UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

Administrative Judges

Christine N. Kohl, Chairman
Gary J. Edles
Dr. Reginald L. Gotchy

In the Matter of	)	
Philadelphia Electric Company	)	Docket Nos. 50-352
	)	50-353
(Limerick Generating Station	)	
Units 1 and 2)	)	

APPLICANT'S BRIEF IN OPPOSITION TO EXCEPTIONS BY DEL-AWARE UNLIMITED, INC. RELATING TO THE ATOMIC SAFETY AND LICENSING BOARD'S PARTIAL INITIAL DECISION OF MARCH 8, 1983 AND THE MEMORANDUM AND ORDER DENYING DEL-AWARE'S MOTION TO REOPEN THE RECORD OF JUNE 1, 1983

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Introduction

On March 8, 1983, the presiding Atomic Safety and Licensing Board ("Licensing Board") issued a Partial Initial Decision ("PID") on contentions filed by Del-Aware Unlimited, Inc. ("Del-Aware" or "appellant")[1/] relating to the supplemental cooling water system for the Limerick Generating Station.[2/] Exceptions to the PID were filed by

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1/ Although Del-Aware is a membership organization, it is the entity itself rather than its members which is the intervenor/appellant in this proceeding. Accordingly, Applicant shall refer to Del-Aware as the appellant in the singular.

2/ Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), Docket Nos. 50-352-OL and 50-353-OL, "Partial Initial Decision (On Supplementary Cooling Water System Contentions)," LBP-83-11, 17 NRC ____ (March 8, 1983) (hereinafter "PID").

Del-Aware on March 21, 1983.[3] On the same day the PID was issued, Del-Aware requested a reopening of the record to consider a new late contention. Although initially determining that it lacked jurisdiction to consider the proposed contention,[4] the Licensing Board subsequently issued an order on June 1, 1983 denying the request.[5] Pursuant to an order of the Appeal Board deferring the briefing of Del-Aware's exceptions until the resolution of the motion to admit the late contention,[6] Del-Aware was given to July 18, 1983 to file a brief in support of its exceptions.[7]

On July 18, 1983, Del-Aware filed what the Appeal Board described as "a collection of documents previously filed with the Licensing Board, purporting to constitute the appellate brief of intervenor Del-Aware Unlimited, Inc., in

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3/ Exceptions to Partial Initial Decision of ASLB (On Supplementary Cooling Water System Contentions) (March 21, 1983).

4/ Limerick, supra, "Memorandum and Order Finding no Jurisdiction to Entertain Del-Aware's Request to Admit Late Filed Contention V-26," LBP-83-25, 17 NRC ____ (April 27, 1983), rev'd and remanded, ALAB-726, 17 NRC ____ (May 2, 1983).

5/ Limerick, supra, "Memorandum and Order Denying Del-Aware's Motion to Reopen the Record" (June 1, 1983).

6/ Limerick, supra, "Order" (March 25, 1983).

7/ Limerick, supra, "Order" (June 2, 1983).

support of its exceptions . . . ."[8/] Finding that the tendered documents did not constitute a proper brief in compliance with the Rules of Practice of the Nuclear Regulatory Commission ("NRC" or "Commission"), the Appeal Board struck the documents and gave Del-Aware until August 19, 1983 to file a proper brief.[9/] Del-Aware's brief was served on August 23, 1983,[10/] along with a motion seeking permission to file the brief out of time.[11/] On August 25, 1983, the Appeal Board granted the motion.

Subsequently, Applicant filed a motion to strike the brief and dismiss the appeal on the ground that the brief failed to comply with the Commission's briefing requirements under its Rules of Practice and precedents.[12/] On September 2, 1983, the Appeal Board denied the motion to strike and dismiss, requiring Applicant to file its brief by October 3, 1983.[13/]

8/ Limerick, supra, "Order" (July 20, 1983).

9/ Id.

10/ Appellant's Brief in Support of Exceptions from Partial Initial Decision (August 23, 1983).

11/ Appellant's Motion for Two Day Extension of Time to File Brief (August 23, 1983).

12/ Motion by Philadelphia Electric Company to Strike Appellant's Brief in Support of Exceptions from Partial Initial Decision and to Dismiss the Appeal (August 31, 1983).

13/ Limerick, supra, "Order" (September 2, 1983).

As discussed below, Del-Aware's brief primarily addresses rulings by the Licensing Board preceding and following the PID which excluded certain contentions or portions thereof as proposed by Del-Aware. The Licensing Board properly found that those proposed contentions sought to raise matters beyond the jurisdiction of the NRC. Further, Del-Aware's late contentions failed to satisfy the applicable criteria under 10 C.F.R. §2.714(a)(1)(i)-(v) for their admission. In some instances, it is unclear whether Del-Aware is asserting that a contention was improperly excluded, that findings in the PID were contrary to the weight of the evidence, or that the Licensing Board erred as a matter of law. By any standard, Del-Aware's claims are wholly lacking in merit. An analysis of these issues demonstrates that the Licensing Board acted properly and that its decisions should therefore be sustained.

Statement of Facts

The matter before the Appeal Board involves the application filed on March 17, 1981 by the Philadelphia Electric Company for an operating license for the Limerick Nuclear Station, two boiling water reactors designed to operate at a core power level up to 3,293 megawatts thermal and a net electrical output of 1,055 megawatts electric. The Limerick Station is located in Limerick Township, Montgomery County, Pennsylvania, on the East Bank of the Schuylkill River, approximately four miles downriver from Pottstown.

On August 21, 1981, the NRC published in the Federal Register a notice of "Receipt of Application for Facility Operating Licenses; Consideration of Issuance of Facility Operating Licenses; Availability of Applicant's Environmental Report; and Opportunity for Hearing."[14/] Petitions seeking leave to intervene were thereafter filed by a number of groups and individuals, including Del-Aware. Following a special prehearing conference on January 6-8, 1982, the Licensing Board admitted a number of petitioners and proposed contentions.[15/] Of the petitioners admitted, only Del-Aware filed and litigated contentions relevant to the supplemental cooling water issues decided in the PID.

The Licensing Board admitted three contentions on behalf of Del-Aware which were the subject of the evidentiary proceeding resulting in the PID.[16/] Prior to the issuance of the PID, Del-Aware sought admission of several additional contentions. Thus, on August 25, 1982, Del-Aware sought to amend Contention V-16c to allege that

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14/ 46 Fed. Reg. 42557 (August 21, 1981).

15/ Limerick, supra, LBP-82-43A, 15 NRC 1423 (1982).

16/ Initially, the Licensing Board admitted four contentions, but subsequently reconsidered and denied one of them on the ground that it sought to litigate construction impacts, which may not be raised at the operating license stage. Limerick, supra, "Memorandum and Order (Concerning Objections to June 1, 1982 Special Prehearing Conference Order) (July 14, 1982) (slip op. at 4-5). Applicant does not read appellant's brief to contest the denial of this contention.

withdrawals from the Delaware River would introduce toxics and pollutants into the East Branch Perkiomen and North Branch Neshaminy Creeks. The Licensing Board denied the motion to amend, finding that the proposed contention sought to raise matters litigable at the construction permit stage and that no significant change had been shown.[17/]

On September 26, 1982, Del-Aware sought the admission of new Contentions V-22, pertaining to impacts of the Merrill Creek Reservoir on salinity levels in the Delaware River, V-23, pertaining to depletive uses of water from the Delaware River, and V-24, relating to a decision on August 27, 1982 by the Pennsylvania Public Utilities Commission regarding financial arrangements for the construction of Limerick Unit 2. Finding it unnecessary to balance the factors governing the admissibility of late contentions, the Licensing Board ruled that proposed Contentions V-22 and V-24 raised matters properly considered only at the construction permit stage, and that proposed Contention V-23 related to a water allocation decision by the Delaware River Basin Commission, which was not reviewable by the NRC.[18/]

17/ Limerick, supra, "Order (Denying Del-Aware's Petition to Amend Contentions)" (September 10, 1982).

18/ Limerick, supra, "Memorandum and Order (Denying Del-Aware's Petition to Amend Contentions)" (January 24, 1983. Subsequently, the Licensing Board denied reconsideration of its decision disallowing the three late contentions, and denied another late-filed (Footnote Continued)

Subsequent to the PID, Del-Aware continued to pursue the same issues in yet additional, proposed late contentions. These were similarly rejected by the Licensing Board on the same grounds. Thus, the Licensing Board rejected proposed Contention V-26, relating to minimum flow objectives in the Delaware River as regards the "river follower" method of supplying water for Limerick decided at the construction permit stage.[19/] At that time, the Licensing Board also denied late proposed Contentions V-27, relating to the alleged deletion of public drinking water supplies as a component of the project based upon a local nonbinding referendum, and V-28, asserting that PECO would have to pursue alternative cooling water sources as a result of alleged legal obstacles created by the referendum.[20/]

The three admitted contentions which were granted to Del-Aware were the subject of an evidentiary proceeding from October 4-6, 18-22 and 25-26, 1982. Excluding the

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(Footnote Continued)
contention, designated V-25, which also raised issues relating to Unit 2. Limerick, supra, "Memorandum and Order - Denying Petitions of Del-Aware for Reconsideration and to Admit a Late Contention" (March 8, 1983).

19/ Limerick, supra, "Memorandum and Order Denying Del-Aware's Motion to Reopen the Record (June 1, 1983).

20/ Id. at 9 n.3.

contention abandoned by Del-Aware,[21] these two contentions were as follows:

> Contentions V-15 and V-16a (in part) - The intake will be relocated such that it will have significant adverse impact on the American shad and short-nosed [sic] sturgeon. The relocation will adversely affect a major fish resource and boating and recreation area due to draw-down of the pool.
>
> Contention V-16a - Noise effects and constant dredging maintenance connected with operations of the intake and its associated pump station will adversely affect the peace and tranquility of the Point Pleasant proposed historic district.[22]

Witnesses provided by Applicant testified that the diversion would have no significant adverse impact on the Delaware River or its aquatic life, and that measures would be undertaken to ensure that any noise associated with pumping operations would be mitigated if necessary to avoid disturbance of nearby residents. NRC Staff witnesses provided testimony which reached the same conclusions. Del-Aware offered witnesses who presented testimony on its contentions.

21/ Del-Aware withdrew one of its contentions in the midst of the proceeding because "we just have no basis to contest [the findings of the project's engineer, a witness for Applicant] at this point" (Tr. 2033). A stipulation was entered shortly thereafter. See Tr. 2370-71; Stipulation Concerning Contention V-16b ff. Tr. 2371; PID at 51.

22/ Limerick, supra, LBP-82-43A, 15 NRC at 1479.

The Licensing Board's PID, issued on March 8, 1983, disposed of Del-Aware's contentions in favor of Applicant. The Licensing Board found "that there would be no significant adverse impact on the populations of American shad and shortnose sturgeon in the Delaware River as a result of operation of the presently proposed Point Pleasant intake," that there was "no evidence that the proposed intake would have an adverse impact on recreational activities in the Delaware River," and that "after any necessary noise mitigation measures have been undertaken, operation of and maintenance for the proposed intake and pumping station would not have a significantly adverse affect on the proposed historic district."[23/]

23/ PID at 1-2.

Argument[24/]

I. The Licensing Board Correctly Declined to Admit Contentions and Testimony Regarding Salinity and Water Quality Impacts in the Delaware River Considered and Resolved by DRBC in its Water Allocation Decision for the Point Pleasant Diversion Project.

Appellant contests the Licensing Board's denial of contentions and exclusion of evidence relating to downstream salinity and water quality impacts allegedly attributable to the diversion of Delaware River water at Point Pleasant. However, inasmuch as the diversion has been authorized by DRBC in allocating such water to the project, the Licensing Board determined that DRBC's analysis of such downstream impacts was an integral part of its decision to allocate water for the Point Pleasant diversion and that relitigation of such matters by the NRC would violate an express statutory prohibition against conflicting agency decisions.

A. DRBC has Plenary Authority for Allocating Delaware River Basin Resources and its Decisions on Point Pleasant Have Been Sustained by the Federal Courts.

DRBC is a political and corporate entity created by the States of Delaware, New Jersey, New York and Pennsylvania

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24/ Appellant's brief does not refer to its exceptions and it is difficult to correlate the exceptions to particular sections of its brief. Recognizing that exceptions are waived if not briefed, see, e.g., Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1255 (1982), Applicant does not address any points beyond those raised in appellant's brief. Although some of (Footnote Continued)

and the United States in a Compact approved by Congress in 1961.[25/] This agency was established in recognition of the fact that the waters of the Delaware River Basin, while subject to the sovereign right and responsibility of the signatory parties, are regional in nature and functionally interrelated. A single administrative agency was therefore deemed essential for the effective coordination of efforts and programs sponsored by federal, State and local governments, as well as private enterprise, affecting valuable water resources.[26/] Accordingly, DRBC exercises plenary authority for the management, conservation and allocation of water resources in the Delaware River Basin.[27/]

(Footnote Continued)
appellant's arguments overlap, Applicant has utilized the same format for ease of reference.

25/ See Public Law 87-328, 75 Stat. 688 (1961).

26/ DRBC Compact at §§1.3, 3.1 and 3.2.

27/ See generally Delaware Water Emergency Group v. Hansler, 536 F. Supp. 26, 28-31 (E.D. Pa. 1981), aff'd mem., 681 F.2d 805 (3d Cir. 1982); Limerick, supra, ALAB-262, 1 NRC 163, 167-68 (1975), aff'd sub nom. Environmental Coalition of Nuclear Power v. Nuclear Regulatory Commission, No. 75-1421 (3d Cir. November 12, 1975). See also Delaware River Basin Commission v. Bucks County Water and Sewer Authority, 474 F. Supp. 1249 (E.D. Pa. 1979), appeal dismissed, 615 F.2d 1353 (3d Cir. 1980), vacated, 641 F.2d 1087 (3d Cir. 1981); Dublin Water Co. v. Delaware River Basin Commission, 443 F. Supp. 310 (E.D. Pa. 1977); Bucks County Board of Commissioners v. Interstate Energy Co., 403 F. Supp. 805 (E.D. Pa. 1975); Borough of Morrisville v. Delaware River Basin Commission, 399 F. Supp. 469 (E.D. Pa. 1975), aff'd mem., 532 F.2d 745 (3d Cir. 1976). In ALAB-262, the Appeal Board found that DRBC is a federal
(Footnote Continued)

In granting DRBC generic statutory responsibility over water resource allocation, Congress and the signatory states provided specific mechanisms for ensuring that Basin waters would be fairly and reasonably allocated, and that the consequences of each allocation would be carefully analyzed and well understood. To effectuate these objectives, the Compact provides for the development of a Comprehensive Plan to which projects are periodically added.[28/] The Compact requires that any project within the Basin having a substantial effect on its water resources must be approved by DRBC under Section 3.8, which authorizes approval if the proposed project "would not substantially impair or conflict with the comprehensive plan."

Since its creation and the subsequent passage of NEPA, DRBC has devised internal procedures for evaluating projects requiring approval under Section 3.8 in order to determine potential environmental impacts in compliance with NEPA.[29/] As explained by the Licensing Board, DRBC followed these procedures in thoroughly evaluating all environmental

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(Footnote Continued)
agency for the purpose of determining the responsibilities of the NRC and DRBC, respectively, under the National Environmental Policy Act of 1969, 42 U.S.C. §4321 et seq. ("NEPA"). Id. at 189.

