



Deposition of:
Coastal Zone Hearing

September 23, 2021

In the Matter of:
Coastal Zone Hearing

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1 BEFORE THE COASTAL ZONE INDUSTRIAL CONTROL BOARD
2 FOR THE STATE OF DELAWARE
3 JEANETTE SWAIN,)
4 COLLINS PARK CIVIC)
5 ASSOC.,)
6)
7 Appellants,)
8)
9 v.) CZICB Appeal No.
10) 2021-01
11)
12 THE STATE OF)
13 DELAWARE, DEPARTMENT)
14 OF NATURAL RESOURCES)
15 AND ENVIRONMENTAL)
16 CONTROL,)
17)
18 Appellee.)

VOLUME III

- - -

Virtual Public Hearing
Dial-In Number: 1-408-418-9388
Event Number: 2333 557 4740

Thursday, September 23, 2021
8:30 a.m.

- - -

BEFORE: The Coastal Zone Industrial Control Board
Richard Legatski, Chairman
Robert Baker
Jeffrey Draper
Pamela Meitner
Karen Peterson
Jamie Whitehouse

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1 MR. LEGATSKI: Good morning, everyone.
2 The meeting is called to order.

3 MR. MALONEY: And I will just -- this is
4 Kevin Maloney. I'll just confirm that the court reporter
5 is present, I see that she is, and I would confirm --
6 like to confirm with Sascha that she is taping the
7 proceeding also.

8 THE COURT REPORTER: I am.

9 MS. MOHAMMED: I am.

10 Also, Mr. Baker will be joining us soon.
11 He's just having some technical difficulties.

12 MS. MEITNER: Thank you.

13 MS. MOHAMMED: You're welcome.

14 Mr. Baker?

15 MR. BAKER: Yes.

16 MS. MOHAMMED: Okay.

17 MS. MEITNER: Chairman Legatski,
18 recognizing that you don't have an official -- would you
19 like me to try to move things along when it's clear from
20 the visuals that parties are ready to proceed and --

21 MR. LEGATSKI: Yes, please do.

22 MS. MEITNER: Thank you.

23 Mr. Whetzel, are you ready to proceed?

24 MS. PETERSON: Mr. Chairman, could we

1 call the roll just to establish a quorum?

2 MS. MEITNER: Good idea.

3 MR. LEGATSKI: Yes, please.

4 Sascha, would you call the roll?

5 MS. MOHAMMED: Mr. Richard Legatski?

6 MR. LEGATSKI: Present.

7 MS. MOHAMMED: Jamie Whitehouse?

8 MR. WHITEHOUSE: Present.

9 MS. MOHAMMED: Karen Peterson?

10 MS. PETERSON: Present.

11 MS. MOHAMMED: Pamela Meitner?

12 MS. MEITNER: Present.

13 MS. MOHAMMED: Jeffrey Draper?

14 MR. DRAPER: Present.

15 MS. MOHAMMED: Robert Baker?

16 MR. BAKER: Present.

17 MS. MEITNER: All members of the board

18 are present?

19 MS. MOHAMMED: Yes.

20 MS. MEITNER: Okay. Thank you.

21 Mr. Whetzel?

22 MR. WHETZEL: Yes. Fuji is prepared to

23 proceed.

24 Good morning, members of the board,

1 Mr. Chairman. As the board will recall, Fuji presented
2 two Fuji witnesses on the afternoon of our last hearing,
3 Melissa Toledo and Maureen Concordia, both employees at
4 the Fuji plant in New Castle.

5 At this point, Fuji calls Mr. Richard
6 Beringer.

7 Court reporter, will you swear
8 Mr. Beringer, please?

9 - - -

10 M. RICHARD BERINGER, having first been duly
11 sworn according to law, was examined and testified as
12 follows:

13 - - -

14 DIRECT EXAMINATION

15 BY MR. WHETZEL:

16 Q. Mr. Beringer, would you introduce yourself to
17 the panel, please?

18 A. I'm Richard Beringer. I'm a professional
19 engineer in the state of Delaware.

20 Q. Would you briefly review your educational
21 background?

22 A. I have a bachelor of science degree at -- from
23 Lafayette College in Eastern Pennsylvania, and I have
24 40 years of experience.

1 Q. Experience doing what, Mr. Beringer?

2 A. Environmental work, and in particular, air
3 permitting and coastal zone permitting.

4 Q. Where are you employed?

5 A. Duffield Associates, Wilmington, Delaware.

6 Q. What is Duffield Associates?

7 A. Duffield Associates is a consulting firm,
8 consulting, engineering, and science firm.

9 Q. Mr. Beringer, would you briefly review your
10 permitting experience with particular note of coastal
11 zone and air permitting?

12 A. I have been -- with Duffield Associates, I've
13 been working for 30 years in the state of Delaware, and
14 have done many Coastal Zone Permits and many air permits.

15 Q. And those air permits involved combustion
16 sources, specifically natural gas combustion?

17 A. They have.

18 Q. Do you hold any professional licenses or
19 certifications?

20 A. I do. I'm a professional engineer in the
21 state of Delaware.

22 Q. Mr. Beringer, have you prepared a résumé and
23 curriculum vitae?

24 A. Yes, I have.

1 MR. WHETZEL: Ms. Mohammed, would you
2 briefly make Mr. Cragg the presenter of this initial
3 exhibit?

4 MS. MOHAMMED: I'm sorry. Who do you
5 want me to make the presenter?

6 MR. WHETZEL: Yes. I need Mr. Cragg to
7 be able to share this particular document.

8 MS. MOHAMMED: Is that Fuji witness 2?

9 MR. WHETZEL: No. It's Tyler Cragg.

10 MS. MOHAMMED: Tyler Cragg, oh, okay.
11 Here we go.

12 MR. WHETZEL: And Tyler Cragg is an
13 attorney with my firm just so everybody knows who he is.

14 MS. MOHAMMED: Okay.

15 BY MR. WHETZEL:

16 Q. Mr. Beringer, is what's shared on the screen
17 as Fuji 2 your curriculum vitae?

18 A. It is.

19 Q. Is it an accurate representation of your
20 professional experience?

21 A. Yes, it is.

22 Q. Thank you. Mr. Beringer, what were you asked
23 to do in connection with this matter?

24 A. I was asked to review the application and the

1 secretary's decision and provide expert testimony.

2 Q. Were there particular aspects of the
3 application that you had focused on?

4 A. The air emissions and the offset of those air
5 emissions.

6 MS. MEITNER: Excuse me, Mr. Whetzel.
7 It's Pam Meitner.

8 MR. WHETZEL: Yes.

9 MS. MEITNER: While the witness is
10 testifying, would it be all right to take down the
11 exhibit? Thank you.

12 MR. WHETZEL: Yes. Thank you.

13 We can take down the CV at this point.

14 MS. MEITNER: And did I hear correctly
15 that this witness is here as an expert witness?

16 MR. WHETZEL: Yes. I was about to
17 tender him as an expert now that we've gotten through the
18 foundational elements.

