
4 after?

5 A Right. It's my understanding that until you
6 have an application, there's no need to.

7 JUDGE STOCKHOLM: I can -- I can also affirm
8 for the record what the -- what the witness says is
9 correct. In terms of our internal procedures, the
10 application -- until the application is deemed complete,
11 all kinds of different staff may well work on reviewing
12 it, et cetera, for the determination the secretary has
13 to make with regard to compliance with the rules.

14 Once the secretary says yes, it complies with
15 the rules, then that firewall, as the witness described
16 it, is put in place with regard to the identification,
17 which I believe is actually in the rules, of who is
18 assigned as trial staff to the case to represent that
19 public interest.

20 I only put that on the record because I just
21 wanted to confirm that the witness was, in fact, correct
22 about that in terms of our internal procedures.

23 Any other questions?

24 Okay. Very good.

1 Yes. One last thing before we go off the
2 record, unless somebody else brings up something else,
3 we identified Exhibits 175 through 197 today, and we
4 also identified a substitute exhibit for Exhibit 173.
5 Is that correct?

6 JUDGE PHILLIPS: Yes. 173 was replaced.

7 JUDGE STOCKHOLM: With regard to all of those
8 exhibits, they've been identified. Is there any
9 objection to moving them into the record?

10 Hearing none, those exhibits are admitted.

11 (Exhibits 175 through 197 received in
12 evidence.)

13 JUDGE STOCKHOLM: And we will see you all
14 roughly 9:00 tomorrow morning.

15 (Whereupon, the proceedings adjourned at
16 6:40 p.m.)

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