

BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE

EDWARD BINTZ,

Appellant,

v.

Appeal No.

DEPARTMENT OF NATURAL RESOURCES

2024-04

AND ENVIRONMENTAL CONTROL,

Appellee.

HEARING

DATE: Tuesday, January 28, 2025

TIME: 9:01 a.m.

BEFORE: Dean Holden, Chair

Deborah Wicks, Member

Robert Mulrooney, Member

Randall Horne, Member

LOCATION: DNERC

89 Kings Highway

Richardson and Robbins Building

Dover, DE 19901

REPORTED BY: Blake Robinson

JOB NO.: 7077448

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A P P E A R A N C E S (Con't)

ALSO PRESENT:

Janella Sapp, Administrative Assistant

Brandon Holston, Administrative Assistant

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E X H I B I T S

NO.	DESCRIPTION	ID/EVD
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1 P R O C E E D I N G S

2 THE CHAIR: Good morning. My name is
3 Dean Holden, Chairperson of the Delaware Environmental
4 Appeals Board.

5 Before we begin today, for those of
6 you attending in person, please silence your
7 electronic devices. For those of you joining on the
8 phone or online, please mute your microphones unless
9 you're addressed by the board.

10 For the purpose of today's hearing of
11 the Delaware Environmental Appeals Board is to
12 consider Mr. Edward Bintz's motion to compel
13 production of the entire record for the secretary in
14 Appeal 2024-04.

15 The appeal filed by Mr. Bintz
16 challenges two federal consistency certifications
17 issued by DNREC to the US Army Corps of Engineers in
18 connection with the project in development by US Wind
19 to create an offshore wind farm for power generation.

20 Notice of today's hearing in the
21 auditorium at DNREC's offices at 89 Kings Highway,
22 Dover, Delaware, and by virtual access was posted on
23 the State of Delaware Secretary of State's public
24 meeting calendar on which the boards -- and on the

1 board's website.

2 In addition, public notice of this
3 hearing was published in the News Journal and the
4 Delaware State News.

5 The Delaware Environmental Appeals
6 Board is a quasi judicial body created by the General
7 Assembly to hear appeals of decisions of the Secretary
8 of DNREC. The way the board fulfills its duties and
9 responsibilities, including conducting hearings is
10 established and governed by the Delaware Code, board's
11 regulations, and case law.

12 I will now introduce board members and
13 the board staff, other board members participating in
14 this hearing and constituting a quorum pursuant to 7
15 Del Code Section 6007 are Ms. Deborah Wicks,
16 Mr. Robert Mulrooney, and Mr. Randall Horne.

17 I would also like to introduce the
18 board's assigned Deputy Attorney General, Zach Naylor,
19 and the board's administrative assistants, Janella
20 Sapp and Brandon Holston. The appellant is
21 represented by the Honorable Jane Brady.

22 Would you please introduce yourself for
23 the record?

24 MS. BRADY: Yes. Thank you. My name

1 is Jane Brady. I'm here representing Mr. Bintz.

2 THE CHAIR: Thank You. The appellee is
3 represented by Deputy Attorney General Sawyer Traver
4 at today's proceedings.

5 I ask that Counsel take this
6 opportunity to introduce themselves to the board and
7 for the record.

8 MS. TRAVER: Yes, my name is Sawyer
9 Traver, Deputy Attorney General with the Department of
10 Justice here today representing DNREC.

11 THE CHAIR: Ms. Brady will have up to
12 20 minutes to argue in favor of motion to compel and
13 may reserve any portion of that allotted time for
14 rebuttal. That will be followed by 20 minutes for
15 DNREC to argue against the motion. Ms. Brady will be
16 permitted 10 minutes for rebuttal argument.

17 Board members may ask questions during
18 argument or after the allotted time. The board may
19 deliberate in executive session after the arguments
20 have concluded. The board may issue an oral decision
21 thereafter but will issue a written order following
22 this hearing.

23 Ms. Brady, you may now proceed.

24 MS. BRADY: Thank you and good morning.

1 This is a hearing as you said on a motion to compel
2 that was filed by Mr. Bintz to require the Department
3 of Natural Resources to provide the entire record to
4 this board and to him as he brings a motion or an
5 appeal of a decision by the secretary.

6 The Delaware Coastal Management Plan
7 specifically is intended to ensure protection of
8 Delaware's coastal areas from environmental damage and
9 to preserve its use for recreation and scenic and
10 aesthetic enjoyment.

11 7 Delaware Admin Code 2201 requires
12 that the proposed activities that are subject to
13 federal approval that might reasonably have
14 foreseeable effects on Delaware's coastal area are to
15 be reviewed by DNREC for consistency between that
16 federal approval and Delaware's rules and regulations.

17 Mr. Bintz filed a substantive appeal of
18 the finding of consistency that the Department of
19 Natural Resources made, but he found the record
20 submitted to this board and available to him to be
21 significantly lacking, and so he filed this motion to
22 compel.

23 7 Delaware Code 6008 states that when
24 this board holds a public hearing of an appeal of a

1 final decision of the secretary, the record before the
2 board shall include the entire record before the
3 secretary. 7 Delaware Admin code similarly states
4 that the record before the board includes the entire
5 record before the secretary.

6 The plain meaning of words controls in
7 Delaware law and there is no ambiguity in the word
8 "entire." It means whole, all, everything.

9 The state is correct in its response in
10 a couple of respects. First, it notes that the
11 Environmental Appeals Board regulations do not define
12 what the entire record is. That is true as far as I
13 could find.

14 But the state then engages in a flawed
15 argument that the entire record need only contain the
16 documents that the secretary is required to review in
17 making a determination of consistency.

18 Therefore, the state argues that they
19 need only provide what essentially is in the
20 chronology, only those items that without which the
21 secretary's decision would be procedurally flawed.

22 That's not -- but is that what the
23 entire record is meant to mean? I don't think so.
24 Indeed there is guidance as to what the entire record

1 should mean in federal regulations and case law.

2 The Administrative Procedure Act at the
3 federal level uses the word whole record as opposed to
4 entire record and requires the whole record to be
5 submitted by an agency when a ruling is on appeal.

6 Like this board, it is not expected
7 that the parties create a new record when determining
8 if the decision was supported or not supported by
9 substantial evidence. Rather, the board relies on the
10 record that is presented, which is supposed to be all
11 of the information that was before the agency when the
12 agency made the decision.

13 The federal government provides
14 guidance to federal agencies on what the entire whole
15 record should be. It should be the paper trail that
16 documents the agency's decision making process and the
17 basis for the agency's decision.

18 That guidance includes describing some
19 of the types of documents and materials that are
20 relevant to the process of the agency's decision and
21 were -- whether they support the decision or not.

22 And I believe attached as an exhibit is
23 a copy of the US Department of Justice Environment and
24 Natural Resource Division guidelines for agencies on

1 what would comprise the whole record.

2 In Citizens to Preserve Overton Park
3 vs. Volpe, The United States Supreme Court held that a
4 portion of the record was not the whole record.

5 We know the entire record, the whole
6 record is not before this board, and we know that
7 there was significant additional information that was
8 provided to DNREC after the public comment period
9 expired and before the secretary made the decision
10 that is challenged in this underlying matter.

11 How do we know that? Because DNREC
12 says so. First, there's a three-month gap in the
13 documented information included in that portion of the
14 record the state provided. We know that during that
15 time the state was seeking new information and
16 clarification that was utilized by the secretary in
17 making his decision.

18 For instance, the state acknowledges
19 that the Delaware Coastal Management Plan requires the
20 agency to coordinate with network partners, and they
21 represented that they were going to do so in public
22 statements at the time of public comment. But they
23 claim they don't have to include those reports from
24 those partners in the record.

1 Further in one document provided by
2 DNREC, the agency acknowledged that they sought and
3 received additional information following the close of
4 the public comment period regarding significant
5 environmental concerns, including location of the
6 offshore cables and decommissioning of the project.

7 However, the request and responses nor
8 the specific information that was included in those
9 responses is provided as part of your record.

10 Now, why is this information important?
11 This board needs to determine when challenged if a
12 secretary's decision is substantially supported by the
13 evidence that the secretary considered.

14 But if you don't know what all of that
15 evidence is, whether it is contradicted, whether there
16 are differences of opinion between those partners we
17 discussed earlier, you can't do your job and neither
18 can Mr. Bintz fairly prosecute his underlying claim.

19 Appellants are only permitted to
20 introduce evidence that is included as part of the
21 record when challenging the secretary's decision. How
22 is he to learn if there were contradictions with the
23 interpretations of the information provided by one of
24 those network partners or by the applicant themselves

1 is a fair extrapolation of the actual facts that were
2 presented? He cannot and neither can this board.

3 Mr. Bintz's underlying claim is that
4 the secretary failed to take into account reasonably
5 foreseeable coastal zone effects as required by the
6 Delaware Coastal Management Plan.

7 In fact, he addresses several aspects
8 of what the Coastal Management Plan is to protect that
9 were not addressed specifically in the secretary's
10 order.

11 Such a consideration touches on
12 virtually every determination with regard to
13 consistency. What information was available, if there
14 were gaps in that information relevant to an aspect of
15 the impact on the coastal zone is not known.

16 Further, an appellant has the burden to
17 establish the decision was not supported by
18 substantial evidence. They cannot possibly meet that
19 burden if they don't know what evidence was considered
20 by the secretary in making the decision that's being
21 challenged. And that's where the state is right
22 again.

23 Mr. Bintz does not know whether other
24 evidence was before the secretary because the state

1 won't tell him. The state makes an absurd demand on
2 appellants to identify the documents they're claiming
3 are not part of the record.

4 If it were not for the particular facts
5 in this case, we would not be able to identify that we
6 know there are documents that were considered by the
7 secretary that are not in the record that the agency
8 presented to this board. Not every applicant might be
9 so fortunate.

10 The Federal Administrative Procedures
11 Act, Section 10127 identifies some of the materials
12 that comprise the record: all notices; all
13 correspondence between the agency and the parties;
14 exhibits, documents, and testimony submitted into
15 evidence; and all recommended orders, summaries of
16 evidence, and findings; and all interlocutory and
17 final orders of the agency shall be included in the
18 record.