19 MS. MEITNER: Thank you. Please
20 proceed.

21 MR. WHETZEL: At this point, Fuji offers
22 Mr. Beringer as an expert in the areas of air emissions,
23 air permitting, and coastal zone permitting.

24 MS. MEITNER: Is there any objection

1 from the other parties?

2 Hearing none, and given the credentials
3 shown, we'll accept this expert testimony.

4 MR. WHETZEL: Thank you.

5 BY MR. WHETZEL:

6 Q. Mr. Beringer, what specifically did you do in
7 connection with your work on this matter?

8 A. I reviewed the calculations that went into
9 estimating the air permit emissions. Or not the air
10 permit, but the air emissions, and I reviewed the offsets
11 to see if they were -- more than offset the emissions.

12 Q. Did you also review the project with
13 representatives of Fuji?

14 A. Yes, I have.

15 Q. Who specifically?

16 A. Melissa Toledo and Maureen Concordia, yeah.

17 Q. Thank you. Mr. Beringer, did you prepare the
18 permit application that brings us here today?

19 A. I did not.

20 Q. But you reviewed it?

21 A. Yes, I have.

22 Q. And what conclusions have you drawn as a
23 result of your review of the permit application?

24 A. That the emissions have been appropriately

1 offset.

2 Q. Okay. Let's discuss the permit application in
3 a little more detail. Mr. Beringer, in general terms,
4 what is the Fuji project described in the application?

5 A. The -- my understanding from reading the
6 application is that the Fuji project is a process to
7 replace or to manufacture the raw materials for their
8 current operations and to move that -- to allow the
9 materials to be made in Delaware rather than in Scotland.

10 Q. And were you present for the -- virtually
11 present for the testimony of Ms. Toledo and
12 Ms. Concordia?

13 A. Yes, I was.

14 Q. And does their testimony comport with your
15 understanding of the Fuji project?

16 A. Yes, it does.

17 Q. Thank you. Mr. Beringer, would you help us
18 understand from a project approval, project design
19 standpoint at what point a Coastal Zone Permit
20 application is filed?

21 A. Typically, it's when the project is -- from a
22 design standpoint has reached about an 85, 90 percent
23 full design. Typically, things that might still be to be
24 done would be the final specifications for the project

1 for bidding, and then the actual bid documents. But all
2 the essential design has to be done before you can apply.

3 Q. And why does the Coastal Zone Permit
4 application come at that stage of the process?

5 A. You have to be in a position to understand and
6 identify all of your impacts, potentially negative
7 impacts to the environment.

8 Q. Are you able to estimate for the board in
9 general terms how much it costs to get to that stage of
10 the process?

11 A. For a project such as this one, I would -- I
12 would, from experience, think that it's going to be
13 better than a half million dollars.

14 Q. Are you aware of how much Fuji has, in fact,
15 spent on the project design aspects of the project?

16 A. I don't have specific numbers, but I
17 understand that it's close to a million dollars.

18 Q. Okay. Mr. Beringer, what are the air emission
19 sources that are described in the application?

20 A. There are two boilers that will be providing
21 heat for the process, and there will be a HVAC system
22 that will provide comfort heating and cooling for the
23 employees.

24 Q. Can you describe the size or types of boilers

1 that are in the application?

2 A. The two boilers are fairly small, they're
3 4.6 million BTU.

4 Q. What's the fuel source of these boilers?

5 A. Natural gas.

6 Q. Anything else? Just natural gas?

7 A. Just natural gas.

8 Q. Are natural gas boilers commonly used?

9 A. Very commonly.

10 Q. Can you give us some typical applications
11 where natural gas boilers were used?

12 A. Well, they're used for applications such as
13 this, but they're also used for schools, elementary
14 schools, high schools, colleges. They're also used in
15 most commercial buildings at this point. And on the
16 small scale, furnaces, boilers are natural gas-fire
17 boilers and furnaces would be used in residential
18 applications, specifically something like an apartment
19 building.

20 Q. And what will these natural gas boilers be
21 used for specifically at the Fuji plant?

22 A. I understand that they will be used to provide
23 hot water to heat the process -- manufacturing process.

24 Q. Do the boilers of the Fuji permit application

1 require an air permit?

2 A. No, they don't.

3 Q. Why not?

4 A. They're too small.

5 Q. Can you elaborate?

6 A. The air permitting in the state of Delaware,
7 the regulations exempt boilers under 15 million BTU from
8 permitting.

9 Q. Do you have an understanding as to what that
10 exemption is predicated on?

11 A. Essentially, negligible emissions of concern
12 to the public health.

13 Q. Let's talk a little bit about the fuel source,
14 the natural gas. Is the natural gas used in these
15 boilers the same natural gas that is used in residential
16 applications?

17 A. Yes, it is. It is distributed pipeline gas.

18 Q. It is for home use?

19 A. Yes, it is.

20 Q. Used for cook tops?

21 A. Yes, it does.

22 Q. It's used for hot water heaters potentially?

23 A. Yes.

24 Q. As you said, used in other commercial

1 applications, correct?

2 A. Correct.

3 Q. Let's talk a little bit about what happens
4 when we combust natural gas, Mr. Beringer.

5 MR. WHETZEL: And then, Ms. Mohammed, if
6 you could switch the presenter to Fuji witness 2, I'd
7 appreciate it.

8 BY MR. WHETZEL:

9 Q. Mr. Beringer, in broad strokes, what happens
10 when natural gas is combusted?

11 A. The natural gas burns. It's an oxidation
12 process that creates heat and converts the methane and
13 the natural gas to other substances.

14 Q. Would it assist your testimony to illustrate
15 that process?

16 A. What if we get the iPad working?

17 MR. WHETZEL: Mr. Chairman, members of
18 the board, bear with us. We're getting a device
19 connected. I apologize for the delay.

20 MS. MEITNER: A point of order,
21 Mr. Maloney. In this circumstance, do we ask the court
22 reporter to take a picture of this? Or do we ask the
23 counsel to prepare an exhibit? I'm not sure I'm familiar
24 with what you do when a witness uses an illustration in

1 this format.

2 MR. WHETZEL: Mr. Chairman, Ms. Meitner,
3 I can offer a suggestion.

4 MS. MEITNER: Go ahead.

5 MR. WHETZEL: Our expectation was that
6 as we try and analogize to a non-virtual world that at
7 the conclusion of the drawing, we would mark the drawing
8 with -- as an exhibit for identification, and then screen
9 print or otherwise generate an electronic or hard copy of
10 it, and submit that to Ms. Mohammed for purposes of the
11 record if that's acceptable to Mr. Maloney and to the
12 board.