28/ DRBC Compact at §13.1.

29/ See DRBC Administrative Manual - Part II, Rules of Practice and Procedure at §2-4. The Appeal Board can take official notice of these Rules, a copy of which was previously provided for the record.

impacts associated with the Point Pleasant diversion, including the downriver salinity and water quality impacts raised by appellant. This resulted in the issuance of the DRBC Final Environmental Assessment for the Neshaminy Water Supply System (August 1980).

In a challenge to the sufficiency of DRBC's environmental review, the United States District Court for the Eastern District of Pennsylvania found that the DRBC Final Environmental Assessment was "sufficiently detailed and thorough to meet the substantive statutory requirements" of a full environmental impact statement.30/ The Court specifically affirmed DRBC's authoritative treatment of downstream impacts, stating:

> The record shows constant and thorough study and consideration of the salinity problems of the Delaware River. Although experts, as well as laymen, may disagree as to a "safe" rate of flow, DRBC is the agency charged with this decision, and it, not this court, has the necessary expertise to make that determination.31/

Similarly, a subsequent appeal brought by intervenor herein and others, challenging determinations by DRBC and the U.S. Army Corps of Engineers regarding downriver salinity and water quality impacts was again rejected by

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30/ Delaware Water Emergency Group v. Hansler, 536 F. Supp. at 41.

31/ Id. at 42-43 n.25.

> thereof, has been adopted with the concurrence of the member appointed by the president, the exercise of any powers conferred by law on any officer, agency or instrumentality of the United States with regard to water and related land resources in the Delaware River Basin shall not substantially conflict with any such portion of such comprehensive plan and the provisions of Section 3.8 and Article 11 of the Compact shall be applicable to the extent necessary to avoid such substantial conflict . . . .

Upon being provided with the affidavit of Gerald M. Hansler, Executive Director of DRBC, to the effect that the federal representative had, in fact, concurred in all docket decisions leading to final approval of the Point Pleasant diversion (except for a single abstention on the third of seven docket decisions followed by further concurrences),[39/] the Board properly found that "it is precluded from considering matters concerning the allocation of Delaware River water for cooling Limerick."[40/]

The specific contention rejected by the Licensing Board, whose exclusion appellant apparently contests, asserted that DRBC failed to consider adverse impacts related to the salinity gradient downstream in the Delaware

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39/ See Affidavit of Gerald M. Hansler, Executive Director, DRBC (June 15, 1982), attached to Applicant's Objections to Special Prehearing Conference Order (June 17, 1982).

40/ Limerick, supra, "Memorandum and Order (Concerning Objections to June 1, 1982 Special Prehearing Conference Order)" (July 14, 1982) (slip op. at 18-19).

Estuary.[41] Upon another motion seeking reconsideration, the Licensing Board explained its rationale as follows:

> It would be the quantity of water withdrawn, not its particular use, which would lead to the changes in salinity. Moreover, any change in salinity would result not just from this water withdrawal, but from the total quantity of water withdrawn for uses approved by the Delaware River Basin Commission (DRBC). . . .
>
> DRBC is charged with regulating the water supply and uses of water in the Delaware River Basin. SPCO at 1469. This includes, necessarily, the authority to decide for which of several competing possible uses water will be allocated. Since changes in the salinity gradient would result directly from the allocation without regard to how it is used, the remedy for these changes would be to change the allocation. A decision to change the allocation would substantially conflict with DRBC's decision authorizing it, and therefore would be the type of action precluded by section 15.1(s) of the compact. Since NRC cannot change the allocation causing the alleged salinity changes, it would be a pointless exercise for NRC to reconsider by litigation in this hearing the causes and possible remedies of any such changes in salinity in the Delaware River and one in which the NRC need not engage.[42]

41/ See Supplemental Petition of Coordinated Intervenors at 69 (November 24, 1981), which sets forth Del-Aware proposed Contention V-16.

42/ Limerick, supra, LBP-82-72, 16 NRC 968, 969-70 (1982). A similar ruling was made to exclude proposed Contention V-23, alleging that DRBC was implementing a new policy to meet the need for Delaware River water needs in view of continuing increases in depletive uses. Limerick, supra, "Memorandum and Order (Denying (Footnote Continued)

The Licensing Board correctly recognized that water supply needs and impacts associated with the depletive use of Delaware River Basin resources go to the very heart of DRBC's unique responsibilities under its Compact. The Appeal Board may take official notice that DRBC's published reports fully analyze such impacts with regard to the allocation of water for Point Pleasant.[43/] The fact that DRBC fully integrated this consideration of water quality issues with its allocation of water for Point Pleasant is confirmed by reference to its approval of the allocation in DRBC Docket No. D-69-210 CP (March 29, 1973) (page six), by which DRBC established the basic requirement that withdrawals at Point Pleasant may not reduce the flow as

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(Footnote Continued)
Del-Aware's Petition to Amend Contentions)" (January 24, 1983).

43/ For example, DRBC fully considered the impact that the Point Pleasant diversion would have upon downstream reaches of the Delaware River. See DRBC Final Environmental Assessment for the Neshaminy Water Supply System, Part III, pp. 2-34 to 2-38; Part IV-47 to IV-48 (August 1980). Flow maintenance in the Delaware River necessary to prevent an increase of saltwater intrusion and deterioration of water quality in the Estuary was also considered by DRBC at an earlier stage in the project. DRBC Final Environmental Impact Statement at 23, 29-31, 35 (1973). Further, consideration of the flows necessary to maintain water quality in the Delaware River is an ongoing DRBC function. See, e.g., DRBC Final Report and Environmental Impact Statement of the Level B Study (May 1981); Interstate Water Management - Recommendations of the Parties to the U.S. Supreme Court Decree of 1954 to the Delaware River Basin Commission Pursuant to Commission Resolution 78-20 (November 1982).

measured at the Trenton gage below 3,000 cfs, absent release of an equivalent compensating flow from an upstream reservoir. DRBC imposed this condition in granting final Section 3.8 approval to the project in Docket No. D-79-52 CP (February 18, 1981) (pages five to six).

Appellant's arguments that the excluded contentions and testimony should have been permitted are frivolous. First, the Draft Environmental Statement ("DES") issued for Limerick by the Staff in no way confers jurisdiction upon the NRC or constitutes an assertion or finding on the part of the NRC that it has jurisdiction to entertain such matters in its licensing proceedings. The requirement of an environmental impact statement has been described as an environmental full disclosure law.[44/] As such, an impact statement gives proper focus to all relevant environmental factors, regardless of whether the agency has authority to take any action with regard to such impacts. In short, a federal agency has considerable latitude in preparing an EIS even to the point of being overinclusive in its scope. As the Licensing Board correctly noted, the Staff "may, if it desires, perform a more complete review than the minimum legally required."[45/]

44/ Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972).

45/ Limerick, supra, IBP-82-72, 16 NRC at 972. In that (Footnote Continued)

C. The Licensing Board Properly Denied the Proposed Contention Regarding Alleged Impacts of Diverted Water on Receiving Streams.

Del-Aware's brief scarcely mentions the issue of the alleged impact of Delaware River water upon the receiving streams. While the failure to address the issue in any substantive fashion effectively waives it,[46/] the ruling of of the Licensing Board in disallowing various forms of this contention was entirely proper. Contention 16c alleged that the discharge of water into the Perkiomen and Schuylkill will cause toxic pollution and thus adversely affect fishing and drinking water supplies. In ruling on the contention, the Board held that it lacked specificity and, more importantly, was inadmissible because impacts upon the Perkiomen and Schuylkill were considered at the construction permit stage.[47/]

Del-Aware sought reconsideration of this ruling, alleging that a change of the intake location would cause more low quality water from the Tohickon Creek upstream to

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(Footnote Continued)
regard, the Licensing Board examined the letter dated January 5, 1981 from Mr. Tedesco of the NRC Staff to Applicant, upon which appellant relies, and noted that Del-Aware's characterization of the letter is simply "unsupported by the language of the letter." Id.

46/ See note 24, supra.

47/ Limerick, supra, LBP-82-43A, 15 NRC at 1486.

be drawn into the intake.[48/] The Board believed that the new intake location was not yet firmly established, but held that if it later appeared that the intake would be located where it would allegedly take in more seriously degraded water, the Board would consider whether there was justification for admitting an untimely contention.[49/]

Again, on August 25, 1982, Del-Aware sought to amend Contention 16c, submitting as a basis results of water samples taken in the Delaware River. The Board rejected this contention, restating that what was required for an admissible contention was a comparison of water quality of the water which would be diverted through the intake at its present location with the quality of water which would have been diverted according to plans at the construction permit stage.[50/] The Board correctly ruled that Del-Aware had not provided such a comparison and that there was nothing to support a claim that the water quality would be worse at the

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48/ Request of Del-Aware Unlimited, Inc. for Reconsideration of Aspects of Special Prehearing Conference Order at 6 (June 17, 1982). Del-Aware characterized its argument as seeking reconsideration of Contention V-17, but as the Board correctly noted, these issues are relevant to Contention V-16c. Limerick, supra, "Memorandum and Order (Concerning Objections to June 1, 1982 Special Prehearing Conference Order)" (July 14, 1982) (slip op. at 10).

49/ Id. at 11.

50/ Limerick, supra, "Order (Denying Del-Aware's Petition to Amend Contentions)" (September 10, 1982) (slip op. at 3).

presently proposed location.[51/] Indeed, the Board found that the data presented by Del-Aware indicated that the water quality "do not vary significantly upstream and downstream of Point Pleasant or from concentrations in the Tohickon Creek."[52/] The Board further noted that when it issued its July 14, 1982 Order, it was under the impression that the "new" location was significantly closer to the outfall of the Tohickon Creek than previously. In fact, the difference, if any, was minuscule.[53/]

The Board therefore found that such a slight change in location did not on its face indicate a significant change in the quality of water withdrawn at Point Pleasant and that Del-Aware had provided no basis for such a finding.[54/] The Board gave Del-Aware every opportunity to present an admissible contention on the quality of water diverted into the receiving streams, but it was unable to do so. The Board correctly excluded this issue.

51/ Id.

52/ Id.

53/ As the Board later found, the change in location was from the shoreline to a point approximately 245 feet into the river channel. PID at 9. This obviously represented no measurable shift upstream toward the mouth of the Tohickon.

54/ Limerick, supra, "Order (Denying Del-Aware's Petition to Amend Contentions" (September 10, 1982) (slip op. at 3).

D. Extra-Record Submissions Should not be Considered.

Insofar as appellant proffers a number of documents relating to post-hearing matters which have arisen before other agencies, such documents obviously are not a part of the record on appeal and cannot be considered by the Appeal Board absent a reopening of the record.[55/] While none of the matters raised by appellant with regard to these extraneous documents is relevant on the merits, their proffer merely demonstrates that DRBC is performing its intended statutory function of overseeing issues related to the allocation of Delaware River Basin water resources. Such issues were properly excluded by the Licensing Board from the hearing.

II. The Licensing Board Acted Properly in Conducting an Evidentiary Hearing on Supplemental Cooling Water Contentions Prior to Commencement of Construction at Point Pleasant.

Appellant argues that the Licensing Board erred in conducting limited hearings on its contentions prior to the issuance of a Final Environmental Statement ("FES"). Appellant's argument is essentially a recitation of points previously made by the Staff in seeking reconsideration of

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55/ E.g., Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-430, 6 NRC 457, 458-59 (1977).

the Licensing Board's Special Prehearing Conference Order[56/] on submitted petitions and contentions.[57/]

At that time, Del-Aware did not object to the hearing schedule devised by the Licensing Board to permit a decision on its contentions prior to the commencement of construction at Point Pleasant.[58/] As Del-Aware's counsel accurately stated at the outset of the hearing, "we agreed to have a fast track hearing."[59/] Notwithstanding this agreement, Del-Aware filed a motion only a week before the evidentiary hearing commenced, after prepared testimony and trial briefs had already been submitted by all parties, to postpone the hearing. The motion dealt principally with the project's construction schedule.[60/] On appeal, appellant concedes

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56/ See Limerick, supra, 15 NRC at 1479-81 (scheduling expedited hearing).

57/ See NRC Staff's Request for Reconsideration of Licensing Board's Special Prehearing Conference Order at 10-13 (June 28, 1982). At the hearing, the Staff took the position that "[o]ur regulations [under NEPA] would not foreclose these hearings" (Tr. 753-54).

58/ See Request of Del-Aware Limited [sic], Inc. for Reconsideration of Aspects of Special Pre-Hearing Conference Order (June 17, 1982).

59/ Tr. 761. Del-Aware's agreement to this schedule is also indicated by a letter from Staff counsel to the Licensing Board dated July 7, 1982 proposing an expedited hearing schedule. Del-Aware acknowledged its consent to this schedule at page 2 of its subsequent motion filed on September 27, 1982. See Tr. 757.

60/ See Motion of Intervenor Del-Aware Unlimited, Inc. for Change of Hearing Schedule, Consolidation or to Strike Staff Testimony (September 27, 1982).

that the Board's action was appropriate at the time, although it now questions it using 20/20 hindsight:

> While the Board commendably moved quickly to insure timely consideration of environmental impacts in scheduling this early hearing, subsequent revelation that construction is not needed now, and failure of the staff to comply with NEPA renders [the action ill-advised and unnecessary].61/

In short, Del-Aware did not timely object to an early hearing on its contentions and participated fully at every step of the proceeding to litigate its contentions vigorously. If Del-Aware were truly aggrieved by the hearing schedule, it should have objected to the Licensing Board's Special Prehearing Conference Order of June 1, 1982, as did the Staff. Additionally, it could have sought interlocutory review. Having lost on the merits, appellant now seeks to resurrect this issue of procedural compliance in order to litigate its contentions anew.

As discussed below, the Licensing Board acted judiciously and, in any event, Del-Aware has shown absolutely no prejudice as a result of this procedure. Further, it is unconscionable for Del-Aware to have acquiesced in the Licensing Board's expedited treatment of its contentions, essentially for its benefit,62/ only to challenge that

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61/ Appellant's Brief at 12.

62/ It is noted that at no time during this proceeding did
(Footnote Continued)

action on appeal. Its consent to and participation in the expedited proceeding, if such expedition be deemed error, clearly constitutes invited error.

A. The Expedited Hearing on Del-Aware's Contentions was a Proper Exercise of Discretion by the Licensing Board.

It must be borne in mind that the Point Pleasant project represents a rather unique situation in terms of the customary review undertaken by the NRC for the issuance of operating licenses. As the Licensing Board found, the project will, in addition to supplementing cooling water for Limerick, provide public water supplies for Bucks and Montgomery Counties, Pennsylvania, allocated by DRBC to the Neshaminy Water Resources Authority ("NWRA").63/ As the project builder, NWRA is not subject to the jurisdiction of the NRC.64/

The Licensing Board therefore had no authority to stay construction of the project until the Staff could issue the FES for Limerick. Such unwarranted action would have vetoed or suspended, in effect, the authorization granted by DRBC

(Footnote Continued)
the Licensing Board invoke its sua sponte authority under 10 C.F.R. §2.760a with regard to any contention or issue on appeal.

63/ PID at 51.