19 Delaware case law makes clear that in
20 reviewing an agency's decision, the reviewing party,
21 whether it's the court or this board, is to conduct
22 a -- hold on, I can't read my writing -- searching and
23 careful analysis of the evidence. That is not
24 possible on the record that has been presented to you

1 in this matter.

2 Now, I have no doubt that each one of
3 you would like to make and wants to make the right and
4 proper decisions in your appeals and to afford the
5 members of the public who have fair reason to
6 challenge a decision the secretary makes a good
7 opportunity to do so.

8 But this board needs to clarify that
9 the entire record is the whole record and that this
10 board and appellants are entitled to know what
11 information was available to the secretary before he
12 made the decision you're being asked to endorse and
13 the appellant is challenging.

14 Now, I won't presume to advise you what
15 specific information you might designate, but I do
16 offer these Federal Administrative Procedure
17 Guidelines as a guide.

18 Let me say one more thing. We are not
19 seeking to supplement the record. We are asking the
20 state to complete the record, the record that existed.
21 We are not asking additional information be placed in
22 it. We are asking for the state to provide the
23 information that was before the secretary when he made
24 his decision.

1 That is the only fair way that you can
2 make a decision you can feel comfortable is supported
3 and the only fair way that any appellant who wants to
4 challenge the decision of a secretary can do that.

5 I know this may be an expansion on what
6 has been typically done, and to be candid as attorney
7 general, I didn't always attend the -- I've attended
8 EAB hearings but hadn't paid the kind of critical
9 attention to the rules as I did for preparing for this
10 matter.

11 And it seems to me that it would
12 behoove this agency -- this board, rather, to review
13 what you want to see and hear in these matters and
14 define what you want the entire record to comprise.

15 And I suggest to you it should be far
16 more than what the chronology includes and what is
17 required simply to make sure that the secretary checks
18 the mandatory boxes.

19 You should know what was there, whether
20 it was contradicted, whether -- in making your
21 determination, whether the agency's decision was
22 substantially supported by the evidence before it.
23 Thank you.

24 THE CHAIR: Thank you, Ms. Brady.

1 MS. TRAVER: Thank you.

2 Good morning, board members. As stated
3 earlier, my name is Sawyer Traver here today
4 representing the Appellate DNREC.

5 The appellant today moves to compel
6 DNREC to file reports and analyses and e-mails and
7 correspondence that he alleges have been omitted from
8 the entire record here.

9 Appellant's vague requests to
10 supplement the record are unsupported by the law and
11 would drastically expand the meaning of the record
12 before the secretary on appeal to the EAB.

13 THE REPORTER: Ms. Traver, would you
14 move the mic just a little bit closer? Thank you.

15 MS. TRAVER: Accordingly, DNREC
16 respectfully requests that the EAB deny Appellant's
17 motion to compel today.

18 The record filed with the EAB in this
19 matter is complete and the entire record. The
20 Delaware Coastal Management Programs, the DCMP,
21 policies prescribe what must enter the record for the
22 secretary's federal consistency review, and each of
23 those items has been provided to Appellant here.

24 It's important to consider in this case

1 that the federal consistency review process is
2 distinct from environmental permitting also done by
3 DNREC, where you would have a public hearing with
4 testimony and hearing officer's report. Here, federal
5 consistency review is the state's part of the federal
6 approval process and inherently more limited.

7 So the state in this matter was
8 reviewing a US Army Corps of Engineers permit for
9 federal consistency and US Winds' Outer Continental
10 Shelf plan for BOEM.

11 For the Army Corps of Engineer permit,
12 the DCMP policies require from the applicant a
13 statement of consistency certification, a copy of the
14 application, the detailed description of the proposed
15 activity, an assessment relating to the probable
16 coastal zone effects, and a brief set of findings
17 derived from that assessment indicating that the
18 proposed activity is consistent with the DCMP's
19 policies.

20 From DNREC what is required is
21 coordination with network program partners, public
22 notice, and its federal consistency review response in
23 writing.

24 Similarly for the outer continental

1 shelf plan, the applicant had to provide a copy of its
2 application plan certification and supporting
3 information. And DNREC had to, again, provide that
4 public notice and its federal consistency review
5 response.

6 The DCMP policies do not require that
7 reports or correspondence be reviewed in connection
8 with the issuance of the federal consistency
9 concurrences, nor were any reports prepared here.

10 The DCMP had regular calls with its
11 network program partners, and the concerns and
12 comments made on those calls were compiled into the
13 written federal consistency decisions that were issued
14 in this matter.

15 Further, introducing correspondence
16 into the record would be inappropriate here, as the e-
17 mails were not part of the record in this matter and,
18 again, that would dramatically expand the scope of the
19 EAB's review in all cases.

20 Because all items required for review
21 by the DCMP's policies have been provided to Appellant
22 here, the record is administratively complete.

23 Next, the appellant's brief cites the
24 Federal Administrative Procedure Act in support of his

1 argument that DNREC must file the entire record with
2 the EAB.

3 However, the APA presumes that an
4 agency has filed the complete record in an appeal and
5 requires a party contesting the completeness of the
6 record to rebut this presumption with first reasonable
7 nonspeculative grounds for the belief that the
8 documents were considered by the agency and not
9 included in the record.

10 And second, identification of the
11 allegedly omitted materials with specificity, not
12 merely identifying broad categories of documents and
13 data likely to exist.

14 Appellant's request here is exactly the
15 speculative non-specific request for documents this
16 presumption wards against.

17 Appellant incorrectly theorizes that
18 reports and analyses must exist that have been omitted
19 from the record. However, federal courts have held
20 that a petitioner's belief that certain documents may
21 exist fails to overcome the presumption of a complete
22 record. And that's a site from footnotes 16 of my
23 brief.

24 Further, Appellant fails to assert any

1 reasonable nonspeculative grounds for his belief that
2 reports and correspondence were relied upon by the
3 agency and not included with the record.

4 The materials that US Wind submitted
5 pursuant to the requirements of the DCMP policies were
6 provided at the record in this matter. And those
7 materials together with the public comments submitted
8 and conversations with the DCMP's network program
9 partners as recorded in the final written consistency
10 concurrences comprise the entire record in this
11 matter, and all of that has been provided to
12 Appellant.

13 Appellant's arguments are too
14 speculative and non-specific to rebut the presumption
15 that DNREC has provided the entire record in this
16 matter here.

17 In sum, Appellant's motion to compel is
18 overly broad, unsupported by the law, and DNREC again
19 respectfully requests that it be denied. Thank you.

20 THE CHAIR: Ms. Brady?

21 MS. BRADY: Yes.

22 THE CHAIR: Ms. Brady?

23 MS. BRADY: Yes. Thank you.

24 So I submit the state doesn't really

1 address the issue, which is not what must enter the
2 record. She keeps citing to the obligation that the
3 secretary has to do certain specific things, but the
4 record that you're required to receive doesn't say
5 provide us with proof you considered all the things
6 you have to. It says the entire record.

7 And so if the secretary rejects
8 information, doesn't give it as much weight, has it,
9 doesn't consider it, and we know -- then that is
10 relevant. Whether he checks all the boxes when he
11 makes the decision is not the question that is put to
12 you by the language in your regulations and the law.
13 The entire record should be before you for you to make
14 a determination.

15 The -- she said that we're not -- oh.
16 She said you're expanding the scope of the EAB review
17 if you grant our request. No. We're letting you do
18 your job.

19 The scope of your review is to be the
20 entire record and whether it's substantially -- the
21 secretary's decision is substantially supported by
22 that record, whether it's support -- and whether that
23 information that was considered supports the ultimate
24 decision or not.

1 And there will be many times that there
2 will be contradictory, conflicting, and different
3 opinions. Heck, in the proposal to go under the bay
4 for the connection to these cables to a substation,
5 the EPA and National Fisheries both recommended
6 against doing that. The state granted it a permit to
7 do that.

8 So we know there's stuff -- there's
9 information in the record that the secretary may not
10 regard as compelling his decision, but it's part of
11 the record, and it should be provided.

12 And we do rebut the presumption here.
13 That presumption is in the absence of anything else,
14 but we know that there was requests for additional
15 information, that it was provided, and we don't know
16 what that information is.

17 We only have the secretary summary in
18 his opinion about the location. We know it was
19 regarding the location of the cables, and we know it
20 was regarding the decommissioning. We know it was
21 about that, but we don't know what information was
22 provided. You don't know what information was
23 provided.

24 You can't avoid an obligation to

1 provide information the secretary relied upon by not
2 writing it down.

3 So if there's a practice that the
4 network partners don't provide their input in writing
5 or there's a practice that the staff who talk to those
6 network partners don't write memos to the secretary
7 about what that network partner says, that's avoiding
8 their duty to show that the record supports -- what
9 the record entails that supports or doesn't support
10 the secretary's decision.

11 So my assessment is that the entire
12 record is not being addressed. It's not being
13 provided to you, that the state is not addressing what
14 the entire record should be, but only what the minimal
15 mandatory aspects should be. And whatever is required
16 by the Federal Consistency Guidelines or the DCMP,
17 that's what we have to give you.

18 And that's not what the law and the
19 regulations say. They say you're entitled to the
20 entire record. Thank you.

21 THE CHAIR: Thank you, Ms. Brady.

22 Questions from the board?

23 MR. HORNE: So what I'm interpreting
24 and understanding is that basically all documents

1 received relative to this project constitute the
2 record. The fact that they may not have been
3 considered is important because they weren't
4 considered or they were chosen not to be considered.
5 Is that correct?

6 MS. BRADY: I think whether they were
7 rejected --

8 MR. HORNE: Ms. Brady, your mic's off.
9 Thank you.

10 MS. BRADY: Whether they were rejected
11 or accepted, the agency receives that information.
12 That makes it before the secretary. They consider it
13 an agency decision.