13 MR. MALONEY: That sounds reasonable to
14 me.

15 Does other counsel have any objection to
16 that approach?

17 MS. MEITNER: No.

18 MR. KRISTL: Not at this time.

19 MR. MALONEY: Understood.

20 MS. SCOTT: No objection.

21 MS. MEITNER: Well, let's proceed.

22 THE COURT REPORTER: I apologize.

23 Mr. Whetzel, I feel like I can see your mouth moving, but
24 I can hear absolutely nothing.

1 MR. WHETZEL: I'm sorry. I was talking
2 to my colleagues to try and resolve the technical glitch.

3 THE COURT REPORTER: Okay. I apologize.
4 I thought I was missing testimony.

5 MR. WHETZEL: All right. We're going to
6 go a little more old school with this or at least try to.

7 BY MR. WHETZEL:

8 Q. Mr. Beringer, as soon as we get the paper you
9 have in front of you -- the camera, I'm going to ask you
10 to draw.

11 A. I think what might work is if I draw something
12 then hold it up.

13 Q. All right. Why don't we do that.

14 Mr. Beringer, would you please
15 illustrate for the board as best you're able in this
16 virtual format the natural gas combustion process?

17 A. Sure. First, I'll start with the boiler, and
18 that is the location where combustion occurs such as
19 that. On the input, you have fuel. In this case, it's
20 natural gas, which is methane, and you have air which is
21 there to support the combustion, and that's where you
22 pick up substances like nitrogen and oxygen as well as
23 other substances in more minor applications.

24 When these are mixed and burned, they

1 produce combustion by-products or co-pollutants. And
2 those are things like nitrogen oxides, volatile organic
3 compounds, also accounted for sometimes is total organic
4 carbon, carbon monoxide, carbon dioxide, and particulate
5 matter. Sorry.

6 Q. All right. Thank you. Mr. Beringer, if you
7 could leave the drawing displayed on the camera for just
8 another question or two.

9 And at this point, I would ask that the
10 drawing be marked as Fuji Exhibit 4 for identification.

11 (A document was marked as FugiFilm
12 Exhibit 4 for identification.)

13 BY MR. WHETZEL:

14 Q. Mr. Beringer, what's going on in the boiler in
15 the box that you've drawn the boiler on where you've
16 written combustion?

17 THE COURT REPORTER: I'm sorry. I'm
18 having trouble hearing you, Mr. Whetzel. Could you
19 repeat that? There's quite an echo.

20 MR. WHETZEL: Sure.

21 BY MR. WHETZEL:

22 Q. Mr. Beringer, with reference to Fuji
23 Exhibit 4, what takes place in the box that you've
24 identified as boiler and the written the word

1 "combustion"?

2 A. Fuel is burned and heat is generated.

3 Q. What's the heat used for?

4 A. In this case, the heat is to heat water, and
5 water is used to heat the process in Fuji's building.

6 Q. You've identified a list of combustion
7 by-products. Are those the by-products that are
8 identified in the Fuji permit application?

9 A. Yes.

10 Q. Is there a relationship among those
11 substances?

12 A. They are --

13 MS. MEITNER: Mr. Whetzel?

14 MR. BERINGER: They are proportionate to
15 the --

16 MS. MEITNER: Excuse me, Mr. Whetzel.

17 MR. WHETZEL: Yes.

18 MS. MEITNER: I wonder if -- I'm having
19 a little difficulty understanding you. I wonder if I
20 could ask you to move just, like, 4 inches back from the
21 mic to see if it's any better.

22 MR. WHETZEL: Yes, I'll certainly try.
23 My apologies. I -- we have the same setup we had on
24 Monday, so I'm not sure why we're having -- I'm not sure

1 why we're having problems today, but I'll certainly try
2 that.

3 BY MR. WHETZEL:

4 Q. Mr. Beringer, just to make sure that we have
5 it on the record, what's the relationship among the
6 substances that you've identified as combustion
7 by-products?

8 A. They are strict ratios with the type of fuel
9 and the amount of fuel that's being burned.

10 Q. So what happens if a particular quantity of
11 natural gas is used?

12 A. A particular quantity of each of these
13 constituent by-products would be produced.

14 Q. And if a quantity of natural gas combustion is
15 reduced or eliminated, what happens?

16 A. All of these by-products would be similarly
17 eliminated.

18 Q. All of them or can you pick and choose among
19 them in terms of what's eliminated?

20 A. They would all be eliminated.

21 Q. Okay. That will close the examination on
22 this -- on this exhibit.

23 MS. MEITNER: Excuse me. Can the
24 witness --

1 MS. SCOTT: Ms. Meitner, I think on
2 Monday, the witness muted themselves in order to reduce
3 the echo. Perhaps if Fuji's witness mutes while
4 Mr. Whetzel is speaking, we won't have the echo because
5 it is difficult to hear.

6 MS. MEITNER: And I was going to ask the
7 witness to repeat their last statement.

8 MR. BERINGER: You can't pick and choose
9 which substances are eliminated. When you eliminate a
10 source of combustion, you eliminate all of these
11 combustion by-products.

12 MS. MEITNER: Thank you.

13 BY MR. WHETZEL:

14 Q. Mr. Beringer, let's talk a little more about
15 the air emissions specifically for the Fuji product. Did
16 the permit application identify and calculate the air
17 emissions from the project?

18 A. Yes, it did.

19 MR. WHETZEL: Ms. Mohammed, if we could
20 make Tyler Cragg the presenter, then that -- he will be
21 the presenter for the remainder of the examination.

22 I would ask that we put up Joint
23 Exhibit 1, and specifically page 33 of Joint Exhibit 1.

24 MS. MEITNER: Can you enlarge that? Oh,

1 thank you.

2 MR. KRISTL: I also want to note for the
3 record that Joint Exhibit 1 is the Secretary's Order. I
4 think that is Joint Exhibit 5, which is the application.

5 MR. WHETZEL: I apologize. We had an
6 earlier identification chart.

7 Thank you, Mr. Kristl.

8 For the record, this is Joint Exhibit 5,
9 the Fuji permit application.

10 BY MR. WHETZEL:

11 Q. And just so that it's abundantly clear,
12 Mr. Beringer, do you recognize this document?

13 A. Yes, I do.

14 Q. What is it?

15 MS. MEITNER: Mr. Whetzel, what page for
16 the record?

17 MR. WHETZEL: Page 33 of Joint
18 Exhibit 5.

19 MS. MEITNER: Thank you.

20 MR. BERINGER: It's a table that was
21 prepared and included in the application to generate the
22 requirement for offsets.