64/ The Appeal Board may wish to take official notice of the fact that NWRA is the entity authorized by DRBC to construct and operate the facility. See DRBC Docket No. D-65-76 CP(8) (February 18, 1981) (page 8).

to build the pumping station.[65/] As the District Court held in Del-Aware Unlimited, Inc. v. Baldwin, supra: "NRC has no jurisdiction to enjoin NWRA's construction."[66/] Although the Licensing Board initially declined to determine whether it had authority to stay construction of the project, indicating that the expedited hearing approach was preferable,[67/] it subsequently stated at the hearing: "The Board does not in the first instance control the construction schedule, nor is a decision by this Board necessary before construction can commence."[68/]

In such circumstances, the Licensing Board reasonably determined that it could not conduct a meaningful adjudication of Del-Aware's contentions if the hearing were delayed past the point of construction. As the Licensing Board stated:

> The Board does, however, firmly believe that NEPA requires that the

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65/ This position was taken by Applicant in seeking reconsideration of the order following the first special prehearing conference, which Applicant interpreted possibly to imply the existence of such authority. See Applicant's Objections to Special Prehearing Conference Order (June 17, 1982).

66/ Del-Aware Unlimited, Inc. v. Baldwin, Tr. 1440.

67/ Limerick, supra, "Memorandum and Order (Concerning Objections to June 1, 1982 Special Prehearing Conference Order)" (July 14, 1982) (slip op. at 2-3).

68/ (Tr. 757). The Licensing Board restated this position in Limerick, supra, "Confirmatory Memorandum and Order (Denying Motion of Del-Aware to Change Hearing Schedule)" (October 20, 1982) (slip op. at 3).

> operational impacts at issue be given meaningful consideration. The contentions which the Board proposes to hear before construction begins concern environmental impacts attributable to operation of the plant. . . . However, if construction continues before the Board has an opportunity to consider these issues, such consideration could be rendered meaningless, e.g., the cost of minimizing environmental harm may have become prohibitively expensive.
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> . . . It is commonly recognized that as construction continues, the cost of corrective action to minimize environmental harm may increase, even to the point where such action is not reasonably possible. . . . In an effort to comply with Congress's intent in inacting NEPA, the Board intends to consider these contentions before construction has advanced so far that there is no realistic opportunity for it to order actions which it may determine are necessary to minimize harm to the environment.
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> . . . .
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> Should the Board accept both the Staff's arguments, it would appear that the Board would be forced to wait to hear these issues, quite possibly until construction is completed and certain actions which might minimize environmental harm are no longer feasible. This approach would appear to violate at least the spirit of NEPA, as set forth in connection with our discussion of the Applicant's objections, supra.69/

With regard to the argument that the provisions of 10 C.F.R. §51.52 precluded an early hearing, the Board stated:

69/ Limerick, supra, "Memorandum and Order (Concerning Objections to June 1, 1982 Special Prehearing Conference Order)" (July 14, 1982) (slip op. at 3-4, 15).

> We cannot force the Staff to act quickly, but we have pointed out the advantages of early action. We note that we are at present seeking only an evaluation of particular impacts, not a statement of the ultimate cost/benefit conclusion.70/

In so ruling, the Licensing Board correctly observed that the Appeal Board had previously approved early hearings on particular identifiable environmental costs even though the ultimate cost/benefit balance would not be ascertainable until later.71/ See Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539 (1975). In that case, the Appeal Board noted two important reasons for bifurcating environmental issues so that certain narrow issues could be adjudicated earlier than others: (1) an economy of time and expense might be achieved if the Applicant is put on notice that location of the facility (as regards the Limerick proceeding, the intake structure associated with the Point Pleasant pumping

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70/ Id. at 17-18.

71/ Accordingly, appellant erroneously claims that the issuance of the PID is contrary to NEPA's requirement that environmental considerations be incorporated into the decision-making process. Appellant's Brief at 10-12. Its reliance upon Greene County Planning Board v. Federal Power Commission, 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972), is misplaced. That case dealt with final agency action prior to issuance of the agency's environmental impact statement. In the instant case, the PID did not authorize issuance of an operating license and, as a decision upon discrete issues, did not purport to represent the NRC's final cost/benefit determinations under NEPA.

station) would be rejected on environmental grounds; (2) disclosure of a need for taking further steps to ameliorate readily identifiable environmental costs of construction or operation, or the need to collect further data on the dimensions of certain threatened environmental harm.[72] As the Appeal Board stated:

> A finding along one of these lines would not amount to a final disposition of any environmental question. But, especially if forthcoming appreciably in advance of the target date for the start of construction activities, it might produce a substantial reduction in the eventual overall environmental impact of the facility.[73]

This was precisely what the Licensing Board was attempting to accomplish in setting an early hearing schedule on Del-Aware's contentions to permit "meaningful NEPA review of these issues."[74]

Thus, the expedited hearings on its contentions actually had the effect of affording Del-Aware a more meaningful adjudication of its concerns. Notwithstanding appellant's allegation of a technical departure from 10 C.F.R. §51.52 in the conduct of the evidentiary proceeding prior to the furnishing of the FES for Limerick to the Environmental

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72/ 1 NRC at 547.

73/ Id.

74/ Limerick, supra, "Memorandum and Order" (Concerning Objections to June 1, 1982 Special Prehearing Conference Order) (July 14, 1982) (slip op. at 18).

Protection Agency ("EPA"), it is difficult to perceive any alleged error harmful to appellant.

Its argument that the Staff did not have the benefit of the views of other agencies on Del-Aware's contentions is without merit. The views of all agencies, including EPA and the U.S. Fish and Wildlife Service, were available to the Staff prior to the hearing. These particular agencies had previously commented upon the project extensively to DRBC and the Corps of Engineers when the latter agencies prepared their Environmental Assessments and issued permits for the project. Indeed, appellant presented testimony at length from employees of both EPA (Pence, Tr. 1435-1523)[75/] and U.S. Fish and Wildlife Service (Miller and McCoy, Tr. 3039-3370) during the hearing.

Twelve hearing days and over 4,000 transcript pages were consumed in litigating Del-Aware's two contentions, resulting in a PID which was itself 102 pages in length. To argue, as appellant does, that the Licensing Board did not rule upon "an adequately developed record"[76/] is to deny

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75/ Moreover, as appellant itself points out, EPA's comments on the DES relate to the very matters of downriver water quality impacts (e.g., salinity intrusion and dissolved oxygen levels), which the Licensing Board properly excluded from the hearing as properly within the jurisdiction of DRBC, not the NRC. Whether such consideration is appropriate for the FES is another matter. See the discussion at page 20, supra.

76/ Appellant's Brief at 8.

that phrase all meaning. In no tangible respect does Del-Aware show that the expedited hearing deprived it of an opportunity to present or, conversely, deprived the NRC of an opportunity to receive, other information which would have caused the Licensing Board to reach a different result.

It must be emphasized that the Licensing Board decided only two narrow contentions as to (1) the potential for impacts upon aquatic life and recreation by operation of the pumping station intake and (2) potential noise impacts from the pumphouse. A determination of these specific matters prior to issuance of the entire FES was not a violation of NRC regulations. The Licensing Board correctly appreciated that delaying the hearing might eliminate the potential for corrective or mitigative actions and that no useful purpose would be served by awaiting the formal issuance of an FES once construction had commenced. The views of other agencies were already on record and any other comments could be taken into account in computing the ultimate cost/benefit analysis for Limerick.

B. Appellant Cannot Challenge on Appeal any Error to Which it Consented and in Which it Participated.

Having failed to prevail on the merits of its two contentions, Del-Aware now challenges on appeal the propriety of holding an expedited evidentiary hearing on its contentions. The case law expresses the general principle precluding a party from challenging a tribunal's conduct of a proceeding after having invited or acquiesced in the

action or ruling, which applies even where the party's inducement of the error was not deliberate and its consent was implicit rather than express. This is called the doctrine of invited error.77/

These principles apply foresquarely here. Del-Aware had every opportunity to object to an expedited hearing, but did not seek a postponement of the hearing until practically the eve of its commencement. Even when the Staff raised the very points now asserted by appellant, it remained silent.

77/ See, e.g., International Travelers Cheque Co. v. BankAmerica Corp., 660 F.2d 215, 224 (7th Cir. 1981); Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp., 571 F.2d 1144, 1155 (10th Cir.), cert. denied, 439 U.S. 862 (1978); First National Bank, Henrietta v. Small Business Administration, 429 F.2d 280, 284 (5th Cir. 1970). In Overhead Door Corp. v. Newcourt, Inc., 611 F.2d 989, 990 (5th Cir. 1980), the court cited with approval 5 C.J.S. Appeal & Error §1501, which states in part:

> It is a well-established doctrine that a party may not avail himself of error into which he has led the trial court, intentionally or unintentionally; this is called invited error.
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> The general rule . . . is that an appellant or plaintiff in error is estopped, or will not be permitted, to take advantage of errors for the commission of which he was responsible, or which he himself committed, caused, brought about, provoked, participated in, created, or helped to create, or contributed to, or which he has invited or induced the trial court to commit, as where the ruling, or error, was made at his request or suggestion, or on his urging, or where he procured the making of the ruling or the taking of the action. [Footnotes omitted.]

It acquiesced in every scheduling order issued by the Licensing Board without comment to the contrary.

A very similar situation occurred in United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952), where a party to an ICC proceeding challenged the validity of the examiner's appointment after the proceeding had been completed. The Court stated:

> Appellee did not offer nor did the court require any excuse for its failure to raise the objection upon at least one of its many opportunities during the administrative proceeding. . . .
>
> The apparent reason for complacency was that it was not actually prejudiced by the conduct or manner of appointment of the examiner. There is no suggestion that he exhibited bias, favoritism or unfairness. . . . The issue is clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits and can prevail only from technical compulsion irrespective of considerations of practical justice.
> . . . .
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> . . . [O]rderly procedure and good administration require that objections to the proceedings of administrative agency be made while it has an opportunity for correction in order to raise issues reviewable by the courts. . . . Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at

> the time appropriate under its practice.78/

This principle has been observed in numerous lower court decisions. In First-Citizens Bank and Trust Co. v. Camp, 409 F.2d 1086 (4th Cir. 1969), the court rejected a claim against successive scheduling of hearings on two applications before the Comptroller of the Currency and the composition of the hearing panel where no timely objection had been lodged. Criticizing the same strategy employed by appellant herein, the court stated:

> [Plaintiff's] right to raise at the judicial level procedural objections not advanced before the administrative agency is suspect, because, ordinarily, a litigant is not entitled to remain mute and await the outcome of an agency's decision and, if it is unfavorable, attack it on the ground of asserted procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctable at the administrative level.79/

Similarly, where objections to ICC hearing proceedings were not timely made, the court in Braswell Motor Freight Lines, Inc. v. United States, 271 F. Supp. 906, 911 (W.D. Texas 1967), held:

> . . . [I]t would be repugnant to orderly procedure and good administration for a party who had failed during the progress of an administrative hearing to timely insist upon his rights, to be allowed

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78/ 344 U.S. at 35-37 (emphasis added).

79/ 409 F.2d at 1088-89 (emphasis added).

> later to successfully raise the issue if it should develop that the recommendations of the trial examiner, upon which the agency decision was based, were not to his liking.80/

Simple justice and adherence to these well-founded principles require that Del-Aware not be permitted to raise this claim of error after having sought the advantages of an expedited hearing for itself.

III. The Licensing Board Correctly Found that the Point Pleasant Pumping Station Intake Would not have any Significant Adverse Impact Upon American Shad and Shortnose Sturgeon Populations.

While appellant is apparently dissatisfied with findings by the Licensing Board regarding the potential for adverse impacts to American shad and shortnose sturgeon at the Point Pleasant intake, it is difficult to discern any particular error which is alleged. Insofar as appellant complains that the views of certain agencies were not obtained prior to the hearing, it is reiterated that their views were well known on the records before DRBC and the Corp of Engineers in their separate permitting proceedings.

80/ See also Inter-Tribal Council v. United States Department of Labor, 701 F.2d 770, 771 (9th Cir. 1983); Georgia-Pacific Corp. v. United States Environmental Protection Agency, 671 F.2d 1235, 1242-43 (9th Cir. 1982).

Also, personnel from these agencies testified at the evidentiary hearing in this proceeding.[81/]

Although appellant alleges noncompliance with the Fish and Wildlife Coordination Act, 16 U.S.C. §662(a), there is no explanation as to how that particular statute was allegedly violated. In any event, that statute is inapplicable because the Point Pleasant project is not being constructed pursuant to an NRC construction permit or operating license.[82/] Rather, the necessary federal approvals and permits were issued by DRBC and the Corps of Engineers. As noted above, those agencies did consult with U.S. Fish and Wildlife Service prior to the issuance of such approvals and permits.

Apparently, the principal error assigned by appellant is that the Licensing Board allegedly focused upon the survivability of American shad and shortnose sturgeon as a species in the Point Pleasant area as opposed to some lesser degree of impact.[83/] This assertion is clearly contrary to the detailed findings in the PID as to (1) physical and

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81/ In addition to the testimony of EPA and U.S. Fish and Wildlife Service personnel (see page 32, supra), it is noted that employees of the Pennsylvania Fish Commission also testified (Kaufmann and Emery, Tr. 1700-2147).

82/ See the discussion at pages 27-28, supra.

83/ Thus, appellant asserts that "the destruction of a school of fish can be significant without regard [to] the loss of the species." Appellant's Brief at 20.

behavioral characteristics of American shad and shortnose sturgeon at all life stages, (2) flow characteristics of the Delaware River at the intake and (3) operational characteristics of the intake itself. From an exacting analysis of all relevant factors, the Licensing Board concluded that "the intake, as relocated, would have no significant adverse effect on the Delaware River populations of either American shad or shortnose sturgeon."[84/] Thus, the Licensing Board focused upon any potential impact to these populations, not merely the survivability of the species.

Insofar as appellant suggests the Licensing Board did not consider some unspecified "alternatives" to the diversion, the record does not disclose, nor does appellant point to, any alternative with lesser impacts to American shad and shortnose sturgeon.[85/] The NRC has no obligation to consider such vaguely stated and speculative alternatives. As the Supreme Court held in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978), to ensure that an environmental impact statement "is something more than an exercise in frivolous boilerplate the

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84/ PID at 35.

85/ See Appellant's Brief at 19-20. The Appeal Board is not obliged to guess at what error is assigned. Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49 (1981). Here, appellant does not even identify the order allegedly excluding this issue.

concept of alternatives must be bounded by some notion of feasibility."[86/]

IV. The Licensing Board Correctly Excluded a Contention Which Would Have Litigated Environmental Impacts Attributable Solely to the NWRA Portion of the Project.

Appellant asserts that the Licensing Board erred in failing to attribute to Limerick impacts resulting from the NWRA portion of the project.[87/] Appellant does not specify either the contention or evidence which it claims to have been erroneously excluded. Presumably, appellant is referring to its proposed Contention V-17, which alleged that environmental impacts from the NWRA public water supply portion of the project should be attributable to Limerick.[88/] It is emphasized that the Licensing Board rejected this contention on the ground that it sought to litigate "impacts of the portion of the Point Pleasant

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86/ See also Kentucky v. Alexander, 655 F.2d 714, 718 (6th Cir. 1981); Lake Erie Alliance for the Protection of the Coastal Corridor v. United States Army Corps of Engineers, 526 F. Supp. 1063, 1071-72 (W.D. Pa. 1981), aff'd mem. 707 F.2d 1392 (3d Cir. 1983).

87/ Applicant finds no exception filed by Del-Aware which even colorably relates to this argument. See 10 C.F.R. §2.762(a). Appllicant is aware that a proposed rule would eliminate the need for filing exceptions. 48 Fed. Reg. 29876 (June 29, 1983).