14 So the case law looks at what is in the
15 record is what is before the secretary. What
16 information could they call upon in making their
17 determination? And then your obligation is to find
18 that that information in the whole either does or does
19 not substantially support the subject.

20 MR. HORNE: This is where I'm having a
21 little confusion.

22 MS. BRADY: Yeah.

23 MR. HORNE: So there's going to be a
24 lot of stuff submitted back and forth that has

1 absolutely nothing to do with anything. But there are
2 things that, as you say, are presented that could have
3 been considered and may have been determined not to be
4 relevant, so they're -- they didn't provide those.

5 MS. BRADY: Right.

6 MR. HORNE: Are you suggesting that
7 everything or just what was used or specifically
8 excluded in making the decision?

9 MS. BRADY: So I think everything in
10 the sense that that is the record. So if it was a
11 request, what time are you going to have a Zoom to
12 have a call? No. But if it's the content of the Zoom
13 call, yes.

14 They -- and there's an obligation for
15 the state to preserve what it does, the record that it
16 creates. And they're suggesting that, you know, oral
17 conversations, you know, that federal regs even
18 include notes of that, internal summaries of evidence.

19 So that's part of what is before the
20 secretary within the agency in making the
21 recommendations, interlocutory, or final decisions.

22 MR. HORNE: Okay. And from your
23 standpoint, would you agree that there are documents
24 that were not included because you or DNREC as the

1 case may be determined that they weren't relevant to
2 the decision making process?

3 MS. TRAVER: No. I think the DCMP sets
4 forth the documents that are relevant to the
5 secretary's review.

6 MR. HORNE: This is clearly where our
7 issue is, right here; right?

8 MS. BRADY: So the federal laws and the
9 case law that looks at it does not distinguish what
10 the secretary determines is relevant and what is in
11 the record. So there could be a conflict of interest
12 or a --

13 MR. HORNE: Sure.

14 MS. BRADY: -- a prejudice or a bias in
15 deciding what is relevant. That's why with FOIA, any
16 kind of public review of the government action, the
17 entire record is the entire record.

18 MR. BINTZ: Can I weigh in just for a
19 sec?

20 MR. HORNE: Sure. The --

21 MR. BINTZ: Anything that you can do to
22 clear the air.

23 MR. BINTZ: Yeah. Well, we had -- we
24 had mentioned in the brief that there's a three-month

1 gap. So pretty much what -- what DNREC is reviewing
2 via the DCMP is information submitted by US Wind, so
3 of course it's going to have the US Wind
4 perspective --

5 MR. HORNE: Sure.

6 MR. BINTZ: -- as opposed to a more
7 objective review by -- by DNREC. And we don't have
8 anything reflecting that objective review, you know,
9 by DNREC other than the conclusion itself.

10 And to me that's -- that's, you know,
11 an important part of what it takes to review what the
12 analysis was and -- and does it, you know -- is it --
13 does it constitute substantial evidence for the
14 position they took?

15 MR. MULROONEY: Ms. Brady, you talked
16 about coordination with network partners. I guess
17 that's correspondence and documents related to that
18 coordination. What would that look like? I'm not
19 sure I understand what network partners would be and
20 what documents --

21 MS. BRADY: Well, the Coastal
22 Management Plan requires that they consult with
23 network partners. The state can tell you exactly who
24 they consulted with.

1 I can't because we don't have that
2 record, but it would be agencies, organizations that
3 have an interest in and expertise regarding any aspect
4 of the project that they would want to hear from.

5 And I don't know, are they defined in
6 the code there, network partners, Ma'am?

7 MS. TRAVER: I am not sure if they're
8 defined in the code.

9 MS. BRADY: I don't think they are.

10 MS. TRAVER: But the -- I would assume
11 they are. I would hope. The concurrence letters list
12 the agencies that DNREC coordinated with.

13 MR. MULROONEY: So they're state
14 agencies and external organizations as well?

15 MS. BRADY: They can be. Yes.

16 MR. MULROONEY: Could be.

17 MS. BRADY: In fact -- yes. In fact
18 they only list the divisions within DNREC, but there
19 may be reports and analysis from those divisions that
20 we don't have.

21 MR. MULROONEY: Okay.

22 MS. BRADY: They simply talked to them
23 or they got a report from them. I suspect there's a
24 lot of internal analysis and communication relating to

1 what ultimately the decision was that has not been
2 revealed.

3 MR. MULROONEY: So for DNREC -- so that
4 communication or the information that you're -- the
5 feedback you're getting from network partners, that
6 would or would not have been part of the decision
7 making process?

8 MS. TRAVER: It was part of the
9 decision making process, the comments that were
10 received --

11 THE REPORTER: Ms. Traver, would you
12 turn your mic on? Sorry.

13 MS. TRAVER: Sorry.

14 Yes. It was part of the decision
15 making process. The comments received from the
16 network program partners were incorporated into the
17 final consistency concurrences.

18 MR. MULROONEY: Okay. So that -- were
19 those records provided as part of the overall?

20 MS. TRAVER: There aren't reports.
21 There aren't records in that sense.

22 MR. MULROONEY: Then what would it be?
23 Correspondence or --

24 MS. TRAVER: It was my understanding

1 from speaking with DNREC is that records that there
2 were regular phone calls that all of the network
3 program partners would participate on.

4 MR. MULROONEY: Okay. So nothing
5 documented then in terms of in writing?

6 MS. TRAVER: Not that I've reviewed.

7 THE CHAIR: Is there a listing of who
8 within those different network partners participated?

9 MS. TRAVER: I could absolutely get
10 that for you.

11 THE CHAIR: Is that in the current
12 document provided to date?

13 MS. TRAVER: No. No. And let me
14 rephrase. I can get a list of who all the network
15 program partners are. I am not sure who participated
16 on every call. I can see if they have that
17 information.

18 THE CHAIR: Any other questions? Have
19 more?

20 Ms. Brady, you mentioned a three-month
21 gap in documents. Could you tell us a little bit more
22 about that?

23 MS. BRADY: That's between -- well,
24 that's between when public comment period expired and

1 when the secretary issued the order.

2 And we know that there were things
3 happening in that time, clearly. That's when they
4 were seeking out the other opinions from the network
5 partners. That was when they were evaluating the
6 information, asking US Wind for additional
7 information, considering what they've said, and
8 deciding about the location.

9 Even changing a little bit of the
10 project about the location or getting assurances about
11 the location of the cables as well as -- sorry, I
12 forgot my mic -- as well as the decommissioning
13 because there's been a lot of concern in the public
14 about the costs of decommissioning and whether there
15 should be a bond up front and that kind of thing.

16 And the federal government undermined
17 some of the other projects on the east coast by saying
18 you didn't have -- that they overrode the state's
19 requirement of a decommissioning bond.

20 And so that was a particular area of
21 concern for the public, but we don't know what their
22 response was and all the details of what that was,
23 what information was provided that might have affected
24 or influenced the secretary's decision.

1 THE CHAIR: Thank you.

2 Ms. Traver, the -- in my reading of the
3 secretary's consistency -- the order or the
4 consistency determinations, there seems to be a number
5 of additional requirements that are within it that
6 weren't included in the documents submitted by US
7 Wind.

8 Is the record that's been provided for
9 this appeal, does it contain the backup documents that
10 were utilized or the department opinions that were
11 utilized to determine those that were included in the
12 submission?

13 MS. TRAVER: I'm not sure I understand.
14 You say the secretary's order contained additional
15 requirements?

16 THE CHAIR: Yeah. Correct. I mean, it
17 speaks about -- let me see where that was. So it
18 speaks about restrictions in addition to other
19 mitigation and monitoring effects to protect natural
20 resources. Right? And that's on page 3 of 8.

21 And and to me it reads that DNREC has
22 taken all the submissions that came from the applicant
23 and the input and correspondence with the network
24 partners and come up with this list of additional

1 mitigation and monitoring efforts. Right?

2 To me, it doesn't seem like the record
3 that's been submitted to date provides the backup for
4 how those were determined.

5 MS. TRAVER: Just glancing at this
6 list, these look like standard Watershed Stewardship
7 and Fish and Wildlife requirements. I assume it
8 would've come up in conversation with those partners.

9 MR. HORNE: And is that -- is that not
10 why this is a conditional concurrence because they've
11 added -- no?

12 MS. BRADY: It's conditional because
13 the state had not yet granted or made the
14 determination on the pending permits for beach
15 construction subaqueous and wetlands permits.

16 And so it conditioned the consistency
17 on those permitting processes, which are also now on
18 appeal to this board and to the superior court because
19 the appeal from the beach construction is directly to
20 superior court.

21 MR. BINTZ: And let me supplement it.
22 On page 8 -- starting on page 8 of the conditional
23 concurrences, they add just -- I think what you
24 were -- where you were heading on this, is that there

1 are new conditions that are added, for example, for
2 the -- to protective Bethany Beach firefly, which is
3 an endangered species, they put in a requirement that
4 there be no permanent lighting.

5 That is nowhere to be found in the US
6 Wind materials. They were providing during
7 construction that they would not I -- I guess it was
8 time of year restrictions. So during the summer they
9 couldn't do lighting. But this is a different
10 requirement.

11 And -- and so you'll see eight
12 additional conditions here that are over and above
13 what is required elsewhere.

14 And -- and there's no explanation as to
15 your question. There's no backup to support of for
16 how in the record right now as to how they arrived at
17 those.

18 THE CHAIR: Right. Ms. Traver, I mean,
19 it seems to me that if -- to produce these additional
20 conditions and things that were added that are outside
21 of the record, the documents that have been been
22 submitted to date, it would be tough that that
23 occurred just through a phone call and then made its
24 way into the secretary's order. Right?

1 To me, there seems to be -- there's got
2 to be some documents of the development of this that
3 led to the ultimate document.

4 MS. TRAVER: All I can say is reports
5 weren't required. No reports were submitted.

6 MS. BRADY: I think that first part is
7 correct. Reports aren't required. You know, the only
8 thing that's required is you check three boxes,
9 really, maybe four.

10 But that's not the question before this
11 board on this motion nor is it the question before any
12 reviewing board or court. The question is whether
13 they complied with the regs and the law, which
14 requires the entire record be here for you to make a
15 determination.