23 BY MR. WHETZEL:

24 Q. And did you review the emissions calculations?

1 A. Yes, I did.

2 Q. How are these emissions calculated?

3 A. The nitrogen oxides and the carbon monoxide
4 values were calculated from manufacturer's information
5 regarding the efficiency of the combustion in the
6 proposed boilers and the remaining pollutants,
7 co-pollutants were estimated from AP40- -- an EPA
8 document called AP42.

9 Q. And how are these compounds and these
10 co-pollutants related?

11 A. They are all products of combustion.

12 Q. And is the emissions calculation methodology
13 used in the application a commonly used approach for
14 doing that kind of work?

15 A. Yes, it is the common approach for estimating
16 air emissions.

17 They are exhausted to the atmosphere
18 through a stack of sufficient height to get them into the
19 air and so that they disperse at -- in a way that is not
20 harmful to human health.

21 THE COURT REPORTER: I apologize,
22 Mr. Whetzel. I was unable to hear the question before
23 the witness started speaking and I missed -- I got the
24 witness's answer, but not the question.

1 MR. WHETZEL: And I'm sorry. I'll just
2 pose it again, and ask Mr. Beringer if the answer is the
3 same.

4 BY MR. WHETZEL:

5 Q. I think the question was how do these
6 co-pollutants or these combustion by-products actually
7 get released to the environment? Thank you.

8 A. My answer is the same.

9 Q. Mr. Beringer, let's focus a little more
10 specifically on the offsets in the permit. Those are
11 identified in this column on page 33 of Joint Exhibit 5
12 that's headed "Offset requirements, ton per year."
13 Correct?

14 A. Correct.

15 Q. And with reference to the permit application,
16 what offsets are identified in the application and
17 ultimately incorporated in the permit?

18 A. The applicant has offered to purchase 2 tons
19 of emission reduction credits for NOx, and 1 ton of
20 emission credits for VOCs, and to eliminate five propane
21 fired fork trucks and replace them with electric
22 equipment, both fork trucks and pallet jacks.

23 Q. Mr. Beringer, why the focus on NOx, VOCs, and
24 carbon monoxide?

1 A. They are all three precursors to the formation
2 of ozone.

3 Q. And is ozone an air quality issue in New
4 Castle County more broadly?

5 A. Yes. Traditionally, it has been the parameter
6 of the National Air -- Ambient Air Quality Standards that
7 has not been met regularly, and is the reason, historic
8 reason why the Philadelphia metropolitan region,
9 including New Castle County, were considered
10 non-attainment for ozone.

11 Q. Were you virtually present for the testimony
12 of DNREC's witness Ms. Mensch?

13 A. Yes, I was.

14 Q. Did you hear her testimony about DNREC's
15 consideration of ozone precursors in connection with
16 review of the offset requirements?

17 A. Yes, I did.

18 Q. Is that approach consistent with your
19 experience with DNREC on these kinds of applications?

20 A. Yes, it is.

21 Q. Thank you. Let's talk a little more
22 specifically about the forklift project, which you
23 identified as one of the two components of the offset
24 package.

1 What emission source does the forklift
2 project eliminate?

3 A. It eliminates the combustion of propane.

4 Q. What is propane?

5 A. Propane is a straight chain gas that is
6 chemically -- it's, what, C₃H₈.

7 Q. Is it a fuel source?

8 A. Yes, it is.

9 Q. Fuel source commonly used for gas grills,
10 among other things?

11 A. Yes, that and small engines.

12 Q. And what does the combustion of propane emit?

13 A. Well, pretty much all of the same substances
14 that are emitted with the combustion of natural gas.

15 Q. In the permit application, what does Fuji
16 specifically focus on for offsets relating to the
17 forklift project?

18 A. The carbon monoxide.

19 Q. Are the other propane-related co-pollutants
20 eliminated as well?

21 A. Yes. Nitrogen oxides would be eliminated,
22 carbon dioxide would be eliminated, particulate matter
23 would also be eliminated, volatile organic compounds
24 would be eliminated.

1 Q. Would those reductions be eligible to be
2 considered as offsets?

3 A. Yes, they would.

4 Q. Thank you, Mr. Beringer. Let's focus on the
5 second component of the offset package, the emissions
6 credit. The board heard some testimony on Monday about
7 emissions credits, and I just want to confirm your
8 understanding of how they work.

9 First, what is emissions credit?

10 A. Emissions credit is a credit that is generated
11 by an applicant to the State. The State reviews the
12 applicant's calculations of emission reductions or
13 emission elimination, and going through a painstaking
14 process in accordance with the regs. And the -- if they
15 agree with the applicant, then they award credits.

16 Q. And just to be clear, when you refer to
17 applicant, you're not referring to Fuji, you're referring
18 to some other source that may be seeking to reduce or
19 eliminate air emissions and bank or trade those credits,
20 correct?

21 A. That is -- that is correct.

22 Q. And do these credits sometimes arise from
23 plant shutdowns?

24 A. They often arise from plant shutdowns.

1 Q. And you may have answered this, Mr. Beringer,
2 but does DNREC oversee this emissions credits process?

3 A. Yes, they do. There is a particular process
4 to follow and DNREC is in control of that process.

5 Q. Is DNREC promulgating a regulation that
6 governs that process?

7 A. Yes, they have.

8 Q. Have you been involved with applying for
9 emissions credits?

10 A. Yes, I have.

11 Q. What has your experience in that process been?

12 A. It's painstaking. You have to go through a
13 lot of steps to demonstrate that, in fact, you have shut
14 down the equipment, you have removed it from the
15 property, or you have truly created a reduction in
16 emissions through new technology or through an air
17 pollution control device of some type.

18 Q. And would you briefly explain for the board
19 what happens during that application process and
20 specifically what happens with the emissions or emissions
21 credits that are the subject of the application?

22 A. The person who has created the reduction
23 totals them up and submits them to the State of Delaware.
24 The State of Delaware reviews them and if they agree with

1 the application, they immediately retire 25 percent of
2 the reduced number and -- so that they cannot be used and
3 there is a guarantee that there is a long-term reduction
4 in pollutants. 25 percent of them are provided to the
5 State for use in economic incentives, and 50 percent are
6 awarded back to the person who's applied and created the
7 reduction for their use or for sale.

8 Q. So for illustration, Mr. Beringer, what total
9 amount of emissions reductions would be required for a
10 1-ton credit to be available to the State for economic
11 development purposes?

12 A. Let's take an example of NOx. You would -- an
13 entity would have to reduce NOx by 4 tons to get a 1
14 ton -- and what would happen would be there would be 1
15 ton of that 4 tons that's retired permanently, and 1 ton
16 would go to the State, and 2 tons would go to the entity
17 that created the reduction.

18 Q. So, Mr. Beringer, does the 1-ton credit in the
19 Economic Development Office actually represent the
20 reduction elimination of something more than 1 ton of
21 pollutions?