88/ Supplemental Petition of Coordinated Intervenors at 70 (November 24, 1981).

diversion utilized solely by the NWRA."[89/] In contrast, the Licensing Board did consider all impacts attributable to the joint operation of the intake by Applicant and NWRA, i.e., the full withdrawal of 95 mgd as authorized by DRBC.[90/]

The Licensing Board correctly ruled that those parts of the Point Pleasant project which would be used only by NWRA do not require consideration by the NRC. Against the argument now proffered by appellant that the NWRA portion of the project would not be built but for Limerick, the Licensing Board properly held that "the test for determining

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89/ Limerick, supra, LBP-82-43A, 15 NRC at 1487 (emphasis added).

90/ Id. at 1484 (emphasis added). The Licensing Board held:

> [I]t appears likely that environmental impacts of a jointly used intake system and reservoir result from the total size and operation of the system and that they cannot meaningfully be separated. In the absence of such a methodology permitting separation, we will consider the total environmental impacts of the Point Pleasant intake and pumping station, the transmission main to the Bradshaw Reservoir, and the Bradshaw Reservoir itself.

15 NRC at 1472 (emphasis added). See also PID at 51.

As the Licensing Board subsequently stated in rejecting another proposed contention, "the impacts alleged in Del-Aware's litigated contentions were considered in the P.I.D. based on the combined water withdrawal rates of both PECo and NWRA because of the cumulative impact during times when water withdrawals by PECo would be permitted for Limerick." Limerick, supra, "Memorandum and Order Denying Del-Aware's Motion to Reopen the Record" at 9 n.3 (June 1, 1983) (emphasis added).

whether a project has been illegally segmented for NEPA purposes is not whether one segment would [not be built] but for the other."[91/] The Licensing Board correctly concluded that no improper segmentation would occur by excluding consideration of the NWRA portion of the project because (1) both the Limerick and NWRA portions of the total project have independent utility, and (2) actions by the NRC regarding Limerick would not foreclose options by NWRA on its portion of the project, which was approved by DRBC.[92/] Its conclusion was entirely in accordance with the federal case law on segmentation.[93/]

91/ Limerick, supra, LBP-82-43A, 15 NRC at 1473.

92/ Id. at 1473-74.

93/ Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 439 (5th Cir., Unit B 1981); Sierra Club v. Froehlke, 534 F.2d 1289, 1297 (8th Cir. 1976); Sierra Club v. Callaway, 499 F.2d 982, 990 (5th Cir. 1974); United Family Farmers, Inc. v. Kleppe, 418 F. Supp. 591, 596-97 (D.S.D. 1976). Further, as the Supreme Court held in Kleppe v. Sierra Club, 427 U.S. 390, 412-14 (1976), a determination of which projects should be included in an environmental impact statement involves "practical considerations of feasibility" and a "high level of technical expertise" such that agency discretion to review projects separately exists "[e]ven if environmental interrelationships could be shown conclusively." This rationale applies even more forcefully here, given the fact that entire project, including the NWRA portion, had already undergone comprehensive environmental review by the U.S. Department of Agriculture, DRBC and the U.S. Army Corps of Engineers. Moreover, as noted, NWRA is not even subject to the jurisdiction of the NRC.

Appellant claims that the Licensing Board's decision rested on an affidavit by Robert A. Flowers, Executive Director of NWRA, but the affidavit was not even submitted until after the issuance of the challenged Order of June 1, 1982.[94/] While the Licensing Board subsequently referred to the affidavit in a footnote,[95/] the Licensing Board clearly placed fundamental reliance upon its legal analysis rather than any factual showing in the affidavit. In any event, appellant has failed to demonstrate any error in the affidavit, nor has it shown any legal relevance between Applicant's financial commitment to the project and consideration of environmental impacts attributable solely to the NWRA public water supply portion of the project. The Licensing Board properly refused to find "financial dependence to be the equivalent of lack of physical independent utility"[96/] in rejecting Del-Aware's proposed contention.

94/ See Affidavit of Robert A. Flowers, Executive Director, NWRA, attached to Applicant's Objections to Special Prehearing Conference Order (June 17, 1982).

95/ Limerick, supra, Memorandum and Order (Concerning Objections to June 1, 1982 Special Prehearing Conference Order) at 9 n.2 (July 14, 1982).

96/ Id. at 8.

V. Compliance With the National Historic Preservation Act of 1966 for the Point Pleasant Project is not the Responsibility of the NRC.

Appellant asserts that, in some undefined respect, the PID fails to reflect NRC compliance with Section 110(f) of the National Historic Preservation Act, 16 U.S.C. 470h-2(f), regarding the protection of historic landmarks listed on the National Register. Specifically, appellant is concerned with visual imparts of a noise barrier wall to be constructed around the Point Pleasant pumping station transformers, if needed, in order to reduce noise from the transformers so as not to disturb nearby residents.

During the hearing, Applicant committed itself to the construction of a suitable barrier, if necessary, to attenuate transformer noise in the direction of such residences (Boyer, Tr. 1049). Accordingly, the Licensing Board imposed a condition requiring tests to be performed to ascertain whether the transformers will, in fact, cause audible offsite noise.[97/] Appellant asserts that the Licensing Board improperly refused to consider visual impacts from such a barrier if needed, yet points to no adverse evidentiary ruling by the Licensing Board. Even assuming that the Licensing Board so ruled, its action was entirely correct.

97/ PID at 45-47, 100-101.

First, as the Board noted, compliance with the National Historic Preservation Act was previously achieved by other agencies.[98] In fact, in responding to the recent challenge by appellant and others in Del-Aware Unlimited, Inc. v. Baldwin, the District Court determined that a Memorandum of Agreement between the Corps of Engineers and the Advisory Council on Historic Preservation regarding the project satisfied all requirements under the National Historic Preservation Act. The District Court held that the Memorandum of Agreement governed the issues raised by appellant in that case, which are the same here, "[w]ith respect to esthetics, which would include the height of any buildings . . . ."[99]

Second, esthetic impacts associated with a noise barrier were beyond the scope of the two admitted contentions. No motion for admitting a new, late contention was filed.[100] Third, such issues were properly excluded as relating to contingent and speculative impacts. The existence of such a barrier and its physical configuration and characteristics are wholly dependent upon tests which have not yet been performed. Since the Licensing Board's

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98/ Id. at 40.

99/ Del-Aware Unlimited, Inc. v. Baldwin, supra, Tr. 1454.

100/ See generally Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC ____ (June 30, 1983).

consideration of noise impacts related to the NRC's compliance with NEPA,[101] speculative and contingent impacts need not have been considered.[102] If and when such a barrier is needed, the NRC could consider appellant's esthetic concerns, if any, by way of a petition pursuant to 10 C.F.R. §2.206.

VI. There was no Error in the Licensing Board's Findings Regarding Shortnose Sturgeon.

Appellant claims error regarding the Licensing Board's finding that the intake would have no significant adverse impact upon shortnose sturgeon.[103] This is evidently another instance of semantic quibbling. The Licensing Board did not, as appellant suggests, merely find that the intake would not likely affect the existence of shortnose sturgeon as a species. Rather, it determined that (1) there is no hard evidence that shortnose sturgeon occur at or upstream of Point Pleasant;[104] (2) it is unlikely that shortnose sturgeon spawn at or near Point Pleasant;[105] (3) adult

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101/ PID at 40.

102/ South Louisiana Environmental Council, Inc. v. Sand, 629 F.2d 1005, 1016-17 (5th Cir. 1980); Environmental Defense Fund, Inc. v. Hoffman, 566 F.2d 1060, 1067 (8th Cir. 1977); Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292, 1307 (8th Cir. 1976), cert. denied, 430 U.S. 922 (1977).

103/ PID at 24-28, 73-78.

104/ PID at 24, 73-74.

105/ PID at 25, 28, 74.

sturgeon, if present, would not be affected by the intake at all;[106] and (4) the egg, larval and juvenile stages of shortnose sturgeon, if present, would not experience significant impingement or entrainment.[107] Appellant cites no evidence of record from which contrary findings should have been made, and a fortiori, cites no basis for arguing that the Licensing Board's findings are contrary to the weight of the evidence.

VII. The Licensing Board Properly Excluded a Proposed Contention Seeking to Litigate Schuylkill River Alternatives to the Project.

Appellant has filed a number of documents attached as exhibits which purport to demonstrate the existence of supplemental cooling water alternatives for Limerick from the Schuylkill River, chiefly the Blue Marsh Reservoir. Much of this discussion relates to the state of the nuclear industry as well as ratemaking and the need for power in Applicant's service area. Other portions of appellant's discussion relate to documents and testimony provided to the Pennsylvania PUC in a separate proceeding relating to the pumphouse for the Bradshaw Reservoir. Clearly, all such

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106/ PID at 26, 74.

107/ PID at 26-27, 76-78.

matters are not a part of this record and cannot be considered by the Appeal Board.[108]/

While appellant does not point to any particular action by the Licensing Board as error, apparently it is challenging an order excluding proposed Contention V-24, which sought to litigate Schuylkill River alternatives to the project for one unit at Limerick.[109]/ The essence of appellant's argument appears to be that the Licensing Board should have considered Schuylkill River alternatives capable of providing supplemental cooling water for one unit at Limerick, even though appellant properly acknowledges that the decision of the Pennsylvania Public Utility Commission ("PUC")[110]/ upon which it relies "does not totally rule out completion of Limerick Unit 2 . . . ."[111]/

Preliminarily, the Licensing Board correctly held that it lacked sufficient information to determine whether the PUC decision would, in fact, result in the Applicant's withdrawal of its application for Limerick Unit 2.[112]/

108/ See note 55, supra.

109/ Limerick, supra, "Memorandum and Order (Denying Del-Aware's Petition to Amend Contentions)" (January 24, 1983).

110/ Limerick Nuclear Generating Station Investigation, I-80100341, "Opinion and Order" (August 27, 1982).

111/ Appellant's Brief at 24.

112/ Limerick, supra, "Memorandum and Order" (Denying (Footnote Continued)

However, the Licensing Board also properly determined that the status of the PUC proceeding was irrelevant to several other factors which independently barred admission of this particular proposed contention. As discussed in detail above, only DRBC has authority to allocate water resources of the Delaware River Basin.[113/] Accordingly, any Schuylkill River alternative proposed by Del-Aware in its contention could be implemented only under the existing docket conditions imposed by DRBC in authorizing withdrawals from the Schuylkill River for Limerick. The Licensing Board therefore considered Del-Aware's contentions (i.e., the alternatives of additional withdrawals from the Schuylkill River itself as well as withdrawals based upon flows from an upstream reservoir) in light of the DRBC docket conditions.

The Licensing Board started with the legally correct premise that the supplemental cooling water system for Limerick analyzed and decided upon at the construction permit stage, i.e., the "river follower" method of cooling, could not be challenged by a new proposed alternative at the operating license stage "absent a determination of significantly increased environmental impacts."[114/] As regards the

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(Footnote Continued)
Del-Aware's Petition to Amend Contentions) (January 24, 1983) (slip op. at 8).

113/ See the discussion at pages 10-12, supra.

114/ Limerick, supra, LBP-82-43A, 15 NRC at 1464. Appellant
(Footnote Continued)

argument by appellant that Unit 2 might be eliminated, the Licensing Board framed the issue as follows:

> Thus, we will not consider alternative cooling systems unless it can be shown that they are made possible only if Unit 2 is deleted, and there is a basis in support of a contention that they could have significantly smaller environmental impacts than the proposed Point Pleasant diversion river follower system.115/

The contention proposed by Del-Aware failed to meet these threshold requirements. The Licensing Board noted that existing docket conditions prohibit the withdrawal of Schuylkill River water for Limerick when the flow at the Pottstown gage is below 530 cubic feet per second ("cfs") when one unit is operating, and below 560 cfs for two units. Also, withdrawals are prohibited when the water temperature exceeds 59°F.116/ Utilizing data provided by Applicant with which Del-Aware did not disagree,117/ the Licensing Board determined that supplemental cooling water would have been necessary for the operation of one unit only 3 percent less

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(Footnote Continued)
did not dispute the correctness of this standard. See Limerick, supra, Memorandum and Order (Concerning Objections to June 1, 1982 Special Prehearing Conference Order) (July 14, 1982) (slip op. at 9).

115/ Limerick, supra, "Memorandum and Order (Denying Del-Aware's Petition to Amend Contentions)" (January 24, 1983) (slip op. at 9).

116/ Id. at 10.

117/ Id. at 11.

of the time than for two units.[118] Its determination that such a difference is "manifestly insignificant in view of the requirement for supplementary cooling water more than 30 percent of the time even with only one unit operating"[119] conforms to the same finding by DRBC and the Pennsylvania Department of Environmental Resources.[120]

Because Del-Aware had not satisfied the first threshold requirement of demonstrating that its Schuylkill alternative would be made possible by the deletion of Unit 2, the Licensing Board did not have to determine whether Del-Aware had satisfied the second threshold requirement of showing that the Schuylkill alternative would have significantly smaller environmental impacts than the "river follower" system. The proposed contention was entirely devoid of any basis as to either requirement and was therefore properly excluded.

118/ Id. at 11-12.

119/ Id. at 12.

120/ Id. Insofar as appellant attempted to challenge the temperature restriction imposed by DRBC in its docket decisions so as to make cooling water for Limerick available at other times, the Licensing Board correctly stated that the NRC lacks authority to modify this limitation. It also observed that there was no basis for the NRC to conclude that "some speculative and unquantified change in the temperature restriction" would be taken by DRBC or would result in the availability of more cooling water for Limerick. Id. at 13.

With regard to the Blue Marsh Reservoir as an alternative source for supplemental flows, the Licensing Board noted that flow restrictions on withdrawals from the Schuylkill River imposed by DRBC in its docket decisions "specified that the flow in question was to be measured without including future augmentation from DRBC sponsored projects,"[121] e.g., such as Blue Marsh. According to the testimony of the DRBC Executive Director, therefore, Blue Marsh releases could not be counted as augmenting Schuylkill flows to permit more frequent withdrawals for Limerick.[122] Further, aside from these docket restrictions, Del-Aware failed to satisfy either of the aforestated threshold requirements for admission of an alternative water supply contention.

On appeal, appellant cites a letter dated July 20, 1983 from a Regional Director of the U.S. Fish and Wildlife Service to the Pennsylvania Department of Environmental Resources with regard to the pending PUC proceeding on the Bradshaw pumphouse.[123] As a matter outside the scope of this proceeding and beyond the record, this document may not be considered on appeal.[124] Moreover, it is DRBC, not the

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121/ Id.

122/ Id.

123/ Appellant's Brief at 25.

124/ See note 55, supra.

U.S. Fish and Wildlife Service, which exercises regulatory jurisdiction over the Blue Marsh Reservoir. The views of the U.S. Fish and Wildlife Service as to the potential availability of Blue Marsh storage for Limerick are therefore wholly lacking in any evidentiary weight.

Conclusion

For the reasons discussed more fully above, each of the points raised by appellant is lacking in merit. The Licensing Board conscientiously addressed in detail each of appellant's contentions as litigated or proposed and properly excluded them or found them to be without merit. Its decisions should be affirmed in all respects.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.

Troy B. Conner, Jr.