16 MR. HORNE: So you've -- in your
17 definition of the entire record, you've relied on some
18 federal law, case law?

19 MS. BRADY: Yes. They use the term
20 whole record but they --

21 MR. HORNE: My question is, why does
22 your definition take precedence over DNREC's
23 definition out of the DCMP?

24 MS. BRADY: Well, DNREC doesn't have a

1 definition. There is no definition in Delaware law of
2 what the entire record is, and I encourage this
3 board --

4 MR. HORNE: No. But she's saying they
5 have submitted what the DCMP requires be submitted.

6 MS. BRADY: That's correct. They have
7 submitted what is required, but that is not the
8 record.

9 MR. HORNE: Okay.

10 MS. BRADY: That is simply what boxes
11 have to be checked. That is the minimum that the
12 secretary has to do or the decision is negated. I
13 mean, absolute minimum the secretary has to do or the
14 decision is negated.

15 Your job is to find out -- and your
16 duty is to find out if there's a substantial evidence
17 to support that decision. And you can't do that if
18 you don't know what evidence was before the secretary.

19 MR. BINTZ: And the DCMP does not speak
20 to a record. It lists the -- or it identifies
21 information that US Wind is required to submit with
22 its application. It never uses the word record or
23 purports to say that what US Wind is submitting is the
24 record. It's just what they're required to provide.

1 And there was follow up as reflected in
2 the concurrence letter asking for additional
3 information, and we know that was provided and we --
4 you know, that may well have been other things and --
5 and, you know, that are very relevant to -- to the
6 decision made here.

7 MR. MULROONEY: So I'm not an attorney,
8 but in my prior life when I worked for a company, we'd
9 be involved in lawsuits and there'd be a --

10 MS. BRADY: Sorry for you.

11 MR. MULROONEY: Well, it was part of
12 the job.

13 MS. BRADY: Darn lawyers.

14 MR. MULROONEY: It was -- but it was
15 part of the --

16 UNIDENTIFIED SPEAKER: That's the fun
17 part.

18 Yes. But there is a --there'd be a
19 discovery process, and I would have to identify --

20 MS. BRADY: Right. Right

21 MR. MULROONEY: -- and preserve any
22 documents that would be related to that particular
23 case. Are you asking for discovery process for this
24 or is --

1 MS. BRADY: No. No. There is no
2 discovery before this board.

3 MR. MULROONEY: Okay.

4 MS. BRADY: What is required before
5 this board, though, is the entire record. And so
6 that's why I suggest -- and, you know, again, I have
7 worked with agencies a lot of my career. I never paid
8 the kind of critical attention to this particular
9 issue until now when I was asked to help Mr. Bintz.

10 And it seems to me it would behoove
11 this agency to identify what you expect the agency to
12 provide in terms of the entire record, much like the
13 federal guidelines and US Department of Justice have
14 done. Give Zach a little more work to do. But to
15 help assure that DNREC knows what you expect and what
16 you're entitled to.

17 And it's not -- one of the things they
18 include in the federal guidelines is notes. Because
19 if they have a conversation or they take notes about
20 what one of the divisions wants in this, or there's an
21 e-mail, that's evidence that's before the secretary in
22 making that decision within the agency. That should
23 be preserved.

24 And it's not onerous. Agencies do it

1 every day all the time, but it's not discovery. It's
2 what -- they have an obligation to prove to you
3 there's substantial evidence to support the
4 secretary's decision.

5 And if all you ever get is what they
6 have to do and one sided piece of the information and
7 not all of it, you can't do your job right. And
8 that's what the courts and other agencies have and
9 federal government has recognized.

10 MR. MULROONEY: Okay. Thank you.

11 THE CHAIR: Ms. Wicks?

12 MS. WICKS: No. I'm fine. Yeah. You
13 answer my questions.

14 THE CHAIR: Mr. Horne?

15 MR. HORNE: So our job in this case is
16 to make a determination of the appeal; correct?

17 MS. BRADY: Ultimately, yes.

18 MR. HORNE: Yeah. But the appeal
19 specifies certain things that he identifies as being
20 not correctly or completely or whatever word you want
21 to use evaluated?

22 MS. BRADY: Not included in the record.
23 Right. So there -- the underlying --

24 MR. HORNE: My point is --

1 MS. BRADY: Right.

2 MR. HORNE: -- are we -- in your mind,
3 do we have to have the entire record and review the
4 secretary's determination on the entire -- based on
5 the entire record or just the points that he brings up
6 in his appeal?

7 MS. BRADY: So I think you need the
8 entire record, and that's because that's what the law
9 requires.

10 MR. HORNE: My question is what are
11 we -- what are we determining?

12 MS. BRADY: Okay. So his particular
13 appeal says that there were aspects of what the DCMP
14 is designed to protect that were not specifically
15 addressed in the secretary's order. And he's
16 identified a few of those, but we don't know if
17 there's something in the record about that or not.

18 If you were to try -- I see where
19 you're going with this logically. If you were to try
20 and say --

21 MR. HORNE: I feel better.

22 MS. BRADY: If you were to try and say,
23 okay, in this case we need information related to
24 these three or four things and what you have.

1 MR. HORNE: Exactly.

2 MS. BRADY: And then in this case, we
3 need what you need in this -- the agency is not going
4 to develop practices that preserve the record that you
5 need in advance of knowing what you need or want.

6 And so that's why the defined scope of
7 what the agency should have available and retain for
8 purposes of your determination of substantial support
9 or not.

10 And, again, the litigants are limited
11 in what they can argue to this court on what's in the
12 record. And they decide what the record is unless you
13 tell them what the record is.

14 The the law says the entire record.
15 Their practices I think over time have developed to be
16 that means whatever we absolutely have to consider,
17 and they haven't adopted practices that collect and
18 preserve the kind of information that should be part
19 of the record historically.

20 And I respect that. I just think --
21 and so I know that what I'm saying today is a change
22 in how this board approaches what's provided to them
23 and the expectations of the board.

24 But I think it is an appropriate time

1 to look at this and as I said, look at the regs that
2 USDOJ adopted for the federal natural resources. See
3 if they're helpful.

4 But I think it would be -- it's not
5 going to be tonight, immediate, but I think it will
6 give guidance to the state agencies about what
7 information for all the boards, labor board,
8 everybody, what -- because they do preserve e-mails
9 between people that are discharged from work and all
10 that.

11 They have a lot more of a record that
12 they see in those board hearings than you see in this
13 one particular. But it would help them adopt the
14 practices that comply with the law. That's the law.
15 That's the reg. It's what it says.

16 MR. HORNE: Okay.

17 THE CHAIR: A any last questions from
18 the board? Is there a motion to go to executive
19 session?

20 MR. HORNE: Motion to go to executive
21 session.

22 THE CHAIR: Second?

23 MR. MULROONEY: Second.

24 THE CHAIR: All in favor?

1 MULTIPLE SPEAKERS: Aye.

2 (Off the record.)

3 THE CHAIR: Is there a motion from the
4 board?

5 MS. WICKS: Yes. I make a motion to
6 grant the motion to compel.

7 THE CHAIR: Second?

8 MR. HORNE: Second.

9 THE CHAIR: Is there any discussion on
10 the motion? All right. We'll do a roll call vote.

11 Ms. Wicks?

12 MS. WICKS: Yes.

13 THE CHAIR: Mr. Mulrooney?

14 MR. MULROONEY: In favor.

15 THE CHAIR: Mr. Horne?

16 MR. HORNE: In favor.

17 THE CHAIR: And I also vote in favor,
18 so the motion carries unanimously. We will -- regs
19 require that a written order will be issued within 90
20 days.

21 MS. BRADY: Thank you.

22 THE CHAIR: Thank you very much.

23 MS. BRADY: It's been a pleasure.

24 THE REPORTER: Just before we go off,

1 let me get transcript orders. So I'm going to start
2 with Ms. Brady.

3 Ms. Brady, would you like to order
4 transcript?

5 MS. BRADY: No.

6 THE REPORTER: No. Ms. Traver, would
7 you like to order transcript?

8 MS. TRAVER: No. We'll be in touch if
9 we do.

10 THE REPORTER: Okay. And, Mr. Naylor,
11 would you like to order a transcript?

12 MR. NAYLOR: Yeah. Janelle will take
13 care of it. Of course.

14 THE REPORTER: Thank you.

15 (Whereupon, at 10:11 a.m., the
16 proceeding was concluded.)

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CERTIFICATE

I, BLAKE ROBINSON, the officer before whom the foregoing proceedings were taken, do hereby certify that any witness(es) in the foregoing proceedings, prior to testifying, were duly sworn; that the proceedings were recorded by me and thereafter reduced to typewriting by a qualified transcriptionist; that said digital audio recording of said proceedings are a true and accurate record to the best of my knowledge, skills, and ability; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

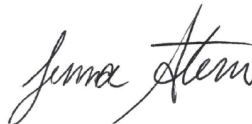


BLAKE ROBINSON
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State of Delaware

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CERTIFICATE OF TRANSCRIBER

I, JENNA STERN, do hereby certify that this transcript was prepared from the digital audio recording of the foregoing proceeding, that said transcript is a true and accurate record of the proceedings to the best of my knowledge, skills, and ability; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.