22 A. Yes.

23 Q. How so?

24 A. If you do the math, you end up with more than

1 1 ton being reduced.

2 Q. Is that due to, in part, the 25 percent of
3 those emissions that are permanently retired for air
4 quality improvement?

5 Mr. Beringer, can you give --

6 THE COURT REPORTER: I'm sorry. I
7 missed that answer.

8 MR. WHETZEL: -- us some examples of --

9 THE COURT REPORTER: I apologize. I
10 missed that answer from the witness.

11 MR. WHETZEL: Can you repeat your
12 answer, Mr. Beringer?

13 MR. BERINGER: Yes.

14 THE COURT REPORTER: Thank you.

15 BY MR. WHETZEL:

16 Q. I believe your answer began, "If you do the
17 math."

18 Would you repeat that answer for the
19 court reporter?

20 A. Oh. If you do the math, the 25 percent
21 reduction yields more than 1 ton of actual emission
22 reduction, permanent actual emission reduction.

23 Q. And I may have confused you.

24 The next question was is that a result

1 in part of the 25 percent that is permanently surrendered
2 for air quality improvement?

3 A. My answer was "yes."

4 Q. Thank you. My apologies.

5 Mr. Beringer, could you give us some
6 examples of recent emissions reductions resulting in
7 credits from facilities in the coastal zone?

8 A. The most recent that I'm aware of was the
9 shutdown of the Formosa plant and the shutdown of the
10 Chemours titanium dioxide plant. And before that, the
11 conversion of the Edge Moor Power Plant by Calpine to --
12 from coal to natural gas.

13 Q. And can you give us some examples of emissions
14 reductions projects and credits arising from facilities
15 outside the coastal zone?

16 A. For instance, a project that I worked on was
17 the closure of the Chrysler plant and conversion of it to
18 Star Campus by the University of Delaware. Another would
19 have been the closure of the GM manufacturing plant in
20 Elsmere.

21 Q. Thank you, Mr. Beringer.

22 MR. WHETZEL: Mr. Cragg, if you could
23 put back up on the screen Joint Exhibit 5 page 33,
24 please. I have some additional questions on that table.

1 BY MR. WHETZEL:

2 Q. Mr. Beringer, you've testified that you
3 reviewed the emissions and offset calculations of the
4 permit, correct?

5 A. Yes, that's correct.

6 Q. And you see on this table that the net
7 increase in tons per year for pollutants is listed as
8 3.931, correct?

9 A. Correct.

10 Q. And the next column over calculates the offset
11 requirement at 4.325 tons per year, correct?

12 A. Correct.

13 Q. Do the offsets in the application, considering
14 reductions and credits, exceed the 4.325-ton per year?

15 A. Yes, they do.

16 Q. And you make that determination on a ton per
17 ton basis?

18 A. Yes, I am.

19 Q. Let's talk again about the forklift
20 elimination. You've told us that does reduce pollutants
21 in addition to carbon monoxide?

22 A. Yes. It would reduce nitrogen oxides and
23 carbon dioxide, particulate matter, to a lesser degree,
24 and volatile organic compounds.

1 Q. And do those pollution eliminations address
2 the pollutants identified on page 33 of Joint Exhibit 5?

3 A. Yes, they do.

4 Q. Did Fuji quantify the additional emissions
5 reductions for those propane pollutants?

6 A. They did not.

7 Q. So in your opinion, are those emissions
8 reductions above and beyond the calculated emissions
9 reductions associated with the forklift project?

10 A. Yes.

11 Q. Let's talk about the NOx credits specifically,
12 Mr. Beringer. Fuji will purchase two NOx credits as part
13 of the offsets required in the permit, correct?

14 A. That is correct.

15 Q. Do those NOx credits reflect the reduction of
16 pollutants in addition to NOx?

17 A. Yes. Since NOx is a by-product of combustion,
18 all the rest of the by-products of combustion or
19 co-pollutants would be eliminated with the elimination of
20 NOx through the NOx credit.

21 Q. Does that include all the pollutants that are
22 listed on page 33 of Joint Exhibit 5?

23 A. For natural gas, yes.

24 Q. So that includes nitrogen oxides?

1 A. Yes.

2 Q. Carbon monoxide?

3 A. Yes.

4 Q. Carbon dioxide?

5 A. Yes.

6 Q. Lead?

7 A. To the extent that the lead is in natural gas,
8 yes.

9 Q. Nitrous oxide?

10 A. Yes.

11 Q. Particulate matter total?

12 A. Yes.

13 Q. PM condensable?

14 A. Yes.

15 Q. PM filterable?

16 A. Yes.

17 Q. Sulfur dioxide?

18 A. Yes.

19 Q. Total organic compounds?

20 A. Yes.

21 Q. Methane?

22 A. Yes.

23 Q. And volatile organic compounds?

24 A. Yes.

1 Q. And given we're talking about natural gas, do
2 you expect the elimination of natural gas combustion to
3 reduce these pollutants in essentially the same ratio as
4 the combustion of natural gas would emit them?

5 A. It would be exactly the same ratio.

6 Q. And why is that?

7 A. Because they are stoichiometrically chemically
8 bound up in certain products and by-product creation.

9 Q. Mr. Beringer, is it necessary or practical to
10 offset each of these pollutants on page 33 independently
11 when we're dealing with combustion sources?

12 A. Not necessary because nitrogen -- if you buy
13 credits for nitrogen oxide, it offsets these other
14 substances. It's not practicable because there's no
15 tracking of most of these other substances besides VOCs
16 and -- to allow, you know -- to generate credits or some
17 other means of tracking what has been reduced and
18 generating credits for them.

19 Q. Thank you. Is NOx an effective measure of
20 emissions from natural gas combustion?

21 A. Yes. It's a good surrogate.

22 Q. Mr. Beringer, do we know what field source the
23 NOx credits in the application are associated with?

24 A. No.

1 Q. Does that affect the determination?

2 A. It doesn't because natural gas is about the
3 cleanest burning fuel that is available currently.
4 The -- most of these credits could have come from --
5 well, they -- if they came from another source, such as
6 petroleum or coal, these co-pollutants would be generated
7 in far higher quantities.

8 Q. Mr. Beringer, do we know geographically where
9 the emissions credits come from?

10 A. We don't specifically.

11 Q. And does that affect your determination?

12 A. No. Because they are generated somewhere in
13 the state of Delaware to be counted and banked in the
14 state of Delaware. And the air in the state of Delaware
15 is what we all breathe, including those in the coastal
16 zone.

17 Q. And you've identified several recent emissions
18 reductions credit-generating projects from specifically
19 within the coastal zone, correct?

20 A. Yes, I have.

21 Q. Mr. Beringer, based on your experience, did
22 DNREC evaluate the emission and offsets for this project
23 consistent with its historic practice?