Troy B. Conner, Jr.
Robert M. Rader

Counsel for the Applicant

October 3, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
Philadelphia Electric Company	)	
	)	
(Limerick Generating Station Units 1 and 2	)	Docket Nos. 50-352 50-353

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance on behalf of the Applicant in the captioned matter. In accordance with §2.713, 10 C.F.R. Part 2, the following information is provided:

Name	-	Jessica H. Laverty
Address	-	Conner & Wetterhahn, P.C. Suite 1050 1747 Pennsylvania Avenue, N.W. Washington, D.C. 20006
Telephone Number	-	202/833-3500
Admission	-	Supreme Court of the United States Supreme Court of the State of Virginia
Name of Party	-	Philadelphia Electric Company

Notice is further given pursuant to §2.708, 10 C.F.R. Part 2, that service upon the Applicant should be made upon the undersigned.

Jessica H. Laverty

Jessica H. Laverty

Dated at Washington, D.C.,
this 3rd day of October, 1983.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
Philadelphia Electric Company	)	Docket Nos. 50-352
	)	50-353
(Limerick Generating Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Brief in Opposition to Exceptions by Del-Aware Unlimited, Inc. Relating to the Atomic Safety and Licensing Board's Partial Initial Decision of March 8, 1983 and the Memorandum and Order Denying Del-Aware's Motion to Reopen the Record of June 1, 1983" and "Notice of Appearance of Jessica H. Laverty," dated October 3, 1983, in the captioned matter have been served upon the following by deposit in the United States mail this 3rd day of October, 1983:

Christine N. Kohl, Chairman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Gary J. Edles
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Reginald L. Gotchy
Atomic Safety and Licensing Appeal Board
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Washington, D.C. 20555

Judge Lawrence Brenner (2)
Atomic Safety and Licensing Board
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Judge Richard F. Cole
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Judge Peter A. Morris
Atomic Safety and Licensing Board
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Robert M. Rader

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-1010

DEL-AWARE UNLIMITED, INC.; SIGSTEDT, VAL; WELLS, COLLEEN; SADOUX, MARC; MASLAND, MARION W.; TOWNSHIP OF BRISTOL; TORKELSON, NORMAN and DIANE; THE PHILADELPHIA FEDERATION OF SPORTSMEN'S CLUBS; LANDIS, SAMUEL; GILMORE, CHARLES; NOBLE, MARY ELLEN; THE PENNSYLVANIA STATE FEDERATION OF SPORTSMEN'S CLUBS; BANNING, RITA C., HONORABLE; WATERSHED ASSOCIATION OF THE DELAWARE RIVER; GREENWOOD, JAMES C., HONORABLE; FONASH, CARL, HONORABLE,

Appellants

v.

ROGER M. BALDWIN, individually, and as District Engineer, U.S. Army Corps of Engineers; ALEXANDER ALDRICH, individually, and as Chairman of the Advisory Council on Historic Preservation; WILLIAM GORDON, individually, and as Assistant Secretary, U.S. Department of Commerce; GERALD HANSLER, individually and as Executive Director, The Delaware River Basin Commission; HAROLD DENTON, individually, and as Director, Division of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission; THE NUCLEAR REGULATORY COMMISSION; HONORABLE PETER DUNCAN, as Secretary of the Department of Environmental Resources of the Commonwealth of Pennsylvania; NESHAMINY WATER RESOURCES AUTHORITY; and PHILADELPHIA ELECTRIC COMPANY

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 82-5115)
District Judge: Honorable James Giles

Argued June 13, 1983

Before HUNTER, HIGGINBOTHAM, Circuit Judges, and ZIEGLER,* District Judge

---

*Honorable Donald E. Ziegler, United States District Judge for the Western District of Pennsylvania, sitting by designation

JUDGMENT ORDER

Appellants appeal from an interlocutory order of the district court denying appellants' motion for preliminary injunction. After consideration of all contentions raised by appellants, to wit, that the court erred:

> 1) as a matter of law by excluding from evidence virtually all of appellants' proferred testimony and documentation which was not included in the Corps' administrative record;
>
> 2) in holding that section 110(f) of the National Historic Preservation Act did not require the Corps to implement measures and consider alternatives which would minimize harm to the Pennsylvania Canal;
>
> 3) in finding that the Corps had given "great weight" to the views of the state and federal fisheries agencies, as required by its statute and regulations;
>
> 4) in finding insufficient likelihood of success on the merits of the NEPA claims to require injunctive relief,

It is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

JAMES HUNTER, III, Circuit Judge

Attest:

M. Elizabeth Ferguson
Chief Deputy Clerk

Dated: July 5, 1983

12/15/83

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEL-AWARE UNLIMITED, INC., VAL SIGSTEDT, COLLEEN WELLS, MARC SADOUX, MARION W. MASLAND, Township of Bristol, NORMAN and DIANE TORKELSON, The PHILADELPHIA FEDERATION OF SPORTSMEN'S CLUBS, SAMUEL LANDIS, CHARLES GILMORE, MARY ELLEN NOBLE, THE PENNSYLVANIA STATE FEDERATION OF SPORTSMEN'S CLUBS, HONORABLE RITA C. BANNING, WATERSHED ASSOCIATION OF THE DELAWARE RIVER, HONORABLE JAMES C. GREENWOOD AND HONORABLE CARL FONASH. Plaintiffs	:	CIVIL ACTION
vs.	:	NO. 82-5115
ROGER M. BALDWIN, individually and as District Engineer, U.S. Army Corps of Engineers, and ALEXANDER ALDRICH, individually and as Chairman of the Advisory Council on Historic Preservation, WILLIAM GORDON, individually and as Assistant Secretary, U.S. Dept. of Commerce, GERALD HANSLER, individually and as Executive Director, The Delaware River Basin Commission, HAROLD DENTON, individually and as Director, Division of Nuclear Reactor Regulation, U.S. THE NUCLEAR REGULATORY COMMISSION, HONORABLE PETER DUNCAN, as Secretary of the Department of Environmental Resources of the Commonwealth of Pennsylvania, NESHAMINY WATER RESOURCES AUTHORITY, and PHILADELPHIA ELECTRIC COMPANY, Defendants.	:	

- - -

December 15, 1982

BEFORE: HONORABLE JAMES T. GILES, J.

Reported by:
Sidney Rothschild OFFICIAL COURT REPORTERS
Room 2722
U.S. Courthouse
Philadelphia, Pa. 19106

APPEARANCES:

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ROBIN LOCKE, ESQ.,
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JANICE SIEGEL, ESQ.,
For Federal Defendants.

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WILLIAM J. CARLIN, ESQ.,
ALAN M. LERNER, ESQ.,
For Neshaminy Water Resources Authority.

DAVID J. GOLDBERG, ESQ.,
For Delaware River Basin Commission.

TROY B. CONNOR, JR., ESQ.,
BERNARD CHANIN, ESQ.,
ROBERT M. RADER, ESQ.,
For Philadelphia Electric Company.

LOUISE S. THOMPSON, ESQ.,
Assistant Counsel
For Commonwealth of Pennsylvania
Department of Environmental Resources.

THE COURT: Good afternoon.

First of all, the record will be completed by the following: By letter of submission of December 8, 1982, DRBC sent in a copy of its Exhibit Number 15. That will be admitted.

By letter of submission of December 13, the plaintiffs submitted a copy of P-58, which is a memorandum dated May 28, 1981, Archaeologist, Office of Cultural Programs, NERO, HRS to Assistant Regional Director, Office of Cultural Program NERO, HRS Subject: Trip Report, Point Pleasant Water Diversion Project, Point Pleasant, Pennsylvania.

This document will be admitted.

Philadelphia Electric Company was given leave to file certain documents pertaining to proceedings before the NRC, in response to plaintiffs' submissions pertaining to NRC matters. Those submissions will be admitted as PECO exhibits, whatever the next PECO number is, according to the record.

MR. CHANIN: If Your Honor please, that is Exhibit 4.

THE COURT: That will be admitted along with the certificate of service form which is attached thereto.

The hearing in this matter concluded Friday evening, the Court has reviewed the entire administrative record, all the exhibits introduced in this proceeding, the

various memoranda, responses, attachments thereto, legal authorities cited, including statutes, regulations and legislative history.

Counsel are to be commended for doing a fine job in pulling together, in a short time, during and after the conclusion of the proceeding, the evidence in the case and focusing it in a manner helpful to the Court.

I have agreed to give a bench opinion because both parties have asserted that by today, by virtue of the actions proposed of the NWRA to commence construction, it would suffer or begin to suffer irreparable harm. I devoted my time to this point in reviewing the record and making my decision and this opinion will constitute the opinion of the Court with respect to the plaintiffs' motion for preliminary injunction. The Court reserves the right to supplement, amend or edit the same.

This action was commenced by plaintiffs substantially as citizens action against various federal agencies, the Pennsylvania Environment Resources Department, DER, PECO, Philadelphia Electric Company, and NWRA, which is the Neshaminy Water Resources Authority.

Individuals have also been named as defendants in their individual and official capacities, where they are the executive directors of the various defendant agencies.

The action is commenced against all defendants,

it appears under the National Environmental Policy Act, the National Historic Preservation Act, the Endangered Species Act, the Delaware River Basin Compact, the Fish and Wildlife Coordination Act, the substantative provisions of Section 110 of the River and Harbors Act of 1899 and Section 404 of the Water Pollution Control and Federal Water Pollution Control Act requirements for permits under Section 402 and for best available tecnnology under Section 316(b) and the Atomic Safety and Licensing Act and regulations thereunder, referring to page 2 of the complaint.

The plaintiff either orally or in the final briefs in this matter has asserted that it intended to file a claim under the Administrative Procedure Act, the plaintiff does not assert a claim under the Administrative Procedure Act. For purposes of this bench opinion, I shall assume that the plaintiff has standing to assert and therefore is entitled to amend the complaint to assert a claim under the Administrative Procedure Act against the appropriate agency defendants.

The complaint, while it names the Delaware River Basin Commission as a defendant and its executive director, in the caption fails to state a cause of action in its body against the Delaware River Basin Commission.

The plaintiff was understood by the Court to amend orally the complaint at the time of the hearing to

assert a claim against the DRBC, that its denial of the Delaware petition for reconsideration was arbitrary and capricious and therefore reviewable in this Court.

Various defendants have filed motions to dismiss, either on jurisdictional grounds with respect to certain allegations or with respect to failure to state a claim upon which refusal can be granted.

With respect to the claims of the plaintiffs asserted under the National Historic Preservation Act, the Endangered Species Act, the Clean Water Act and the River and Harbors Act, I find that this Court has no jurisdiction. Those acts of Congress have specific provisions which limit the right of citizens to bring suits in this Court. There are notice and time provisions which are mandatory. There is no implied cause of action under the River and Harbors Act, in accordance with the decision of the United States Supreme Court and using the same rationale, there is no implied cause of action under either of the National Historic Preservation Act and Endangered Species Act or Clean Water Act.

End 1
sr/kt

Congress has acted in these areas to circumscribe the availability of the federal court to plaintiffs unless and until certain statutory requirements are met. Plaintiffs appear to concede as much in that they argue in their beliefs that they would still have a right of action under the Administrative Procedure Act, because either

there is final agency action or that there is action by the agency which is so threatening of immediate and irreparable harm that resort to the Court is necessary to enjoin agency action.

With respect to plaintiffs' claims against the NRC and Harold Denton in his individual and official capacities, I find that this Court is without jurisdiction and it would be an abuse of discretion to exercise jurisdiction in the context of this complaint, even assuming that the Susquehanna case is still good law in this circuit. First, there is an ongoing administrative review of the PECO-Limerick application within the domain of the Nuclear Regulatory Commission. Plaintiffs, through Delaware are participating in that administrative proceeding, which is not complete. When completed, the plaintiffs, if agreed, will have a right of appeal to the Third Circuit by statute.

Number two, the construction activity which is the subject of this injunction action names NWRA as the builder and constructor of the water system. NRC has no jurisdiction to enjoin NWRA's construction. NRC will determine when, if at all, the PECO water diversion to Limerick I or II will be operational. That is not before this Court.

Furthermore, the NRC has not refused to prepare an environmental impact study. This situation is easily

distinguishable from the Susquehanna case cited by the plaintiffs for the reasons just enumerated.

So, the claims asserted under the Atomic Safety and Licensing Act, are hereby dismissed.

With respect to the claims against Roger Baldwin, as an individual; Alexander Aldrich, as an individual; William Gordon, as an individual and Gerald Hansler, as an individual; I find that the plaintiffs' complaint fails to state a cause of action and those actions will be dismissed with prejudice for the following reasons. Although the plaintiffs assert that Baldwin, Aldrich, Gordon and Hansler are being sued in their individual capacities, a review of the complaint discloses no action by those individuals which amounts to individual actions, as opposed to action in their official capacities.

Moreover, the relief sought by the plaintiffs is against the agency. If plaintiffs are asserting a claim under the Administrative Procedure Act, for example, the proper claim is against the agency, not the individual.

Moreover, I would find from a review of the record and the complaint, that each of the individuals is entitled to qualified immunity. I might say, as well, that the proceeding is not really as on motion to dismiss. It's after hearing.

With respect to the Pennsylvania Department of

Environmental Resources and Peter Duncan, I find that this Court has no jurisdiction. The claims there asserted are under the Clean Water Act. Again, there is a jurisdictional requirement of notice.

Moreover, I doubt that this Court would have jurisdiction in an APA claim against federal agencies, over state agencies, with respect to their administrative agency compliance. Further, the plaintiffs are pursuing in the state administrative channels, challenges to the Pennsylvania DER Acts with respect to various certificates or decisions not to require permits of various kinds.

As a matter of comity, plaintiffs would be required in this Court's estimation, to exhaust administrative remedies in the state procedure and seek whatever relief is appropriate there.

So, even assuming that this Court has jurisdiction with respect to the Pennsylvania DER defendants, it would not exercise that jurisdiction.

For those reasons, the complaint with respect to Peter Duncan as secretary of the DER is dismissed. As a footnote, I observe that there is no emergency situation arising from the claimed inaction of the state official in this instance. It is conceded that the Delaware River Water will not in any way lower the standards of the water in the Perkiomen Creek and that the best available technology is

being used for the intake at Point Pleasant.

Remaining, I find are claims asserted under the National Environmental Policy Act and the Administrative Procedure Act. Having studied all of the relevant material, as well as that which might be irrelevant, but admitted and reviewable, I have concluded that the plaintiffs' motion for preliminary injunction will be denied under both the NEPA and the APA against each of the remaining defendants.

First, with respect to the NEPA and the Corps of Engineers. Plaintiffs complain that the Corps of Engineers in rendering its environmental assessment and negative declaration with respect to the Point Pleasant intake and water diversion system, either acted unreasonably or arbitrary and capriciously in failing to require or failing to conduct an environmental impact study or statement.

The standard of reasonableness is a higher standard of review than arbitrary and capricious, but I find under either standard, the plaintiffs at this juncture on this record have not shown under the standard applicable to considering requests for preliminary injunction have entitlement to that extraordinary relief. This Court is limited under the reasonableness standard to a review of the actions of the defendant agencies and cannot engage in its own personal evaluation of the mental processes of the agency administrators.

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pm/kt

ke 3 sr/kt

So, it's not a matter of record of what this Court would do if it were in the agency's position; it is what the record shows reasonably was considered, taking not only the findings but the administrative record as a whole and considering the administrative record as a whole, I find that with respect to a significant number of plaintiffs' claims, they are collaterally estopped because of the Hansler decision.