JENNA STERN

1	7077448 1:23	action 27:16 46:12,16 47:8 47:12	advance 42:5
10 7:16	8	activities 8:12	advise 15:14
10127 14:11	8 33:20 34:22 34:22	activity 18:15 18:18	aesthetic 8:10
10:11 45:15	820 2:14	actual 13:1	affected 32:23
16 20:22	89 1:19 2:22 5:21	add 34:23	afford 15:4
19801 2:15	9	added 34:11 35:1,20	agencies 10:14 10:24 29:2,12 29:14 39:7,24 40:8 43:6
19807 2:6	90 44:19	addition 6:2 33:18	agency 10:5,11 10:12 11:20 12:2 14:7,13 14:17 16:12 20:4,8 21:3 25:11,13 26:20 39:11,11,22 42:3,7
19901 1:21 2:23	9:01 1:13	additional 11:7 12:3 15:21 23:14 32:6 33:5,14,24 35:12,19 38:2	agency's 10:16 10:17,20 14:20 16:21
2	a	address 22:1	agree 26:23
20 7:12,14	a.m. 1:13 45:15	addressed 5:9 13:9 24:12 41:15	air 27:22
2024-04 1:7 5:14	ability 46:10 47:7	addresses 13:7	allegedly 20:11
2025 1:12	able 14:5	addressing 24:13	alleges 17:7
2201 8:11	above 35:12	admin 8:11 9:3	allotted 7:13,18
28 1:12	absence 23:13	administrative 3:3,4 6:19 10:2 14:10 15:16 19:24	ambiguity 9:7
29044 47:14	absolute 37:13	administrativ... 19:22	analyses 17:6 20:18
3	absolutely 26:1 31:9 42:16	adopt 43:13	analysis 14:23 28:12 29:19,24
3 33:20	absurd 14:1	adopted 42:17 43:2	answer 40:13
302-257-2011 2:8	accepted 25:11		apa 20:3
33830 46:17	access 5:22		appeal 1:6 5:14 5:15 8:5,17,24
5	account 13:4		
5722 2:5	accurate 46:9 47:5		
6	acknowledged 12:2		
6007 6:15	acknowledges 11:18		
6008 8:23	act 10:2 14:11 19:24		
7			
7 6:14 8:11,23 9:3			

<p>10:5 17:12 20:4 33:9 34:18,19 40:16 40:18 41:6,13 appeals 1:1 2:18 5:4,11 6:5 6:7 9:11 15:4 appellant 1:5 2:2 6:20 13:16 15:13 16:3 17:5,23 19:21 20:17,24 21:12 appellant's 17:9,16 19:23 20:14 21:13,17 appellants 12:19 14:2 15:10 appellate 17:4 appellee 1:9 2:10 7:2 applicant 12:24 14:8 18:12 19:1 33:22 application 18:14 19:2 37:22 approaches 42:22 appropriate 42:24 approval 8:13 8:16 18:6</p>	<p>area 8:14 32:20 areas 8:8 argue 7:12,15 42:11 argues 9:18 argument 7:16 7:18 9:15 20:1 arguments 7:19 21:13 army 5:17 18:8 18:11 arrived 35:16 asked 15:12 39:9 asking 15:19,21 15:22 32:6 38:2,23 aspect 13:14 29:3 aspects 13:7 24:15 41:13 assembly 6:7 assert 20:24 assessment 18:15,17 24:11 assigned 6:18 assistant 3:3,4 assistants 6:19 assume 29:10 34:7 assurances 32:10 assure 39:15</p>	<p>attached 10:22 attend 16:7 attended 16:7 attending 5:6 attention 16:9 39:8 attorney 6:18 7:3,9 16:6 38:7 46:14 47:10 audio 46:8 47:3 auditorium 5:21 available 8:20 13:13 15:11 42:7 avoid 23:24 avoiding 24:7 aye 44:1</p> <hr/> <p style="text-align: center;">b</p> <hr/> <p>b 4:1 back 25:24 backup 33:9 34:3 35:15 based 41:4 basically 24:24 basis 10:17 bay 23:3 beach 34:14,19 35:2 behalf 2:2,10 2:18 behoove 16:12 39:10</p>	<p>belief 20:7,20 21:1 believe 10:22 best 46:10 47:6 bethany 35:2 better 41:21 bias 27:14 bintz 1:4 2:2 5:15 7:1 8:2,17 12:18 13:23 27:18,21,23 28:6 34:21 37:19 39:9 bintz's 5:12 13:3 bit 17:14 31:21 32:9 blake 1:22 46:2 46:18 board 1:1 2:18 5:4,9,11 6:6,8 6:12,13,13 7:6 7:17,18,20 8:4 8:20,24 9:2,4 9:11 10:6,9 11:6 12:11 13:2 14:8,21 15:8,10 16:12 17:2 24:22 34:18 36:11,12 37:3 39:2,5 42:22,23 43:7 43:12,18 44:4</p>
--	---	--	---

<p>board's 6:1,10 6:18,19 boards 5:24 43:7 body 6:6 boem 18:10 bond 32:15,19 boxes 16:18 22:10 36:8 37:10 brady 2:3 6:21 6:24 7:1,11,15 7:23,24 16:24 21:20,21,22,23 24:21 25:6,8 25:10,22 26:5 26:9 27:8,14 28:15,21 29:9 29:15,17,22 31:20,23 34:12 36:6,19,24 37:6,10 38:10 38:13,20 39:1 39:4 40:17,22 41:1,7,12,22 42:2 44:21,23 45:2,3,5 brandon 3:4 6:20 brief 18:16 19:23 20:23 27:24 brings 8:4 41:5</p>	<p>broad 20:12 21:18 btlaw.com 2:16 building 1:20 burden 13:16 13:19</p> <hr/> <p style="text-align: center;">c</p> <hr/> <p>c 2:1 3:1 5:1 cables 12:6 23:4,19 32:11 calendar 5:24 call 25:16 26:12,13 31:16 35:23 44:10 calls 19:10,12 31:2 candid 16:6 care 45:13 career 39:7 careful 14:23 carries 44:18 case 6:11 10:1 14:5,19 17:24 25:14 27:1,9 36:18 38:23 40:15 41:23 42:2 cases 19:19 categories 20:12 certain 20:20 22:3 40:19</p>	<p>certificate 46:1 47:1 certification 18:13 19:2 certifications 5:16 certify 46:4 47:2 chair 1:14 5:2 7:2,11 16:24 21:20,22 24:21 31:7,11,18 33:1,16 35:18 40:11,14 43:17 43:22,24 44:3 44:7,9,13,15,17 44:22 chairperson 5:3 challenge 15:6 16:4 challenged 11:10 12:11 13:21 challenges 5:16 challenging 12:21 15:13 change 42:21 changing 32:9 check 36:8 checked 37:11 checks 16:17 22:10</p>	<p>chosen 25:4 chronology 9:20 16:16 cites 19:23 citing 22:2 citizens 11:2 claim 11:23 12:18 13:3 claiming 14:2 clarification 11:16 clarify 15:8 clear 14:19 27:22 clearly 27:6 32:3 close 12:3 closer 17:14 coast 32:17 coastal 8:6,8,14 11:19 13:5,6,8 13:15 17:20 18:16 28:21 code 6:10,15 8:11,23 9:3 29:6,8 collect 42:17 come 33:24 34:8 comfortable 16:2 comment 11:8 11:22 12:4 31:24</p>
---	---	---	---

comments 19:12 21:7 30:9,15	concurrence 29:11 34:10 38:2	9:17 13:13 17:22 18:1,5,9 18:13,22 19:4 19:8,13 21:9 24:16 30:17 33:3,4 34:16	controls 9:6 conversation 34:8 39:19 conversations 21:8 26:17 coordinate 11:20 coordinated 29:12 coordination 18:21 28:16,18 copy 10:23 18:13 19:1 corps 5:17 18:8 18:11 correct 9:9 25:5 33:16 36:7 37:6 40:16 correctly 40:20 corresponden... 14:13 17:7 19:7,15 21:2 28:17 30:23 33:23 costs 32:14 counsel 7:5 46:11,14 47:7 47:10 couple 9:10 course 28:3 45:13 court 11:3 14:21 34:18,20
communication 29:24 30:4	concurrences 19:9 21:10 30:17 34:23	consistent 18:18 constitute 25:1 28:13 constituting 6:14 construction 34:15,19 35:7 consult 28:22 consulted 28:24 contain 9:15 33:9 contained 33:14 content 26:12 contesting 20:5 continental 18:9,24 contradicted 12:15 16:20 contradictions 12:22 contradictory 23:2 control 1:8 2:11,21	
company 38:8 compel 5:12 7:12 8:1,22 17:5,17 21:17 44:6 compelling 23:10 compiled 19:12 complete 15:20 17:19 19:22 20:4,21 completely 40:20 completeness 20:5 complied 36:13 comply 43:14 comprise 11:1 14:12 16:14 21:10 con't 3:1 concern 32:13 32:21 concerns 12:5 19:11 concluded 7:20 45:16 conclusion 28:9	conditional 34:10,12,22 conditioned 34:16 conditions 35:1 35:12,20 conduct 14:21 conducting 6:9 conflict 27:11 conflicting 23:2 confusion 25:21 connection 5:18 19:7 23:4 consider 5:12 17:24 22:9 25:12 42:16 consideration 13:11 considered 12:13 13:19 14:6 20:8 22:5 22:23 25:3,4,4 26:3 considering 32:7 consistency 5:16 8:15,18		

<p>36:12 42:11 courts 20:19 40:8 create 5:19 10:7 created 6:6 creates 26:16 critical 16:8 39:8 current 31:11</p>	<p>decide 42:12 deciding 27:15 32:8 decision 7:20 8:5 9:1,21 10:8 10:12,16,17,20 10:21 11:9,17 12:12,21 13:17 13:20 14:20 15:6,12,24 16:2,4,21 22:11,21,24 23:10 24:10 25:13 26:8 27:2 30:1,6,9 30:14 32:24 37:12,14,17 38:6 39:22 40:4 decisions 6:7 15:4 19:13 26:21 decommissio... 12:6 23:20 32:12,14,19 define 9:11 16:14 defined 29:5,8 42:6 definition 36:17,22,23 37:1,1 del 6:15</p>	<p>delaware 1:2 2:20 5:3,11,22 5:23 6:4,5,10 8:6,11,23 9:3,7 11:19 13:6 14:19 17:20 37:1 46:20 delaware's 8:8 8:14,16 deliberate 7:19 demand 14:1 denied 21:19 deny 17:16 department 1:7 2:10,13,20 7:9 8:2,18 10:23 33:10 39:13 deputy 6:18 7:3 7:9 derived 18:17 describing 10:18 description 4:2 18:14 designate 15:15 designed 41:14 detailed 18:14 details 32:22 determination 9:17 13:12 16:21 22:14 25:17 34:14 36:15 40:16 41:4 42:8</p>	<p>determinations 33:4 determine 12:11 33:11 determined 26:3 27:1 34:4 determines 27:10 determining 10:7 41:11 develop 42:4 developed 42:15 development 5:18 36:2 devices 5:7 differences 12:16 different 23:2 31:8 35:9 digital 46:8 47:3 directly 34:19 discharged 43:9 discovery 38:19,23 39:2 40:1 discussed 12:17 discussion 44:9 distinct 18:2 distinguish 27:9</p>
<p>d</p>			
<p>d 5:1 damage 8:8 darn 38:13 data 20:13 date 1:12 31:12 34:3 35:22 day 40:1 days 44:20 dcmp 17:20 18:12 19:6,10 21:5 24:16 27:3 28:2 36:23 37:5,19 41:13 dcmp's 18:18 19:21 21:8 de 1:21 2:6,15 2:23 dean 1:14 5:3 deborah 1:15 6:15</p>			