24 A. Yes, it does.

1 Q. And how long has that historic practice been
2 applied at DNREC as best you know?

3 A. Certainly at least from the time of the
4 regulations in the late 1990s.

5 Q. Mr. Beringer, let's talk a little bit about
6 carbon dioxide. That's been a focus of some of the
7 testimony and questioning so far.

8 Has carbon dioxide historically been
9 regulated in the Coastal Zone Program?

10 A. It has not.

11 Q. To your knowledge, has DNREC historically
12 required specific offsets for carbon dioxide in the
13 Coastal Zone Program?

14 A. It has not.

15 Q. Does DNREC regulate carbon dioxide in other
16 regulatory programs?

17 A. They do not regulate it under the Clean Air
18 Act or the State's implementation plan of the Clean Air
19 Act at the federal level. And they do regulate it for
20 large-scale sources of combustion associated with the
21 generation of electricity.

22 Q. And are those sources typically much larger
23 than what's involved in this permit application?

24 A. Yes. They are 25 megawatts and larger, and,

1 like I said, they are involved in electrical production
2 that's the -- all handled under the Regional Greenhouse
3 Gas Initiative.

4 Q. Based on your evaluation, Mr. Beringer, do the
5 offsets in the permit application offset the CO2
6 emissions from the project?

7 A. Yes.

8 Q. Is NOx an effective indicator of CO2 emissions
9 reductions from natural gas combustion?

10 A. Yes, it is.

11 Q. So in sum, Mr. Beringer, what's your -- what's
12 your conclusion with respect to the offsets in the Fuji
13 permit application?

14 A. As the Secretary stated, they more than
15 adequately offset the negative environmental impacts from
16 the project.

17 Q. Thank you. No further questions.

18 MS. MEITNER: Professor Kristl, do you
19 have any questions for this witness?

20 MR. KRISTL: I do. Thank you.

21 CROSS-EXAMINATION

22 BY MR. KRISTL:

23 Q. Good morning, Mr. Beringer. You were talking
24 about ozone precursors and NOx and VOCs being ozone

1 precursors. Do you remember that testimony?

2 A. Yes, I do.

3 Q. Okay. And when we talk about ozone precursor,
4 what that means is that those can contribute to the
5 formation of ozone, right?

6 A. That's correct.

7 Q. Okay. And it takes a -- I would presume just
8 scientifically, it takes a certain amount of those
9 precursors to be present and in the right conditions to
10 form ozone, right?

11 A. It does not need -- necessarily relate to the
12 specific amount of those materials, their exposure --
13 they're all photochemically active and their exposure to
14 sunlight is the mechanism.

15 Q. All right. But when we've got more of them,
16 it's more likely that we have ozone. Is that a fair
17 statement?

18 A. Yes. And that's why they're offset.

19 Q. Okay. Now, you indicated the New Castle
20 County is considered to be in non-attainment for the
21 National Ambient Air Quality Standard for ozone, right?

22 A. Correct.

23 Q. Okay. And non-attainment means that, in New
24 Castle County, the ozone levels exceed what the National

1 Ambient Air Quality Standard says should be there, right?

2 A. Once in a five-year period.

3 Q. All right. And one of the goals of the Clean
4 Air Act and the National Ambient Air Quality Standards is
5 to try to get non-attainment areas into attainment,
6 right?

7 I'm sorry. Did you answer? I didn't
8 hear. I'm sorry?

9 A. I said "correct."

10 Q. Okay. Okay. All right. Okay.

11 Now, New Castle County is in
12 non-attainment, but Kent County is in attainment, right?

13 A. Yes.

14 Q. And Sussex County is in attainment, correct?

15 A. Yes.

16 Q. Okay. Now, you said that these emission
17 reduction credits can come from anywhere in the state of
18 Delaware, right?

19 A. Correct.

20 Q. So an emission reduction credit could come
21 from Georgetown?

22 A. Speculatively, yes.

23 Q. Well, it could, right? It could also come
24 from someplace near Dover?

1 A. It's correct.

2 Q. Okay. So when we have this emission reduction
3 credit that's generated, let's say, in Georgetown, that
4 means that there's fewer pollutants in Georgetown, right,
5 because we've eliminated that source or eliminated that
6 amount of ozone precursors?

7 A. I would disagree with that. I would say that
8 there are fewer pollutants in the air, and the air moves
9 across regional boundaries.

10 Q. As air moves across -- or let's put it this
11 way.

12 As pollutants in air move across
13 regional boundaries, they tend to dissipate in
14 concentration. Is that a fair statement?

15 A. That would be anticipated, yes.

16 Q. Okay. Let's -- so that then brings me to
17 the -- your testimony about the credits. You said that
18 it is a -- I want to make sure I get the word right
19 here -- painstaking process in order for a facility to
20 actually generate credits that will be accepted into the
21 emission banking system. Am I characterizing your
22 testimony correctly?

23 A. That is what I said.

24 Q. Okay. And what that means is that before a

1 credit is created, there has to be that shutdown or
2 installation of new controlled technology or whatever it
3 is that's going to result in the reduction of NOx or VOC
4 emissions, right?

5 A. Yes. It has to occur. The reduction has to
6 occur first.

7 Q. Okay. And then you go through this
8 painstaking process, and at the end of that process, the
9 credit is or is not generated, right?

10 A. It is awarded or not awarded.

11 Q. Okay. All right. And so the credit
12 represents a reduction that has already occurred. Is
13 that fair?

14 A. That's correct.

15 Q. Okay. Now, you gave some examples of recent
16 reductions, and you gave some in the coastal zone, right?
17 One of them was the shutdown of a Formosa plant?

18 A. Yes.

19 Q. And that happened what year?

20 A. I was not involved in that project, so I don't
21 really know what year.

22 Q. Safe to say it was more than a year ago?

23 A. I have no factual knowledge of that.

24 Q. How about the DuPont titanium dioxide plant,

1 that shut down more than a year ago, right?

2 A. Yes. That shut down in 2015.

3 Q. Okay. How about the closure of the Chrysler
4 plant so that it was converted into the Star Campus for
5 the University of Delaware? That was more than a year
6 ago, right?

7 A. It was 2008.

8 Q. Okay. And the GM plant in Elsmere, that
9 closed down more than a year ago, right?

10 A. Yes.

11 Q. Okay. All right. I'm sorry. Just one more
12 second here.

13 You mentioned regulation of CO2, or at
14 least there's a program under REGI related to CO2
15 emissions, right?

16 A. Yes.

17 Q. Okay. And as a matter of fact, the
18 regulations set up a CO2, or carbon dioxide, banking
19 system for participants in REGI to use, correct?