The plaintiffs have made out a prima facie case with respect to identifying certain changes since the Hansler decision, which would be of significant impact, if the plaintiffs' allegations were taken as true, but considering the defendant agency's evidence as this Court must at this stage, I find that the plaintiff has not shown by a preponderance of the evidence that there was either an abuse of discretion or a failure to give a hard look at, seriously consider, or give great weight to other agency opinion.

The plaintiffs here are collaterally estopped by the Hansler decision to the extent that the Hansler decision considered or was asked to consider and decided matters which are raised in this complaint. A study of the complaint in the Hansler case demonstrates that it was wide ranging and touched upon almost all the issues which are raised here as if they were new.

The plaintiffs are bound because they are in

privity with those plaintiffs who initiated the action before Judge VanArtsdalen in this respect: That the plaintiffs there, as the plaintiffs here represented the public interest and their interests and injuries now rise no higher and are no less than those asserted by the plaintiffs in Hansler for the public interest.

Judge VanArtsdalen considered not the name of the plaintiff but rather the issue, that is whether or not certain actions or environmental effects were significant or substantial so as to require of the DRBC the preparation of an environmental impact statement as opposed to a final environmental assessment. This Court incorporates all that was decided and considered and therefore precluded here by Judge VanArtsdalen in the Hansler case and as affirmed by the Third Circuit.

What then is new?

1. Designation of the Army Corps of Engineers as the lead agency in determining those matters, environmentally, which were within its specific expertise: navigation, construction in the river, and matters relating to the construction as it would affect navigable waters.

2. A movement of the intake system away from the shore bank and into the channel of the Delaware River.

3. A formal determination by the Advisory Council on Historic Preservation that the village of Point

Pleasant was eligible for and was then placed on the historic register.

4. An assertion that Shortnosed Sturgeon had been seen in the area of Point Pleasant intake although the report was unconfirmed.

A decision by the Corps of Engineers to segment its consideration of the NWRA permits between Point Pleasant and the Pine Run rechannelization.

A salinity study performed by the DRBC, a ground water study done for and by the DRBC.

Next, the most current good faith negotiations between those states who are parties to the DRBC.

Next, a statutory provision change, 110(f), I believe, which the plaintiffs assert required the Corps to take all possible steps to maximize non-impact on national landmarks or historical sites. In the latter category, assert that the authority had the obligation independently to consider other intake sites than Point Pleasant, so as to avoid the historical and archaeological sites altogether.

This Court is called upon, therefore, to interpret that provision. In the findings of facts or the statement of findings, the Corps made specific findings that it had considered alternative routes around Point Pleasant but those were unreasonable for the reasons stated therein. Moreover, in accordance with 33 CFR 800, a memorandum of

agreement was entered into between the Corps, the Advisory Council and the State Historical Preservation officer, with respect to procedures to minimize the impact of the historic district, the channel, and all other areas disrupted by the construction. The undertaking in the memorandum agreement is to have continued monitoring by the Advisory Council, state office, the states, Historical Preservation officer and the Corps to insure that all possible steps are taken to minimize the impact to the historical district canal. Indeed, as I read the agreement, no irreversible action can be taken out and a determination that the action is an action which meets their requirements of 33 CFR 800. The plaintiffs argue that Section 110(f) required the Corps to look for other intake sites along the Pennsylvania canal, other than Point Pleasant, once the historic district has been certified.

End 3 sr/kt

Take 4 pf/kt

The Corps took the position in its findings, that it was bound in terms of its consideration of what was possible by the determination of the DRBC as to the appropriate point for water to be taken from the Delaware River.

In other words, it deferred to the DRBC with respect to that judgment as to whether or not that point of intake was most appropriate, given its other determinations of river resources, basin resources and the needs for water in Bucks and Montgomery Counties, as well as for PECO at Limerick.

I do not find that that deference was unreasonable or arbitrary and capricious. There is a question as to whether or not Section 110(f) applies to other than federal or federally assisted projects. Assuming that it does, it is not to be given the same scope of agency determination requirement as was given and required by statute in the Overton Park case. In that case, the statute required that the agency make a determination that there was no feasible or practical route for highway, other than through a park and only after such determination was made, could be administrator go on to determine what steps should be taken to minimize the impact on the park area.

Here, the Congress decided to delete the requirement for determination by the agency administrator as to feasible or practical alternatives, leaving only that section which required the administrator to determine what steps would maximize or diminish the impact on the historic district.

Considering the legislative history, I do not find that there was a requirement on the Corps to make a determination independently that there was some other place than Point Pleasant for the intake, assuming 110(f) applied. I find that the Corps did consider and gave great weight to the determination by DRBC, that Point Pleasant was the proper site for the intake to accomplish the water supply permits

which it had issued, pursuant to the entire history of the Point Pleasant project, including those matters which were before Judge VanArtsdalen.

To the extent that the Corps referenced and included all of the proceedings by reference that had gone before, I find on this record, that the Corps did consider that history in determining the appropriatness to defer to the DRBC decision to Point Pleasant as the intake location and there is evidence in the record that the Corps did review and consider all of the documentation pertaining to the Point Pleasant project as considered by the DRBC and the AEC and the NWRA. So, I do not find it reasonable to construe 110(f) as requiring an administrator to do other than take all possible steps open and available to it at that time to minimize the impact on the historic district or canal. The Corps considered all of the options open to it and on this record, acted reasonably in arriving at a memorandum of agreement.

Under the applicable regulations, there's a presumption that the memorandum agreement satisfies the obligation of the Advisory Council to advise. I believe the language of the regulation is that the entering into a memorandum of agreement satisfies the obligations of the Advisory Council.

For that reason, I would find that as to the

Advisory Council, that injunctive action is not appropriate under the Administrative Procedure Act. The Advisory Council has satisfied the requirements of the regulations. It has not undertaken any final action with respect to any irreversibly damaging action, with respect to the canal or the historic district as certified.

I find that the record is sufficient for this stage of the proceedings to satisfy me that the Corps studied and considered the effect of moving the intake 245 feet into the Delaware River as it effects or is considered in conjunction with the black eddy, salinity, the effect on the oyster industry and fisheries, dissolved oxygen, shad, Shortnosed Sturgeon, blasting effects, dredging, effects on fish other than shad and Shortnosed Sturgeon, flow velocity at the intake, the effects of impingement and entrainment of fish at the intake, the level of the top of the intake in the river below the surface of the river at various flows, the effect on navigation, recreation and safety to those persons using the river at that point for fishing or other forms of river recreation.

With respect to the salinity, I find that the diversion of water could be said to have been reasonably found by the Corps not to have any significant environmental impact. Only 8 CFS of the diversion can be said to be subject to consumption. As to that amount, there is no dispute that

that is not measureable by existing gages. Critically important, it appears from the record, that to the determination of the DRBC and the Corps, that the Point Pleasant project would not have any adverse effect on the salinity level being placed at Point Pleasant, is that with the water returns, 50 percent of the water will be returned to the Delaware River above or at the Schuylkill River mouth.

The Schuylkill River mouth is stated in the literature in the record to be important as a stream flow to the curtailment of the salinity level.

So, all the water taken out will be put back in, at least that which is measureable. So, to the extent the plaintiffs argue that the diversions will adversely affect salinity, I find that that is not borne out by the record. Moreover, it was considered and discussed by Judge VanArtsdalen.

With respect to dissolved oxygen, I find from this record, that there are studies available to the Corps which were available to the Corps which showed that these diversions or this diversion at Point Pleasant would have no significant environmental impact.

Flows less than that which would be caused by the diversions even at maximum diversion would not significantly change the dissolved oxygen level at any point along the river.

4 pf/kt

5 sr/kt

With respect to the flow velocity at the intake level, I find that the evidence is, in this record, satisfies the reasonableness and the arbitrary and capricious test in that there were studies to show that given the placement of the intake, the kind of intake, the placement of the intake tubes close to one another and so forth, that there would be no significant impact on fish.

The studies made were put on a worse case basis, assuming that there was a spawning ground and the Point Pleasant eddy, that shad would be there as well as Shortnosed Sturgeon either spawning or moving past that point.

The size of the intake screens are two millimeters, that size was considered in relationship to the larva of shad and sturgeon and other fish, although no tests were made on shad per se, there were tests made on fish eggs smaller in size than shad eggs, leading reasonably to the conclusion that shad eggs would not be impinged.

Moreover, the swimming ability of shad was considered. The flow velocity is calculated to be two to one at the intake but the intake structure as presently designed, in cooperation with the Pennsylvania Fish Commission and the United States Fish and Wildlife Service is a state of the art intake, which has very little impact upon early stages of fish, even assuming less than 2-to-1 velocity flow at intake.

The intake velocity diminishes dramatically as one moves one foot from the intake.

There was a netting operation in the vicinity of the intake for Shortnosed Sturgeon, which in 1981 disclosed no sturgeon. No sturgeon had been caught in the immediate vicinity of the intake.

The Shortnosed Sturgeon is an endangered species, there was a determination by the U.S. Department of Commerce that the Point Pleasant water diversion project would not endanger species in the river; further made determinations that the proposed operations would not constitute significant environmental impact with respect to that endangered species. It made a determination that its biological opinion was not related to river flow, rather to what was known about the Shortnosed Sturgeon and that is, that its eggs fall to the river bottom, attach to rocks, or fall or find their way under rocks, and hence, are not subject to intake velocity considerations.

Moreover, there was a determination made but there would be ongoing studies by the applicant, so that monitoring would be made to insure that the project in no way endangered Shortnosed Sturgeon.

As I said before, the intake is designed anticipating the presence of Shortnosed Sturgeon, though there is no evidence of Shortnosed Sturgeon in the area.

On the basis of this record, I find there is no basis for injunctive action with respect to the Department of Commerce either under NEPA, under the APA.

Plaintiffs really have not offered anything to refute the biological opinion rendered.

MR. LERNER: Excuse me, Your Honor, can we take a brief recess?

THE COURT: You may.

With respect to esthetics, which would include the height of any buildings, the noise of any transformers, the replanting of any areas affected by the construction, including the bluff, the evidence shows that there is a memorandum of agreement to blend the underground piping and buildings in the environment.

Apparently, plaintiffs complain that the bluff outside of the certified historic district is not being considered. However, I understand from this record that the pipeline as to the bluff will be underground and covered.

There was the consideration of the archaeology in the area. There is no evidence at that time that there is any archaeology or aboriginal site in the direct line of the water transmission lines. There is an archaeologist, who as a condition of the permit is present at the site, supervising both operations in or about the canal as well as those pertaining to the esthetics. And, the Pennsylvania Historical

Preservation officer is there to approve any and all action.

Plaintiff claims the Corps acted arbitrarily and capriciously or unreasonably in failing to consult or to consult in good faith with the Fish and Wildlife Service which opposed the Point Pleasant diversion. I find that Corps did consult and did consider all of the positions advanced by the Fish and Wildlife Service as well as the Pennsylvania Fish Commission. Simply because the Fish and Wildlife Service had a reluctance to agree with the Corps, that the permit issue, it was the Corps' decision and not Fish and Wildlife's, with respect to permit issuance. The Fish and Wildlife Service did not elevate the matter as it had a right to do and its failure to do so is evidence that it did not on appeal see any significant environment impact.

Nothing new was raised by the Fish and Wildlife Service that had not been considered by the Corps.

Plaintiffs argue that the Corps erred in not considering that with respect to the permit application the Pennsylvania Utility Commission had rejected PECO's application there for a license to commence operation of Limerick II. The record shows that reasonable it would have been engineering-wise unsound to treat the application and permit or construction as involving only water for Limerick II. Limerick I had been authorized and encouraged by the PUC. Moreover, NWRA, and independent water requirement and

PECO's possible withdrawal with respect to Limerick II, would not have greatly enlarged the project of NWRA.

Plaintiffs argue that the Corps erred in issuing its permit while NRC or other local state agencies had not acted with respect to their permits which might be required. I believe counsel conceded during the hearing, that there is no statutory or regulatory requirement in that regard.

Plaintiff's main argument is that the Corps erred in segmenting the Point Pleasant project from the Pine Run rechannelization.

There is a regulation which requires applicants to submit applications for an entire project as opposed to piecemeal submission, that regulation came into effect in 1982, two years after the applications had been filed by NWRA; that regulation does not take away the discretion of the Corps to determine that objectively there should be a division of the project and here there is evidence that the rechannelization though beneficial too, is not essential to the operation of the water diversion system project. Therefore, even if there is some environmental effects relative to the rechanellization, it is not essential to the operation of the system. With respect to the canal, itself, Pennsylvania authorities have review the proposed construction and have determined that the proposed construction under the canal will benefit the

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canal. The Commonwealth of Pennsylvania owns the canal. The kind of intrusions into the canal or under the canal, are not uncommon along its route.

Now, with respect to the plaintiffs' claim that the Corps did not consider a final level B study or a ground water study done for the DRBC in making its determinations, I find that again, it was reasonable for the Corps to defer to the DRBC and this is consistent with the determination by Judge VanArtsdalen in the Hansler case. The level B study is not inconsistent with the management powers of the DRBC to limit the withdrawals for PECO, if river flow is below 3000 CFS and to manage the withdrawal of the potable water by NWRA in times of drought, nor is it inconsistent with the declared management objectives of the DRBC at Montgomery-Bucks County or other areas having ground water, develop a better system for utilization of ground water in conjunction with surface water.

With respect to the ground water study completed in September of 1982, it does appear from the report that the rechargeable rate for wells in the kind of rock which is prevalent in these counties is very slow and unpredictable.

With respect to plaintiffs' contentions that PECO or NWRA could get their water from Philadelphia or other places, including ground water wells, I find that the

plaintiffs' claim of arbitrary and unreasonable would fail based on the Pennsylvania DER assessments and studies rejecting that possibility as being unworkable, both water-wise and in terms of its hope for industry or population growth patterns to diminish the effect on consumption of water. Plaintiffs argue, as well, that the Corps or DRBC did not consider the Schuylkill River or upstream Schuylkill River storage as an alternative to taking out of the Delaware River. Again, the record shows that there was consideration by DRBC and Pennsylvania DER of upstream storage possibilities, along with PECO, as well as the availability of water at times required by the Limerick operation from the Schuylkill and those alternatives were rejected.

With respect to the Schuylkill in terms of temperature of the water or low flows or adverse environmental conditions which would arise from a diversion, now, I do not find as a matter of law that the Corps was obligated to do an independent study of every matter that might have been raised by the plaintiffs. The Corps was entitled to review, to consider the source of the liability, the measurements and its own experience in evaluating information developed by others, whether it was the NWRA or the DRBC or PECO. A review of the administrative record shows that information from these various sources was in the file available to the Corps and encompassed in its findings. Perhaps not in detail,

but sufficiently so, as to persuade this Court that it would be erroneous to conclude that the Corps acted unreasonably or arbitrary and capriciously.

With respect to the DRBC, the plaintiffs' claims against the Corps overlap, but to the extent that they do, any discussion with respect to the DRBC will be equally applicable to the Corps. With respect to the Corps, I find that it's actions on the state of this record satisfy the reasonableness test. Because the DRBC entertained and specifically treated the plaintiffs' petition for reconsideration one could analogize that to affording the plaintiffs a hearing.