<p>division 10:24 divisions 29:18 29:19 39:20 dnerc 1:18 dnrec 2:21 5:17 6:8 7:10,15 8:15 11:8,11 12:2 17:4,6,15 18:3,20 19:3 20:1 21:15,18 26:24 28:1,7,9 29:12,18 30:3 31:1 33:21 36:24 39:15 dnrec's 5:21 36:22 document 12:1 31:12 36:3 documented 11:13 31:5 documents 9:16 10:16,19 14:2,6,14 20:8 20:12,15,20 24:24 26:23 27:4 28:17,20 31:21 33:6,9 35:21 36:2 38:22 doing 23:6 doubt 15:2 dover 1:21 2:23 5:22</p>	<p>dramatically 19:18 drastically 17:11 duly 46:5 duties 6:8 duty 24:8 37:16</p> <hr/> <p style="text-align: center;">e</p> <hr/> <p>e 2:1,1 3:1,1 4:1 5:1,1 17:6 19:16 39:21 43:8 eab 16:8 17:12 17:16,18 20:2 22:16 eab's 19:19 earlier 12:17 17:3 east 32:17 edward 1:4 2:2 5:12 effects 8:14 13:5 18:16 33:19 efforts 34:1 eight 35:11 either 25:18 electronic 5:7 employed 46:11,14 47:8 47:11 employee 46:13 47:10</p>	<p>encourage 37:2 endangered 35:3 endorse 15:12 engages 9:14 engineer 18:11 engineers 5:17 18:8 enjoyment 8:10 ensure 8:7 entails 24:9 enter 17:21 22:1 entire 5:13 8:3 9:2,4,8,12,15 9:23,24 10:4 10:14 11:5 15:9 16:14 17:8,19 20:1 21:10,15 22:6 22:13,20 24:11 24:14,20 27:17 27:17 36:14,17 37:2 39:5,12 41:3,4,5,8 42:14 entitled 15:10 24:19 39:16 environment 10:23 environmental 1:1,8 2:11,18 2:21 5:3,11 6:5 8:8 9:11 12:5</p>	<p>18:2 epa 23:5 es 46:4 esquire 2:3,12 2:19 essentially 9:19 establish 13:17 established 6:10 evaluated 40:21 evaluating 32:5 evd 4:2 everybody 43:8 evidence 10:9 12:13,15,20 13:18,19,24 14:15,16,23 16:22 26:18 28:13 37:16,18 39:21 40:3 exactly 20:14 28:23 42:1 example 35:1 excluded 26:8 executive 7:19 43:18,20 exhibit 10:22 exhibits 14:14 exist 20:13,18 20:21 existed 15:20 expand 17:11 19:18</p>
--	---	--	---

<p>expanding 22:16 expansion 16:5 expect 39:11,15 expectations 42:23 expected 10:6 expertise 29:3 expired 11:9 31:24 explanation 35:14 external 29:14 extrapolation 13:1</p>	<p>15:16 17:22 18:1,4,5,9,22 19:4,8,13,24 20:19 24:16 26:17 27:8 32:16 36:18 39:13,18 40:9 43:2 feedback 30:5 feel 16:2 41:21 file 17:6 20:1 filed 5:15 8:2 8:17,21 17:18 20:4 final 9:1 14:17</p>	<p>followed 7:14 following 7:21 12:3 footnotes 20:22 foregoing 46:3 46:4 47:4 foreseeable 8:14 13:5 forgot 32:12 forth 25:24 27:4 fortunate 14:9 found 8:19 35:5 four 36:9 41:24</p>	<p>getting 30:5 32:10 give 22:8 24:17 39:14 43:6 glancing 34:5 go 23:3 43:18 43:20 44:24 going 11:21 25:23 26:11 28:3 41:19 42:3 43:5 45:1 good 5:2 7:24 15:6 17:2 governed 6:10</p>
<p>f</p>	<p>21:9 26:21</p>	<p>french 2:14</p>	<p>government 10:13 27:16</p>
<p>fact 13:7 25:2 29:17,17 facts 13:1 14:4 failed 13:4 fails 20:21,24 fair 13:1 15:5 16:1,3 fairly 12:18 far 9:12 16:15 farkas 2:4 farm 5:19 favor 7:12 43:24 44:14,16 44:17 federal 5:16 8:13,16 10:1,3 10:13,14 14:10</p>	<p>30:17 financially 46:15 47:11 find 9:13 25:17 37:15,16 finding 8:18 findings 14:16 18:16 fine 40:12 firefly 35:2 first 9:10 11:12 20:6 36:6 fish 34:7 fisheries 23:5 flawed 9:14,21 foia 27:15 follow 38:1</p>	<p>front 32:15 fulfills 6:8 fun 38:16 further 12:1 13:16 19:15 20:24 46:13 47:9</p>	<p>grant 22:17 44:6 granted 23:6 34:13 grounds 20:7 21:1</p>
<p>g</p>	<p>18:16</p>	<p>g</p>	<p>guess 28:16</p>
<p></p>	<p></p>	<p>g 5:1 gap 11:12 28:1 31:21 gaps 13:14 general 6:6,18 7:3,9 16:7 generation 5:19</p>	<p>35:7 guidance 9:24 10:14,18 43:6 guide 15:17 guidelines 10:24 15:17 24:16 39:13,18</p>

h	horne 1:17 6:16 24:23 25:8,20 25:23 26:6,22 27:6,13,20 28:5 34:9 36:16,21 37:4 37:9 40:14,15 40:18,24 41:2 41:10,21 42:1 43:16,20 44:8 44:15,16	included 11:13 12:8,20 14:17 20:9 21:3 26:24 33:6,11 40:22 includes 9:4 10:18 16:16 including 6:9 12:5 incorporated 30:16 incorrectly 20:17 indicating 18:17 influenced 32:24 information 10:11 11:7,13 11:15 12:3,8 12:10,23 13:13 13:14 15:11,15 15:21,23 19:3 22:8,23 23:9 23:15,16,21,22 24:1 25:11,16 25:18 28:2 30:4 31:17 32:6,7,23 37:21 38:3 40:6 41:23 42:18 43:7 inherently 18:6	input 24:4 33:23 instance 11:18 intended 8:7 interest 27:11 29:3 interested 46:15 47:12 interlocutory 14:16 26:21 internal 26:18 29:24 interpretations 12:23 interpreting 24:23 introduce 6:12 6:17,22 7:6 12:20 introducing 19:15 involved 38:9 issuance 19:8 issue 7:20,21 22:1 27:7 39:9 issued 5:17 19:13 32:1 44:19 items 9:20 17:23 19:20
h 4:1 halloran 2:4 happening 32:3 heading 34:24 hear 6:7 16:13 29:4 hearing 1:11 5:10,20 6:3,14 7:22 8:1,24 18:3,4 hearings 6:9 16:8 43:12 heck 23:3 held 11:3 20:19 help 39:9,15 43:13 helpful 43:3 hereto 46:15 47:11 hfk.com 2:7 highway 1:19 2:22 5:21 historically 42:19 hold 14:22 holden 1:14 5:3 holds 8:24 holston 3:4 6:20 honorable 6:21 hope 29:11	i	identification 20:10 identified 41:16 identifies 14:11 37:20 40:19 identify 14:2,5 38:19 39:11 identifying 20:12 immediate 43:5 impact 13:15 important 12:10 17:24 25:3 28:11 inappropriate 19:16 include 9:2 11:23 26:18 39:18	
		j	
		jane 2:3 6:21 7:1	

<p>janella 3:3 6:19 45:12 january 1:12 jenna 47:2,15 job 1:23 12:17 22:18 37:15 38:12 40:7,15 joining 5:7 journal 6:3 judicial 6:6 justice 2:13 7:10 10:23 39:13</p>	<p>39:6 41:16 42:21 knowing 42:5 knowledge 46:10 47:6 known 13:15 knows 39:15</p>	<p>list 29:11,18 31:14 33:24 34:6 listing 31:7 lists 37:20 litigants 42:10 little 17:14</p>	<p>44:5 makes 14:1,19 15:6 22:11 25:12 making 9:17 10:16 11:17 13:20 16:20 25:16 26:8,20 27:2 30:7,9,15 39:22</p>
<p>k</p>	<p>l labor 43:7 lacking 8:21 language 22:12 law 6:11 9:7 10:1 14:19 17:10 21:18 22:12 24:18 25:14 27:9 36:13,18,18 37:1 41:8 42:14 43:14,14</p>	<p>25:21 31:21 32:9 39:14 location 1:18 12:5 23:18,19 32:8,10,11 logically 41:19 look 28:18 34:6 43:1,1 looks 25:14 27:9 lot 25:24 29:24 32:13 39:7 43:11</p>	<p>management 8:6 11:19 13:6 13:8 17:20 28:22 mandatory 16:18 24:15 marked 4:3 materials 10:19 14:11 20:11 21:4,7 35:6</p>
<p>keeps 22:2 kennett 2:5 kind 16:8 27:16 32:15 39:8 42:18 kings 1:19 2:22 5:21 kittla 2:4 know 11:5,6,11 11:14 12:14 13:19,23 14:6 15:10 16:5,19 22:9 23:8,14 23:15,18,19,20 23:21,22 26:16 26:17 28:8,10 28:12 29:5 32:2,21 36:7 37:18 38:3,4,5</p>	<p>laws 27:8 lawsuits 38:9 lawyers 38:13 learn 12:22 led 36:3 letter 38:2 letters 29:11 letting 22:17 level 10:3 life 38:8 lighting 35:4,9 likely 20:13 limited 18:6 42:10</p>	<p>m ma'am 29:6 made 8:19 10:12 11:9 15:12,23 19:12 34:13 35:23 38:6 mail 39:21 mails 17:6 19:17 43:8 make 15:3,3 16:2,17 22:13 36:14 40:16</p>	<p>matter 11:10 15:1 16:10 17:19 18:7 19:14,17 21:6 21:11,16 matters 16:13 mean 9:23 10:1 33:16 35:18 37:13 meaning 9:6 17:11 means 9:8 42:16</p>