20 A. Correct. For the electric power industry.

21 Q. Okay. And so there are credits available for
22 carbon dioxide reductions through the REGI program?

23 A. In the electric power industry.

24 Q. I understand, but just that credits have been

1 created and recognized regulatorily through DNREC's
2 regulation of that industry, correct?

3 A. That's correct.

4 Q. Okay. When going through the list of the
5 different pollutants that are on the table on page 33 and
6 in the application, when Mr. Whetzel asked you about
7 lead, you said that lead is emitted to the extent it's in
8 the natural gas. Am I characterizing your testimony
9 correctly?

10 A. That is what I said. And it could be either
11 in the air or it could be in the natural gas.

12 Q. Okay. But it's not always in natural gas,
13 right?

14 A. Based on my experience, it's not present in
15 natural gas on a normal basis.

16 Q. Okay. All right. And lead is a neurotoxin,
17 correct?

18 A. In certain forms.

19 Q. All right. Yep, that's all I have. Thank
20 you.

21 MR. WHETZEL: I have just one or two
22 questions on redirect if I may, Mr. Chairman.

23 MS. MEITNER: One second, Mr. Whetzel.

24 Ms. Scott or Mr. Tweedie, did you have

1 any questions?

2 MS. SCOTT: Ms. Meitner, this is Devera
3 Scott for DNREC. We have no questions.

4 MS. MEITNER: Thank you.

5 Mr. Whetzel, yes. Go ahead.

6 MR. WHETZEL: Yes. I'm sorry. I didn't
7 mean to -- I didn't mean to jump the gun.

8 REDIRECT EXAMINATION

9 BY MR. WHETZEL:

10 Q. Mr. Beringer, Mr. Kristl asked you some
11 questions about ozone precursors. Does any of that
12 change your conclusion with respect to the Fuji permit
13 application and the offsets?

14 A. No.

15 Q. He asked you some questions about -- well, let
16 me just cut to the chase.

17 Did anything about your colloquy with
18 Mr. Kristl change your conclusions about the permit
19 application and the offsets?

20 A. Not at all.

21 Q. No further questions.

22 MS. MEITNER: I'm sorry, Mr. Whetzel.
23 Did you say you were done?

24 MR. WHETZEL: I did. Thank you. No

1 further questions.

2 MS. MEITNER: Thank you.

3 Do any members of the board have any
4 questions of this witness?

5 MS. PETERSON: Yes. Mr. Chair, Karen
6 Peterson.

7 I have a couple of questions, and these
8 are for Mr. Beringer.

9 Mr. Beringer, I look at the law and the
10 regulations, and it says nothing about excluding any
11 pollutants from the offset calculations. Can you tell me
12 where that exclusion for CO2 originated?

13 MR. BERINGER: I -- it is not considered
14 a pollutant on the Clean Air Act would be my guess. I
15 don't know what the -- why DNREC does what it does or the
16 Secretary has the opinion that they have, but
17 traditionally, it has not been considered in the coastal
18 zone.

19 MS. PETERSON: Okay. But you agree that
20 there is no exception in the law or the regulations for
21 CO2. It talks about negative impacts, environmental
22 release of pollutants and obtaining credits to cover
23 those pollutants. And we agree that CO2 is a pollutant,
24 right?

1 MR. BERINGER: It has been ruled a
2 pollutant by the Supreme Court, I believe.

3 MS. PETERSON: Okay. And so the
4 regulations --

5 MR. BERINGER: And the reason why it
6 wasn't originally is because it's also a by-product of
7 respiration.

8 MS. PETERSON: Okay. And it's still a
9 pollutant. And the regulations talk about all of the
10 pollutants released. And if it meant to exclude CO2 or
11 the Clean Air Act -- Clean Indoor Air Act, it could have
12 said that in the law or the regulations -- except for
13 CO2. Because that is the largest pollutant being
14 released according to that chart that you put up there.

15 And, of course, next to it you say, you
16 know, about the credits, not applicable. Okay. Somebody
17 along the way decided for some reason that CO2 doesn't
18 count. DNREC told us it's because, oh, there's just so
19 much of it, it would be really hard to get credits for
20 it.

21 But can you think of any reason that it
22 is excluded without referring to exclusions in other
23 laws? I'm talking just about this law.

24 MR. BERINGER: In a case like the one we

1 have where we have combustion as the source of the
2 pollutants, it is actually offset completely by the NOx
3 credits.

4 MS. PETERSON: Well, how come those
5 numbers weren't included in the calculations then in
6 terms of how many credits were needed?

7 I mean, if we're looking at, for carbon
8 dioxide, an additional 4,758 tons per year, but that
9 wasn't included with, what, 3,931 credits that they got.
10 I mean, if you add those two numbers together, you know,
11 we're looking at -- if you -- with a 1.1 factor, you
12 would need an extra 5,231 credits to cover the carbon
13 dioxide.

14 MR. BERINGER: You wouldn't because the
15 NOx -- the NOx reduction represents a reduction in CO2 as
16 well.

17 MS. PETERSON: But to the tune of
18 4,755 tons per year?

19 MR. BERINGER: Yes.

20 MS. PETERSON: The math doesn't work.
21 The math doesn't work.

22 MR. BERINGER: Absolutely. It's
23 stoichiometric.

24 MS. PETERSON: All right. Explain to me

1 how that math works. You -- Fuji calculated 3,931 tons
2 per year of pollutants, and that excluded carbon dioxide,
3 which is another 4,755 tons per year. So tell me how
4 that math works.

5 MR. BERINGER: They did not count the
6 CO2 because in the coastal zone, it has traditionally not
7 been counted. DNREC has not asked us to count for those
8 things.

9 MS. PETERSON: But you said it was
10 covered by the -- by the NOx or the VOC, I forget which
11 one.

12 MR. BERINGER: If it had been counted,
13 it would have increased the total tons at the bottom, but
14 the offsets would have also increased the total tons that
15 were offset. The nitrogen oxide offset includes -- by
16 serendipity, it includes the reduction of all the rest of
17 the products of combustion, including CO2, and CO2 is
18 formed in a much higher ratio out of combustion than NOx.

19 MS. PETERSON: Okay. I just don't know
20 how you get from 9,566 tons per year, and you've covered
21 300 -- 3,931 of them. I just don't see how you've
22 covered all of the -- all of the CO2. Maybe my math
23 isn't good or something. I mean, on the chart itself, it
24 says not applicable, so you've already said, We're not

1 considering that 4,755 tons per year. We're not even
2 going to consider that, but oh, by the way, these other
3 credits cover some of that as by-products.

4 MR. BERINGER: No, I actually said it
5 covers all of that.

6 MS. PETERSON: Okay. I'm back to the
7 numbers. The numbers don't work, but all right. Let's
8 move on because I -- we're not going to -- we're not
9 going to get anywhere with that.