Therefore, the standard of review in that instance would appear to be the arbitrary and capricious standard as opposed to the reasonableness standard. The arbitrary and capricious standard is usually accorded to a reviewing agency in decisions where there has been an administrative hearing. The reasonableness standard may be more appropriate in reviewing agency action that was taken not pursuant to a hearing or after a hearing or for promulgation of a regulation. In reviewing the assumed claim against the DRBC, I must assume that the claim is being asserted under the Administrative Procedure Act or under -- you tell me, Mr. Sugarman. Under what statute or regulation are you proceeding as to the DRBC?

MR. SUGARMAN: It's under common law, Your

Honor.

MR. GOLDBERG: Your Honor, if I may, the U.S. Administrative Procedure Act specifically of the DRBC's compact is not applicable to it and that fact is so noted in Judge VanArtsdalen's opinion. So, we are not governed by that procedure specifically.

THE COURT: All right. I will look at the claim against the DRBC in terms of whether or not the DRBC acted reasonably or arbitrarily and capriciously, because I am satisfied that under those tests, no matter how the plaintiffs might be proceeding, injunctive relief is not appropriate. Judge VanArtsdalen found, and I agree, that the DRBC has particular expertise to which the Corps could defer to the DRBC as lead agency to determine all locations of water, the need for water and the management of the river. The Delaware River is a managed flow river. All agree. The DRBC has the exclusive responsibility for the management of this river and water in the basin. The thrust of plaintiffs' charges as to DRBC, is that given its analysis of river flows, that the 3000 CFS objective at Trenton is unreasonable and known to be a mirage by the DRBC for purposes of the Point Pleasant project.

In short, plaintiffs argue that DRBC acknowledges that there's not enough water in the river and that any diversions without augmented flows from dams or reservoirs

to be constructed in the future, will be detrimental to marine life, to the fishing industry and all of the objectives with respect to salinity control, dissolved oxygen and the like.

The plaintiffs' arguments on this record overlook several important factors with respect to the level B studies, the salinity studies and the good faith negotiations. First, the level B study, that's not taking into consideration in its analysis that there would be no controls by PECO if the flows are below 3000 CFS in terms of future projections, nor the management ability of DRBC with respect to the withdrawal by NWRA in times of low flow, nor is there plaintiffs' evidence or argument which considered the fact that the level B report states, I believe, that given existing storage capacities, there is still 110 CFS available for allocation, nor does the plaintiffs' argument take into consideration that the diversion at Point Pleasant would result in consumptive loss of only 8 CFS. To equate the effects of withdrawal of 95 MGD with a consumptive loss of 95 MGD, is misleading.

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DRBC has the responsibility to administer the river flows to meet the permanent application requirements and restrictions as well as one of the public needs served by the river.

Mr. McCoy's presentation basically was a

challenge to DRBC or an attempted challenge to DRBC to fulfill its commitments; that is through good faith. This Court is not in a position from this record to place suspicion on the the ability of DRBC to manage the river nor would it be appropriate for this Court to in effect attempt the manage the river for the DRBC. It's management abilities with respect to PECO and NWRA would reasonably appear to give it the manageability to control the withdrawal of those applicants in accordance with the good faith negotiations results, whatever they may be, which as I understand it from the material reviewed will be to look at the drought of the '60's as the drought of record as a plateau, the record suggests that the drought of the '60's is recurrent on 100 to 300 years as opposed to the drought of the '30's, that occurs maybe once every ten years.

Plaintiffs allege, among other things, that the DRBC has already put into effect the recommendations from the good faith on negotiations with respect to the draw down of water from New York storage unit and hence, argues the plaintiffs their must be a bad faith attempt undertaking to ramrod into effect all the other recommendations including a relaxation of the salinity objectives.

The record shows, however, that the good faith negotiation recommendations are subject to public hearing and comment and that is an ongoing process, and hence, there is

no room for this Court to find, on this record, that there has been a relaxation in fact of the salinity objective.

This Court is not the proper forum for an attack on the proposed salinity level, if there is any change, that should be done through the proper administrative procedures available to plaintiffs or others through the DRBC.

I have reviewed that the plaintiffs' objections raised to the DRBC and the responses to each. In light of the record before the DRBC or that as considered by the DRBC through its own contractors or supplied through studies contracted for through the NWRA. I do not find any reason to conclude that in denying the plaintiffs' petition for reconsideration, the DRBC acted arbitrarily, capriciously or unreasonably.

I could go through each of these in terms of the objections and the responses on this record but I will not.

I have studied the objections and I have studied the responses and found in the record support for the responses.

Based upon my independent findings and discussion here, the Court adopts and incorporates in this bench opinion the following proposed findings of facts as prepared by NWRA, because they are consistent with the Court's foregoing findings.

The Court adopts 1 through 25; 27 through 40, those are background historical as to which there should be no objection.

41 through 65. 66 through 76. 77 through 82. 83 through 116. 117 through 134. 135 through 147. 148 through 150.

I find that those findings of facts are supported by the record evidence available to the Corps and the DRBC.

Plaintiffs final argument with respect to all of the agency defendants and NWRA and PECO is that there was a commitment to the Point Pleasant location such that the Corps merely rubber stamped the desire of the NWRA and PECO to use the Point Pleasant site because it was titled to NWRA and that thereafter all of the efforts of the Corps amounted to no more than going through the motions and was not a good faith environmental assessment.

The plaintiffs suggest that the hiring or the contracting of Miss Mintz was designed to result in a historical district whose boundaries would not include the bluff or the esthetic charm of the village as opposed to selecting the Bucks County Conservancy as advisor on the historic certification because or whereas the later had a broader sense of the boundaries of the historic district.

I find that the record shows that the Bucks

County Conservancy took the position that it was unavailable as a contractor to complete the project within 30 days, Miss Mintz was.

The plaintiffs argue that Miss Mintz did not consult with the Bucks County Conservancy.

It is apparent from the record that the Bucks County Conservancy did review and critique Mintz' report evaluation. The Court submitted to the Advisory Council both the Mintz report as well as the Bucks County Conservancy's critique comments of the Advisory Council had both Mintz' report and the Bucks County Conservancy's views as well as the views of the State Historical Preservation officer in determining the extent of the boundary of the historic district.

Plaintiffs argue that Colonel Baldwin refused to meet with representatives of Delaware on site. The record does not support the view of Colonel Baldin as one who took the tact of avoiding contact with the public or with the plaintiffs; the record does show meetings with counsel of Delaware and Colonel Baldwin and Colonel Baldwin acting as a moderator on a public hearing of the project.

I do not regard, based upon what I reviewed in the record, the Corps' correspondence with the Fish and Wildlife Service as being arbitrary and capricious.

The Wildlife Service did not specify the bases

of its objections to the project with any backup data. It's speculative positions did not raise any concerns not already addressed by the Corps.

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Its request for information are puzzling, inasmuc as it had as much access to the DRBC information as did the Corps with respect to impact on biotics. Likewise, it had access to the NWRA material. It did not conduct any independent studies. The oxygen demand and segmentation appears to have been a factor considered by the DRBC and the NWFA in the dissolved oxygen studies in respect to the flows in the river. I do not observe that the Fish and Wildlife Service took the position in the case before Judge VanArtsdalen that the project was bad, but did not raise any issue then which was not considered and studied to Judge VanArtsdalen's satisfaction by the Corps.

As Judge VanArtsdalen found there, just because one agency has a difference of mind with the permitting agency, is not a basis for saying that an environmental impact statement is required. In considering whether or not the plaintiffs have borne their burden of proving entitlement to injunctive relief, the Court must consider whether or not the plaintiffs will suffere irreparable harm if relief is not granted, or whether the defendants will be harmed if relief is granted, whether the public, generally, will be harmed if relief is granted and whether the plaintiffs are likely to

prevail on the merits of the claim.

I have found that considering the evidence before me, that the plaintiffs have not shown that they are likely to prevail on the merits of the claim. I have considered whether or not the construction in the Delaware River or environs should be enjoined until such time as the NRC acts or the Corps acts upon the rechannelization project in terms of permitting or not. The PUC has determined Limerick I's construction is in the best interest of the public and it has directed that PECO complete that construction at the earliest possible time consistent with public safety. The requirements placed upon the applicant NWRA by the Pennsylvania DER is to complete all construction by the end of 1984. The work in the river has to take place within a specified time during any winter, reducing the period of time that can be devoted to construction and with construction with deliberateness, with a view towards public safety and compliance with the minimization of loss of water in transport. The DRBC has determined a need for water in Bucks and Montgomery Counties, based upon the experience in 1980 and 1981 of water problems in those areas with wells running dry.

Balancing the harm that would occur to the public if the project is not available mechanically for the supply of water to Delaware and Montgomery Counties through NWRA to supplement the well water and considering the harm to

the public if the Limerick I is not available for operation on time because of the lack of completion of the mechanical project, versus the harm to the river, to the canal, to the environs, including the bluff, I find that on balance, the public would suffer more harm if the project presently is enjoined than if it continues. One, there is no harm to the river presently if there is construction. Two, the work under the canal will benefit the canal in terms of its ultimate strength, according to the Pennsylvania Authorities. Three, there is an architect available there and there are procedures outlined for the photographing and replacement of each aspect of the canal dirt or stones removed. The piping is intended to be underground. The effect on the wetlands will be minimal and of no significant impact and that really has not been pressed as an issue here and the harm to the bluff with blasting will be subject to the same conditions as blasting in the district. The pipes will be underground and covered. I agree with plaintiffs that if they have shown that there was a significant environmental impact that has been swept under the rug, then, that would be sufficient to show irreparable harm.

Here, it is not enough to say, well, the NRC has not acted and Limerick might not operate. There is an independent applicant, NWRA, whose needs have independent justification through the DRBC.

Are there any points any counsel believe now the Court failed to consider in its opinion?

MR. SUGARMAN: I am not able at the moment to think of any point which the Court has failed to consider. I did note some concerns that I had with respect to some of the Court's statements, interpretations and so forth.

I don't know if Your Honor means to encompass that within your question.

THE COURT: Well, concerns you can argue later. If I misstated some fact, you should bring it to my attention.

MR. SUGARMAN: Yes, that's what I really meant, Your Honor.

If I may, the Court indicated that the Historic Preservation Act has a provision for notice before suit was filed and I don't have the statute with me, but I am not familiar with any such provision. The same with respect to the River and Harbors Acts. I am not familar with any provisions in either of those statutes for public notice.

With respect to the Clean Water Act, because I didn't rely on it for a preliminary injunction, I didn't put it in evidence, but we did in fact give notice to file a citizen's suit action with respect to the DER actions under the Clean Water Act. The one that we gave notice on was the Department's determination not to require a permit for the discharge into the Neshaminy North Branch. Your Honor stated

that we conceded that the water quality of the Delaware River is such that it won't hurt the Perkiomen and we don't concede that.

THE COURT: Well, it doesn't make any difference. I have really not assumed jurisdiction over the claim.

MR. SUGARMAN: I understand that. The same with respect to best applicable technology with respect to the intake. We concede, if you will, arguendo, that the design is BAT, but we do not concede that the location is and the statute relates to both location and design.

THE COURT: Well, all right, I did find here that the location, considering the design, is not unreasonable.

MR. SUGARMAN: Your Honor, also in that area, and maybe this maybe is an area of omission, did not refer to the fact that the documents reflect that one of the consideration in the location of the intake was to avoid crossing the state line into New Jersey.

I don't know if Your Honor deliberately decided -- that you did not intend to refer to that.

THE COURT: Well, I read that as a possible concern, but what was important was that the design, plus the location had objective support for the conclusion that there would be no significant environmental impact. In fact, largely because of the design, the location became less a

problem.

I will not get into the NRC materials, but I am satisfied that it would be unfair to say that the location of the pipe didn't go 255, because of New Jersey. I am satisfied that the record shows it didn't go to 255 because it was thought reasonable and sufficient to have it go to 245, considering the design of the intake and the location of the intake pipes.

MR. SUGARMAN: Another matter that the Court didn't refer to was the fact that the Corps refused to secure or consider or to abide by and await the information that was being developed in the preliminary hearings before the NRC prior to issuing its permit, although we had informed them of the intention of the NRC to hold those hearings and they were otherwise aware of them. The Corps --

THE COURT: Well, I think I covered that by saying there was no requirement on the Corps by the statute of regulations to await the permit decision of any other agency.

I might say there has been no record determination that there has been a denial of a permit by a permitting agency.

MR. SUGARMAN: I think there's some confusion as to what happened with respect to the historic -- with respect to the national historic landmark. It is our position

that Section 110(f) relates only to the national historic landmark and not to the historic district and that it was not the designation of the district that created the duty to minimize harm, but rather the statutory amendment.

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THE COURT: With respect to the canal?

MR. SUGARMAN: Yes, sir. Well, the statutory amendment was general with respect to all landmarks and it, of course, referred specifically to the, as we say, I don't think there is any dispute about it.

MS. SIEGEL: The canal is the only landmark.

MR. SUGARMAN: The statute refers only to landmarks.

THE COURT: I understand that. I gave you the benefit of the doubt, I suppose, since the canal had not been crossed at any point of taking from the Delaware.

I thought you had argued here that this particular point of the canal --

MR. SUGARMAN: Yes, sir.

THE COURT: -- was so pretty but it's the canal which is the historic landmark.

MR. SUGARMAN: That is right, sir.

THE COURT: I assumed that you were arguing the duty really applied to the district so, I think I treated it.

MR. SUGARMAN: The point I was getting to, your Honor, is that the Corps, your Honor, says that the Corps was entitled to rely on the DRBC. I am not sure if your Honor meant in that way to dispose of our argument that A, the DRBC specifically deferred on the issue of historic

compliance to the Corps, and, if your Honor meant to say that in those circumstances the Corps was still entitled to rely on the DRBC determination as to interpret the DRBC determination as requiring or as determining where on the Delaware River the water should be drawn and then relying on that, even though a statute had been passed and if that is the case then --

THE COURT: I don't understand what you are saying.

The Corps, I found had a right to rely upon the DRBC in determining by its Section 3.8 approval that Point Pleasant was the place for the intake of water to facilitate the delivery of water to Bucks and Montgomery Counties and the Corps had a right to find reasonably that that determination was conclusive.

Actually it was probably conclusive in that there had been a long study of that project, even through a final environmental impact statement, reviewed by the Third Circuit with respect to the location and the location considering that the historic landmark would have to be crossed. And that there are archaeological sites and that indian relics possible in the area and that practical steps should be taken to minimize the harm to the canal, to the historic site, including the village district.

MR. SUGARMAN: The only point I am making,

your Honor, the DRBC made all of those decisions without taking into account, without complying with the National Historic Policy Act, the National Historic Preservation Act, the DRBC passed all of those issues to the Corps of Engineers, so, what the Court is in effect holding, therefore and I just wanted, I guess to clarify that your Honor is aware that the Court is in effect holding that the DRBC could make a final decision on compliance with Section 110 which determined compliance with Section 110(f) while at the same time passing that responsibility to the Corps of Engineers.

THE COURT: I didn't say that. I don't agree with you that 110(f) requires that there be a determination by either the Corps or by the DRBC of feasible and practical alternate routes as in placement of highways through parks.

The obligation is, once a historic landmark is confronted, that all steps be taken to minimize the harm and the Corps found that the canal had to be crossed.

MR. SUGARMAN: But, your Honor, what we are talking about then is --

THE COURT: As well as the DRBC. The issue then was how to minimize the harm to the landmark.

MR. SUGARMAN: What we are talking about is assuming that the landmark has to be crossed, the selection of the location to cross the landmark that would minimize harm.