meant 9:23 meet 13:18 meeting 5:24 member 1:15 1:16,17 members 6:12 6:13 7:17 15:5 17:2 memos 24:6 mentioned 27:24 31:20 merely 20:12 mic 17:14 30:12 32:12 mic's 25:8 microphones 5:8 mind 41:2 minimal 24:14 minimum 37:11,13 minutes 7:12 7:14,16 mitigation 33:19 34:1 mjb 2:7 monitoring 33:19 34:1 month 11:12 27:24 31:20 morning 5:2 7:24 17:2 motion 5:12 7:12,15 8:1,4	8:21 17:17 21:17 36:11 43:18,20 44:3 44:5,6,10,18 move 17:14 moves 17:5 mulrooney 1:16 6:16 28:15 29:13,16 29:21 30:3,18 30:22 31:4 38:7,11,14,21 39:3 40:10 43:23 44:13,14 multiple 44:1 mute 5:8	negated 37:12 37:14 neither 12:17 13:2 46:11 47:7 network 11:20 12:24 18:21 19:11 21:8 24:4,6,7 28:16 28:19,23 29:6 30:5,16 31:2,8 31:14 32:4 33:23 never 37:22 39:7 new 10:7 11:15 35:1 news 6:3,4 non 20:15 21:14 nonspeculative 20:7 21:1 north 2:14 notary 46:19 notes 9:10 26:18 39:18,19 notice 5:20 6:2 18:22 19:4 notices 14:12 number 33:4	objective 28:7 28:8 obligation 22:2 23:24 25:17 26:14 40:2 occurred 35:23 offer 15:16 officer 46:2 officer's 18:4 offices 5:21 offshore 5:19 12:6 oh 22:15 okay 26:22 29:21 30:18 31:4 37:9 39:3 40:10 41:12,23 43:16 45:10 omitted 17:7 20:11,18 onerous 39:24 online 5:8 opinion 12:16 23:18 opinions 23:3 32:4 33:10 opportunity 7:6 15:7 opposed 10:3 28:6 oral 7:20 26:16 order 7:21 13:10 32:1 33:3,14 35:24
	n		
	n 2:1 3:1 5:1 name 5:2 6:24 7:8 17:3 national 23:5 natural 1:7 2:10,20 8:3,19 10:24 33:19 43:2 naylor 2:19 6:18 45:10,12 need 9:15,19 41:7,23 42:3,3 42:5,5 needs 12:11 15:8		
		o	
		o 5:1	

<p>41:15 44:19 45:3,7,11 orders 14:15,17 45:1 organizations 29:2,14 outcome 46:16 47:12 outer 18:9,24 outside 35:20 overall 30:19 overcome 20:21 overly 21:18 overrode 32:18 overtone 11:2</p>	<p>participated 31:8,15 participating 6:13 particular 14:4 32:20 38:22 39:8 41:12 43:13 parties 10:7 14:13 46:12,14 47:8,11 partner 24:7 partners 11:20 11:24 12:16,24 18:21 19:11 21:9 24:4,6 28:16,19,23 29:6 30:5,16 31:3,8,15 32:5 33:24 34:8 party 14:20 20:5 pending 34:14 people 43:9 period 11:8 12:4 31:24 permanent 35:4 permit 18:8,11 23:6 permits 34:14 34:15 permitted 7:16 12:19</p>	<p>permitting 18:2 34:17 person 5:6 perspective 28:4 petitioner's 20:20 phone 5:8 31:2 35:23 piece 40:6 pike 2:5 placed 15:21 plain 9:6 plan 8:6 11:19 13:6,8 18:10 19:1,2 28:22 please 5:6,8 6:22 pleasure 44:23 point 40:24 points 41:5 policies 17:21 18:12,19 19:6 19:21 21:5 portion 7:13 11:4,13 position 28:14 possible 14:24 possibly 13:18 posted 5:22 power 5:19 practice 24:3,5 practices 42:4 42:15,17 43:14</p>	<p>precedence 36:22 prejudice 27:14 prepared 19:9 47:3 preparing 16:9 prescribe 17:21 present 3:2 presented 10:10 13:2 14:8,24 26:2 preserve 8:9 11:2 26:15 38:21 42:4,18 43:8 preserved 39:23 presume 15:14 presumes 20:3 presumption 20:6,16,21 21:14 23:12,13 pretty 28:1 prior 38:8 46:5 probable 18:15 procedurally 9:21 procedure 10:2 15:16 19:24 procedures 14:10 proceed 7:23</p>
p			
<p>p 2:1,1 3:1,1 5:1 page 33:20 34:22,22 paid 16:8 39:7 paper 10:15 park 11:2 part 12:9,20 14:3 18:5 19:17 23:10 26:19 28:11 30:6,8,14,19 36:6 38:11,15 38:17 42:18 participate 31:3</p>			

<p>proceeding 45:16 47:4</p> <p>proceedings 7:4 46:3,5,6,9 47:6</p> <p>process 10:16 10:20 18:1,6 27:2 30:7,9,15 38:19,23</p> <p>processes 34:17</p> <p>produce 35:19</p> <p>production 5:13</p> <p>program 18:21 19:11 21:8 30:16 31:3,15</p> <p>programs 17:20</p> <p>project 5:18 12:6 25:1 29:4 32:10</p> <p>projects 32:17</p> <p>proof 22:5</p> <p>proper 15:4</p> <p>proposal 23:3</p> <p>proposed 8:12 18:14,18</p> <p>prosecute 12:18</p> <p>protect 13:8 33:19 41:14</p> <p>protection 8:7</p> <p>protective 35:2</p>	<p>prove 40:2</p> <p>provide 8:3 9:19 15:22 19:1,3 22:5 24:1,4 26:4 37:24 39:12</p> <p>provided 11:8 11:14 12:1,9 12:23 17:23 19:21 21:6,11 21:15 23:11,15 23:22,23 24:13 30:19 31:12 32:23 33:8 38:3 42:22</p> <p>provides 10:13 34:3</p> <p>providing 35:6</p> <p>public 5:23 6:2 8:24 11:8,21 11:22 12:4 15:5 18:3,21 19:4 21:7 27:16 31:24 32:13,21 46:19</p> <p>published 6:3</p> <p>purports 37:23</p> <p>purpose 5:10</p> <p>purposes 42:8</p> <p>pursuant 6:14 21:5</p> <p>put 22:11 35:3</p>	<p style="text-align: center;">q</p> <p>qualified 46:7</p> <p>quasi 6:6</p> <p>question 22:11 35:15 36:10,11 36:12,21 41:10</p> <p>questions 7:17 24:22 31:18 40:13 43:17</p> <p>quorum 6:14</p> <p style="text-align: center;">r</p> <p>r 2:1 3:1 5:1</p> <p>randall 1:17 6:16</p> <p>rather 10:9 16:12</p> <p>read 14:22</p> <p>reading 33:2</p> <p>reads 33:21</p> <p>really 21:24 36:9</p> <p>reason 15:5</p> <p>reasonable 20:6 21:1</p> <p>reasonably 8:13 13:4</p> <p>rebut 20:6 21:14 23:12</p> <p>rebuttal 7:14 7:16</p> <p>receive 22:4</p> <p>received 12:3 25:1 30:10,15</p>	<p>receives 25:11</p> <p>recognized 40:9</p> <p>recommenda... 26:21</p> <p>recommended 14:15 23:5</p> <p>record 5:13 6:23 7:7 8:3,19 9:1,2,4,5,12,15 9:23,24 10:3,4 10:4,7,10,15 11:1,4,4,5,6,14 11:24 12:9,21 14:3,7,12,18,24 15:9,9,19,20,20 16:14 17:8,10 17:11,18,19,21 19:16,17,22 20:1,4,6,9,19 20:22 21:3,6 21:10,15 22:2 22:4,6,13,20,22 23:9,11 24:8,9 24:12,14,20 25:2,15 26:10 26:15 27:11,17 27:17 29:2 33:8 34:2 35:16,21 36:14 36:17,20 37:2 37:8,20,22,24 39:5,12 40:22 41:3,5,8,17</p>
---	---	---	---

42:4,12,12,13 42:14,19 43:11 44:2 46:9 47:5 recorded 21:9 46:6 recording 46:8 47:4 records 30:19 30:21 31:1 recreation 8:9 reduced 46:7 reflected 38:1 reflecting 28:8 reg 43:15 regard 13:12 23:10 regarding 12:4 23:19,20 29:3 regs 26:17 36:13 43:1 44:18 regular 19:10 31:2 regulations 6:11 8:16 9:11 10:1 22:12 24:19 rejected 25:7 25:10 rejects 22:7 related 28:17 38:22 41:23 46:11 47:7	relating 18:15 29:24 relative 25:1 46:13 47:10 relevant 10:20 13:14 22:10 26:4 27:1,4,10 27:15 38:5 relied 21:2 24:1 36:17 relies 10:9 rephrase 31:14 report 18:4 29:23 reported 1:22 reporter 17:13 30:11 44:24 45:6,10,14 reports 11:23 17:6 19:7,9 20:18 21:2 29:19 30:20 36:4,5,7 represented 6:21 7:3 11:21 representing 7:1,10 17:4 request 12:7 20:14,15 22:17 26:11 requests 17:9 17:16 21:19 23:14	require 8:2 18:12 19:6 44:19 required 9:16 13:5 16:17 18:20 19:20 22:4 24:15 35:13 36:5,7,8 37:7,21,24 39:4 requirement 32:19 35:3,10 requirements 21:5 33:5,15 34:7 requires 8:11 10:4 11:19 20:5 28:22 36:14 37:5 41:9 reserve 7:13 resource 10:24 resources 1:7 2:10,20 8:3,19 33:20 43:2 respect 42:20 respectfully 17:16 21:19 respects 9:10 response 9:9 18:22 19:5 32:22 responses 12:7 12:9	responsibilities 6:9 restrictions 33:18 35:8 retain 42:7 revealed 30:2 review 9:16 16:12 17:22 18:1,5,22 19:4 19:19,20 22:16 22:19 27:5,16 28:7,8,11 41:3 reviewed 8:15 19:7 31:6 reviewing 14:20,20 18:8 28:1 36:12 richardson 1:20 right 13:21 15:3 26:5 27:7 27:7 33:20 34:1 35:16,18 35:24 38:20,20 40:7,23 41:1 44:10 robbins 1:20 robert 1:16 6:16 robinson 1:22 46:2,18 roll 44:10 rules 8:16 16:9
---	---	---	---

ruling 10:5	37:12,13,18	significant 11:7	staff 6:13 24:5
s	39:21	12:4	standard 34:6
s 2:1 3:1 4:1 5:1	secretary's	significantly	standpoint
sapp 3:3 6:20	9:21 12:12,21	8:21	26:23
sawyer 2:12	13:9 17:22	silence 5:6	start 45:1
7:3,8 17:3	22:21 24:10	similarly 9:3	starting 34:22
sawyer.traver	27:5 32:24	18:24	state 1:2 5:23
2:16	33:3,14 35:24	simply 16:17	6:4 9:9,14,18
saying 32:17	40:4 41:4,15	29:22 37:10	11:14,15,18
37:4 42:21	section 6:15	site 20:22	13:21,24 14:1
says 11:12 22:6	14:11	skills 46:10	15:20,22 18:7
24:7 41:13	see 16:13 31:16	47:6	21:24 23:6
42:14 43:15	33:17 35:11	sorry 30:12,13	24:13 26:15
scenic 8:9	41:18 43:2,12	32:11 38:10	28:23 29:13
scope 19:18	43:12	sought 12:2	34:13 43:6
22:16,19 42:6	seeking 11:15	speak 37:19	46:20
searching	15:19 32:4	speaker 38:16	state's 5:23
14:22	seem 34:2	speakers 44:1	18:5 32:18
sec 27:19	seems 16:11	speaking 31:1	stated 17:2
second 20:10	33:4 35:19	speaks 33:17	statement
43:22,23 44:7	36:1 39:10	33:18	18:13
44:8	sense 26:10	species 35:3	statements
secretary 5:13	30:21	specific 12:8	11:22
5:23 6:7 8:5	session 7:19	15:15 20:15	states 8:23 9:3
9:1,3,5,16 11:9	43:19,21	21:14 22:3	11:3
11:16 12:13	set 18:16	specifically 8:7	stern 47:2,15
13:4,20,24	sets 27:3	13:9 26:7	stewardship
14:7 15:6,11	several 13:7	41:14	34:6
15:23 16:4,17	shelf 18:10	specificity	street 2:14
17:12 22:3,7	19:1	20:11	stuff 23:8 25:24
23:9,17 24:1,6	show 24:8	specifies 40:19	subaqueous
25:12,15 26:20	sided 40:6	speculative	34:15
27:10 32:1	signature 46:17	20:15 21:14	subject 8:12
	47:14		25:19

submission 33:12	superior 34:18 34:20	takes 28:11	36:8 41:24
submissions 33:22	supplement 15:19 17:10	talk 24:5	time 1:13 7:13
submit 21:24 37:21	34:21	talked 28:15 29:22	7:18 11:15,22 26:11 32:3
submitted 8:20 10:5 14:14	support 10:21 19:24 22:22	tell 14:1 28:23 31:21 42:13	35:8 40:1 42:15,24
21:4,7 25:24	24:9 25:19	term 36:19	times 23:1
28:2 33:6 34:3	35:15 37:17	terms 31:5 39:12	today 5:5 7:10 17:3,5,17
35:22 36:5 37:5,5,7	40:3 42:8	testifying 46:5	42:21
submitting 37:23	supported 10:8 10:8 12:12	testimony 14:14 18:4	today's 5:10,20 7:4
substantial 10:9 13:18	13:17 16:2,22 22:21	thank 6:24 7:2 7:24 16:23,24	together 21:7
28:13 37:16	supporting 19:2	17:1,14 21:19	tonight 43:5
40:3 42:8	supports 22:23 24:8,9	21:23 24:20,21	took 28:14
substantially 12:12 16:22	supposed 10:10	25:9 33:1	touch 45:8
22:20,21 25:19	supreme 11:3	40:10 44:21,22 45:14	touches 13:11
substantive 8:17	sure 16:17	theorizes 20:17	tough 35:22
substation 23:4	27:13,20 28:5	thing 15:18 32:15 36:8	trail 10:15
suggest 16:15 39:6	28:19 29:7	things 22:3,5 26:2 32:2	transcriber 47:1
suggesting 26:6 26:16	31:15 33:13	35:20 38:4	transcript 45:1 45:4,7,11 47:3 47:5
sum 21:17	suspect 29:23	39:17 40:19 41:24	transcriptionist 46:8
summaries 14:15 26:18	sworn 46:5	think 9:23 25:6 26:9 27:3 29:9	traver 2:12 7:3 7:8,9 17:1,3,13 17:15 27:3
summary 23:17	t	34:23 36:6	29:7,10 30:8 30:11,13,20,24 31:6,9,13 33:2
summer 35:8	t 4:1	41:7 42:15,20	33:13 34:5 35:18 36:4
	take 7:5 13:4 36:22 39:19 45:12	42:24 43:4,5	
	taken 33:22 46:3,12 47:9	three 11:12 27:24 31:20	

<p>45:6,8 true 9:12 46:9 47:5 try 41:18,19,22 tuesday 1:12 turn 30:12 two 5:16 types 10:19 typewriting 46:7 typically 16:6</p>	<p>usdoj 43:2 use 8:9 36:19 40:21 used 26:7 uses 10:3 37:22 utilized 11:16 33:10,11</p>	<p>wildlife 34:7 wilmington 2:6 2:15 wind 5:18,19 21:4 28:2,3 32:6 33:7 35:6 37:21,23</p>	<p>z</p>
<p>u</p>	<p>v</p> <p>v 1:6 vague 17:9 virtual 5:22 virtually 13:12 volpe 11:3 vote 44:10,17 vs 11:3</p>	<p>winds 18:9 witness 46:4 word 9:7 10:3 37:22 40:20 words 9:6 work 39:14 43:9 worked 38:8 39:7 would've 34:8 write 24:6 writing 14:22 18:23 24:2,4 31:5 written 7:21 19:13 21:9 44:19</p>	<p>zach 6:18 39:14 zachary 2:19 zone 13:5,15 18:16 zoom 26:11,12</p>
<p>ultimate 22:23 36:3 ultimately 30:1 40:17 unanimously 44:18 under 23:3 underlying 11:10 12:18 13:3 40:23 undermined 32:16 understand 28:19 33:13 understanding 24:24 30:24 unidentified 38:16 united 11:3 unsupported 17:10 21:18</p>	<p>w</p> <p>want 16:13,14 29:4 40:20 42:5 wants 15:3 16:3 39:20 wards 20:16 watershed 34:6 way 6:8 16:1,3 35:24 website 6:1 weigh 27:18 weight 22:8 wetlands 34:15 wicks 1:15 6:15 40:11,12 44:5 44:11,12</p>	<p>x</p>	<p>x 4:1</p>
<p>y</p>	<p>y</p>	<p>y</p>	<p>y</p>
<p>yeah 25:22 27:23 33:16 40:12,18 45:12 year 35:8</p>	<p>yeah 25:22 27:23 33:16 40:12,18 45:12 year 35:8</p>	<p>yeah 25:22 27:23 33:16 40:12,18 45:12 year 35:8</p>	<p>yeah 25:22 27:23 33:16 40:12,18 45:12 year 35:8</p>

1 DELAWARE RULES OF CIVIL PROCEDURE

2 Part V. Depositions and Discovery

3 Title V, Rule 30

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5 (e) Submission to witness; changes; signing. When
6 the testimony is fully transcribed, the deposition
7 shall be submitted to the witness for examination
8 and shall be read to the witness, unless such
9 examination and reading are waived by the witness
10 and by the parties. Any changes in form or
11 substance which the witness desires to make shall
12 be entered upon the deposition by the officer with
13 a statement of the reasons given by the witness for
14 making them. The deposition shall then be signed by
15 the witness, unless the parties by stipulation
16 waive the signing or the witness is ill or cannot
17 be found or refuses to sign. If the deposition is
18 not signed by the witness within 30 days after the
19 date when the reporter notifies the witness and
20 counsel by mail of the availability for examination
21 by the witness, the officer shall sign it and state
22 on the record the fact of the waiver or of the
23 illness or absence of the witness or the fact of
24 the refusal to sign together with the reason, if
25 any, given therefor; and the deposition may then be

1 used as fully as though signed, unless on a motion
2 to suppress under Rule 32(d) the Court holds that
3 the reasons given for the refusal to sign require
4 rejection of the deposition in whole or in part.
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10 DISCLAIMER: THE FOREGOING CIVIL PROCEDURE RULES
11 ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.
12 THE ABOVE RULES ARE CURRENT AS OF APRIL 1,
13 2019. PLEASE REFER TO THE APPLICABLE STATE RULES
14 OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.
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VERITEXT LEGAL SOLUTIONS

COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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