THE COURT: To what, the canal?

MR. SUGARMAN: To the canal, right.

THE COURT: Well, the canal is important wherever it goes.

MR. SUGARMAN: The harm might be less at different locations.

THE COURT: I will say this. At this point on this record, this is a preliminary injunction hearing, not a final hearing, I have determined that considering your concern as raised, the presumption of regularity according to the agencies is sufficient to meet that.

MR. SUGARMAN: To meet what, your Honor?

THE COURT: Your concern, you have raised a concern that there might be a better place along the canal for it, there is no evidence that there is.

MR. SUGARMAN: Your Honor, there was evidence before the Corps that there would be other locations that would be better. There was evidence in the sense that the -- there was evidence that the point was made to the Corps.

THE COURT: The issue is not just the impact on the canal but the impact on the delivery system of water, you know, it might be, you might go 57 miles north and come back, but you still have to consider what it means in terms of laying pipe and so forth along 57 miles to get to the particular reservoir. As it turns out going this route is

only three-tenths of a mile.

MR. SUGARMAN: We are not arguing, your Honor, that the --

THE COURT: 2.3 miles, whatever it is.

MR. SUGARMAN: We are not arguing that the consideration of minimizing impact to the landmark is the only consideration that the agency is allowed to take into account.

We recognize that there can be other considerations under that statute and as your Honor indicated, that your Honor is interpreting the statute.

What we are saying, there is no evidence that any other locations along the route were ever considered in order to determine whether they would minimize harm to the landmark and whether they would be otherwise acceptable. There is no -- and, your Honor, I just want to make sure that your Honor was intending to hold that didn't have to be done, which is what I understood your Honor to say.

THE COURT: I am holding there does not have to be a determination in the findings that there was some other feasible or practical route; that once the historical landmark is confronted, the agency must consider all possible means of minimizing the harm to the landmark.

MR. SUGARMAN: Does that include other locations, other ways to cross the canal, other places along

the 57 miles?

THE COURT: It could, but in my opinion it doesn't have to.

MR. SUGARMAN: And, your Honor, further holding that the Corps can rely on the DRBC on that point, even though the DRBC did not take into account minimizing harm to the landmark under that statute?

THE COURT: I will find that the DRBC did take into consideration minimization of harm to the canal at that point, even before there was a deferral to the Corps.

There is record evidence showing there were plans minimizing the harm and determination and findings that no significant harm would occur to the canal from the procedures proposed by NWRA were carried out.

So, I cannot say that the DRBC deferred.

Moreover, Section 111(f) was not in effect.

MR. SUGARMAN: Exactly.

THE COURT: But, nevertheless, I am satisfied in this record that the DRBC treated the canal as a historic landmark.

I am also satisfied on the record that the DRBC choice of location was entitled to great deference for the intake, considering the plan for the overall project. For example, the plan for the water to reenter the Perkiomen

Creek, so as to enter into the Delaware River at important points for control of salinity.

So,that's what I meant by saying there is a presumption of regularity with respect to DRBC's consideration of the point of location of the intake.

There's also the consideration of where Shortnosed Sturgeon are located in the river.

MR. SUGARMAN: By the DRBC, your Honor?

THE COURT: No, I am just saying generally.

I mean, the Corps was aware that Shortnosed Sturgeon had been caught ten miles up river and when I say to you that environmentally and need-wise, the DRBC determination of intake is entitled to great deference, such that the Corps was entitled to conclude that the intake had to be in the Point Pleasant area and was not at liberty to in effect assume the role of DRBC in determining the water intake location.

MR. SUGARMAN: Is your Honor then making any holding concerning the responsibility of DRBC to review its prior determination in the light of the statutory change?

THE COURT: The DRBC deferred to the Corps to make sure that it complied, the Corps complied, to be the lead agency on historical landmark impact minimization and I am finding that based upon the Corps' determination of minimization, there was no need for the DRBC to reconsider

its grant.

MR. SUGARMAN: Thank you, your Honor. That clarifies it.

With respect to the bluff, your Honor, I believe --

THE COURT: I got a lot of bluffs out of your brief, that's why I referred to the brief, I mean the bluff, I am not saying that you are bluffing, but you made a big point in your brief that the bluff is somehow outside of the district and is going to be harmed.

MR. SUGARMAN: Yes, sir.

Well, yes and no. We did talk a lot about the bluff or a fair amount about it, but I believe we said in our brief and incidentally that the record shows that the bluff is in the historic district, and not outside of it.

THE COURT: Outside or inside, the Memorandum of Agreement accords it the same protection as it was inside.

MR. SUGARMAN: Sir, I think I explained and I offered testimony to the Court, to have Miss Auerbach to back me up, that I was present at a meeting and she was present at a meeting where the Corps of Engineers specifically they would not consider the bluff, would not define the project as including the bluff and would not address themselves to any impact on the bluff and they would not and did not.

THE COURT: My reading of the agreement is that the bluff is to be accorded protection as though it were in the district, is consistent with the representations of PECO and NWRA and the Corps here at this hearing and that is, that the pipes will be underground and covered and subject to the review of the powers that be to that agreement to make sure there is conformity with the aesthetic objections and landscaping objectives to blend as much as possible into the existing environment.

MR. SUGARMAN: Well, I think, your Honor, I needn't belabor the point, since your Honor has made his determination on it.

I just wanted to call the Court's attention to that specific fact, on that point, that the historic district, I believe does include the bluff, and that the Corps in its documents, to my understanding of those documents, did not afford any protection to the areas across River Road, which means, including the bluff. They defined their area of jurisdiction as running only to River Road.

THE COURT: Well, the Memorandum of Agreement though places the Advisory Council in a position, as well as the State Historical Preservation Officer, in a position to review all of the construction impacts affecting the district, as well as the canal.

MR. SUGARMAN: I think, your Honor, that the

agreement and other counsel, I don't have the agreement with me, and I haven't looked at it -- I have looked at it from that point of view, but I don't want to say, in response to the Court's expression --

THE COURT: Again, I have given you what appears to be a reasonable interpretation.

MR. SUGARMAN: Right.

THE COURT: Based upon my reading and the representation of the applicants and the permitting party.

MR. SUGARMAN: As I say, there is no reason in belaboring the point.

THE COURT: Further, there is no agency determination with respect to the Advisory Council and it has not failed to act or failed to carry out some non-discretionary function and, so, it seems to me, that it may be appropriate, if in effect the pipes are put above ground, or not covered, to complain, but right now, it seems to me that no one is taking the position that you are taking except you.

MR. SUGARMAN: Well, your Honor, we take the position that having -- the scaring of that bluff, by clearing it and keeping it cleared, and blasting through the bluff, to put -- they will never be able to restore the rock base, and they will not revegetate it the way it is, and it will not be a natural rock face, as it is now, and that will occur inevitably as a result of the construction, and we have taken

that position all along and I agree with you. And, it is true that the other agencies haven't -- were not and it's true, that the agencies have not taken the position that we have, and that's why we are here.

Well, the only other point I would make, in response to your Honor's question is that I am not sure as I listen to your Honor, whether you are aware that the DER assessment is under appeal as part of the permit appeals that we have filed with the state.

THE COURT: I am.

MR. SUGARMAN: I wasn't sure about that.

THE COURT: That's why you shouldn't be here on that claim.

MR. SUGARMAN: Well, your Honor, we are only trying to maintain the status quo until these things can be resolved and we did not select the dates for these things to happen, and the NWRA and PECO could have applied for the permits a long time ago and by doing it in the way that they did, the permits came out after they had already advertised for bids in the case of the Corps permit, the DER permits came out just about the date that they went to bid, by waiting that log, and by shortening the time that we could obtain final adjudications, they have put us and the Court in this short time frame situation. So, to say we shouldn't be here, your Honor when --

THE COURT: That's an operational consequence, and the facility is not operating, I mean, so you have plenty of time to have review before the --

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MR. SUGARMAN: That is correct, Your Honor, and the only problem is that some of the harms due in our view result from the inception of construction and we also are concerned that it would be too late to have an open-minded reassessment once construction is far advanced and they certainly --

THE COURT: Open-minded by whom?

MR. SUGARMAN: By the agencies involved.

THE COURT: Well, the harm that the environment faces presently is a disruption of the canal, the filling in of some areas and scarring for purposes of constructing, but even the construction plans are being held in terms of adverse impact to a minimum.

MR. SUGARMAN: Your Honor, that's their contention.

THE COURT: Well, the permit, for example, has a requirement that the dredging equipment be barged. So, I agree with you that there is a risk to the environment that there will be some temporary scarring and some of which may not be put back in perfect order, but on balance, the risk of harm to the environment where there is no significant -- no projection of significant, permanent disfigurement to the canal or to the surrounding environment or to the esthetics of the area, do not outweigh the risk of great public inconvenience if by virtue of delay, the project is not

ready for operation to supply water to various sources.

MR. SUGARMAN: On that point, Your Honor, there is no evidence in the record of any date of inception of NWRA service, that is, public water supply service and there is no -- and the PECO witness on irreparable harm admitted that PECO has not even looked at alternative water supply sources that would enable them to operate Limerick unit one.

THE COURT: My understanding is that the water need in Bucks and Montgomery Counties is ASP and that while there has been no sale of water by contract, no water can be sold until other permits are obtained by the NWRA.

MR. SUGARMAN: My point, Your Honor, is that they have not -- the record is silent as to when they can -- when they can institute service and -- but the record does not show that they need a water treatment plant in order to do that.

THE COURT: Well, that may be so, but still --

MR. SUGARMAN: What I am saying, Your Honor --

THE COURT: In terms of balancing the harm to the environment, based upon the record, versus the risk of harm to the completed objectives of the DRBC in terms of supplying adequate water to the basin, I find that injunctive relief is not appropriate.

MR. SUGARMAN: My point, Your Honor, on that,

and I think it goes to the -- the DRBC desired to provide water to Bucks and Montgomery Counties. That's not controlled by the approval of this project. It's controlled as well independently by NWRA's ability to complete and get permitted and get into operation and water treatment plant and Your Honor may recall that NWRA provided no testimony that indicated in any way that it would be able to institute service upon completion of this project or put the other way, that any delay in the construction in Point Pleasant would delay them in instituting public water supply service. They provided no testimony to that effect, whatsoever.

THE COURT: I am satisfied on the record that I have balanced the equities.

I considered the PECO equities and the monetary loss there as projected is credible in terms of delay costs.

MR. SUGARMAN: But, they provided no evidence that they could not get water from another source.

THE COURT: I am satisfied that given the state of the record that the irreparable harm issue has to be measured from what the expectation of PECO is and that is for the completion of this project by the particular date and we are not in any NEPA considerations, but rather, in irreparable harm considerations and those are measured by what the applicant has reason to expect, given the permits that have been issued.

Do you have anything else?

MR. SUGARMAN: No, sir; only -- may I get clarification on Your Honor's disposition of the -- of our claims against the agencies? For example, under the River and Harbors Act, joined with the Administrative Procedure Act, Your Honor's indication that the Court has no jurisdiction, was that intended to relate to our claims against the Corps of Engineers for issuing the permit in which we say that they acted arbitrarily and capriciously in violation of the River and Harbors Acts under the standards of the APA?

Is the Court meaning --

THE COURT: There's no implied right of action.

MR. SUGARMAN: We agree there's no implied right of action.

THE COURT: That's what I intended to say.

MR. SUGARMAN: Insofar as they come in under the APA, Your Honor is saying there is a cause of action?

THE COURT: Yes, and with respect to that, I do not see that you made out a prima facie case of violation of procedure by the Corps with respect to the Harbors Act. You are really claiming that the Pennsylvania authorities didn't get the right permits.

MR. SUGARMAN: Pennsylvania authorities?

THE COURT: What do you claim the Corps didn't do with respect to Section 10?

MR. SUGARMAN: They didn't give great views to the Fish and Wildlife Service as required by their regulations.

THE COURT: I found that they did.

MR. SUGARMAN: I meant in terms of a cause of action.

THE COURT: That's satisfies that. What other agency claim are you concerned about -- substantive claim, APA claim?

MR. SUGARMAN: Each of the federal agencies, the Historic -- the Advisory Council --

THE COURT: With respect to the Advisory Council, I found they entered an MOA and that satisfied that advice obligation under the regulations and under case law.

Further, there is no filed action by the Advisory Council. They have an ongoing administrative monitorin role. With respect to the National Marine Fishery Service, I found that they did take final action, to be sure, they found there would be no endangerment of the species in the river and no basis to say that the decision was arbitrary and capricious and moreover, there's continuing monitoring action by the agency. It has not abandoned and taken final action and say they will just write it off.

MR. SUGARMAN: One other question.

Under the archaeological work that was

continuing and Your Honor was informed of last week and the week before, the on-site work has concluded. I am informed that the archaeologists under contract to the NWRA have given their -- it is their opinion that there is no need to hold up construction because of the archaeology, although, they found some sigificant archaeological material. They found there is a remains of an Indian house which is a rare fine, but all that's going to be reported --

THE COURT: Just a minute. I do not want you to think that you are testifying.

MR. SUGARMAN: No.

THE COURT: If you have something that you want the Court to consider, you should submit it by way of evidence or affidavit in a final hearing.

MR. SUGARMAN: What I was going to ask Your Honor is, you indicated you would entertain a motion when the archaeological findings were complete and the findings have been made by the respective agencies, the state office and the federal office. I just wanted to clarify that that is still the case and that issue as Your Honor, I think said, was not ripe at the time we brought it out on this motion. I don't know if we would want to be filing a motion.

THE COURT: What I said just about an hour ago -- if you want to file an amended document or another claim, that is your right, but based upon this record, based

upon these contentions, I have made my findings and conclusions.

MR. SUGARMAN: I just wanted to clarify that. Thank you.

THE COURT: I recognize, certainly, that each of the agencies has undertaken by virtue of the limitations on their permits or the memoranda agreements, enforceable undertakings and they can't act arbitrarily and capriciously with respect to the decisions on those agreements, but right now, until there is an assertion in a proper way, that there is an improper action, what has been done, satisfies the requirements of agency action.

MR. SUGARMAN: Thank you very much, sir.

MR. GOLDBERG: Your Honor, just one brief comment. Your Honor indicated that you were reserving the right to amend or extend your marks and in addition, that apparently, there will be some further proceedings before there is a final determination on the merits of this suit and you asked counsel about whether there were any factual materials or corrections to be made. I took notes, but I am not in a position to suggest to the Court any corrections or changes at this point, but after the transcript is available, if it appears that there are any factual points for the assistance of the Court that we could call to your attention, we would like to feel free to do that, so that can be incorporated into any final statement of the Court on this

matter.

THE COURT: Anything that you find to be significant, you should bring it to my attention now. I will certainly correct anything that is obvious, whether it is legal or factual, because I do not know the intent of any party here.

There is a right of appeal from my decision and I do not want to take the position that while I am not enjoining construction, for example, the plaintiffs have to wait until I have entered a final order before considering appellate review. If you do have something in terms -- if you feel I have made a misstatement of the law, straighten me out my tomorrow and I will incorporate it and so there will be a final order, but I am satisfied that however the Court of Appeals looks at it, if it looks at it under whatever theory, it has to look at the factual review of the evidence submitted and the standard of review applied.

All right, anything else?

(No response.)

THE COURT: Thank you.

(Whereupon, Court was adjourned at 6:20 p.m.)

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