10 Did I understand you to say that no
11 calculations were done for the forklifts in terms of
12 reduction in pollutants?

13 MR. BERINGER: The fork trucks, the
14 calculation that was done for the fork trucks was for
15 carbon monoxide, and that was used in the calculations to
16 support the offset of ozone-producing substances.

17 MS. PETERSON: Okay.

18 MR. BERINGER: Which is what DNREC's
19 focus was on, apparently, according to their testimony.

20 MS. PETERSON: Okay. And that brings me
21 to the issue of the ozone precursors. Again, where in
22 the law or the regulations does it say that your offsets
23 only need to pertain to ozone precursors and nothing
24 else?

1 MR. BERINGER: There is nothing in the
2 law that says that. That is what DNREC has traditionally
3 focused on because it is a pollutant of concern in the
4 state of Delaware and the Philadelphia metropolitan
5 region. It is also a pollutant that is quite an issue
6 for public health.

7 MS. PETERSON: And would the same not be
8 true, say, for sulfur dioxide or methane or those? Why
9 is it just ozone that they've carved out this little
10 niche for?

11 MR. BERINGER: Because the -- if you
12 address the ozone, you are also -- through reductions in
13 emissions, you are also covering those other substances.
14 They are eliminated as part of the elimination of
15 combustion.

16 MS. PETERSON: Okay. So is sulfur
17 dioxide eliminated by the credits that Fuji purchased for
18 NOx and VOC? Does that wipe out the sulfur dioxide?

19 MR. BERINGER: That wipes out the sulfur
20 dioxide.

21 MS. PETERSON: Okay. And methane wipes
22 out methane?

23 MR. BERINGER: Yes.

24 MS. PETERSON: Okay. So the purchase of

1 just those two wipes out everything else on the list
2 except carbon dioxide?

3 MR. BERINGER: Correct.

4 MS. PETERSON: Okay. All right. Good
5 to know. Thank you.

6 MS. MEITNER: Mr. Beringer, this is
7 Ms. Meitner. I have a few questions also.

8 MR. BERINGER: Okay.

9 MS. MEITNER: And I'm trying to get
10 clarification on the explanation of how credits wipe out
11 certain things. So this may be a little too simplistic,
12 but do I understand that you say if you close down a
13 plant like the Chemours plant, it's going to have a --
14 potentially, it has a boiler. When they shut that down,
15 you have to give them credits for that boiler with
16 respect to NOx and VOCs, but that boiler is a product of
17 combustion, or it is creating the combustion process.
18 And depending on what fuel it's using, oil called natural
19 gas, it's emitting certain pollutants.

20 So, I mean, that's an example of how
21 some credits would be created. You shut down that boiler
22 and you go through the process, prove what you're doing,
23 and you get credits, correct?

24 MR. BERINGER: That's correct.

1 MS. MEITNER: And then do I understand
2 you to say that when you shut down that combustion
3 system, you are also reducing other products of the
4 combustion, like SO2 and lead, and those quantities are
5 so small, and the system isn't really set up to capture
6 those, so there isn't a banking system for some of the
7 smaller contaminants that are eliminated when you shut
8 down a process; is that correct?

9 MR. BERINGER: That is correct.

10 MS. MEITNER: Okay. And then when you
11 go to use those credits, when somebody goes to use those
12 credits, you know that if these credits are NOx credits,
13 that that came from the shutdown -- and this is probably
14 too broad because I guess they could come from a process
15 that's not necessarily combustion. Well, that's the
16 question.

17 Would they always be from a combustion
18 or they could be from some other process?

19 MR. BERINGER: I am unaware of another
20 process that would generate NOx --

21 MS. MEITNER: Okay.

22 MR. BERINGER: -- besides combustion.

23 MS. MEITNER: Okay. So you're -- any
24 time you're using a NOx credit, technical people would

1 understand that you've captured the NOx because it's big
2 enough, it's measurable enough, and everybody wants to
3 use it. But as a matter of course, there are other
4 really small quantities of combustion products that in
5 kind of place holds for that are there. And you know
6 that those things were also eliminated, but you haven't
7 written it down in that system. Is that a fair
8 categorization of what's going on?

9 MR. BERINGER: That is precisely what's
10 going on.

11 MS. MEITNER: Okay. So somebody shuts
12 down a combustion process. It gets and banks a NOx
13 credit, and all the technical people know and understand
14 that there are little trace contaminants of CO2, of --
15 I'm sorry -- SO2s, particulate, et cetera, and you know
16 that when you go to cash in that credit, that those
17 things are associated with it?

18 MR. BERINGER: Correct.

19 MS. MEITNER: Okay. I think I
20 understand that much better now. Thank you.

21 And I believe I do have one more
22 question.

23 So with respect to CO2, is there CO2
24 associated with the combustion process?

1 MR. BERINGER: Yes.

2 MS. MEITNER: And you used the word
3 "stoichiometrically." So let me just see if I can get a
4 better handle on that. So are you saying that if you
5 take a combustion process that you shut down, it results
6 in a certain NOx credit that you know that there's a
7 specific CO2 amount that has to be generated when that
8 NOx credit -- or that has to be associated with that NOx
9 credit?

10 MR. BERINGER: Could you please restate
11 that question? I'm not sure I understood exactly what
12 you were asking.

13 MS. MEITNER: Okay. And, frankly, I'm
14 not -- I don't think I -- yeah. I'm not sure I said that
15 very well either.

16 Could you explain -- well, first, is CO2
17 associated with combustion?

18 MR. BERINGER: Yes.

19 MS. MEITNER: And is there a direct
20 relationship between the CO2 and the NOx created by the
21 combustion process?

22 MR. BERINGER: Yes, for a specific fuel
23 type.

24 MS. MEITNER: Okay. So -- and I'm sure

1 these numbers are wrong, but just by way of a simplified
2 example, if I have a combustion process that involves
3 natural gas, and it creates 1 ton a year of NOx, is --
4 would there be a number of CO2 always associated with the
5 combustion of natural gas?

6 MR. BERINGER: Yes.

7 MS. MEITNER: Do you know what that is,
8 that number, by chance?

9 MR. BERINGER: It's in the ballpark of
10 2,400 tons per year -- or per ton of NOx. Pardon me.

11 MS. MEITNER: So if I have one NOx
12 credit of natural gas, it's an -- it's representative of,
13 you know, 2,000 plus tons of CO2 credit?

14 MR. BERINGER: Yes.

15 MS. MEITNER: Okay. I have a much
16 better understanding of the situation. Thank you very
17 much.

18 Are there any other questions for this
19 witness?

20 MR. WHITEHOUSE: Not from me.

21 MR. DRAPER: Pam, this is -- this is
22 Jeff Draper and I have one question.

23 MS. MEITNER: Yes, sir.

24 MR. DRAPER: Mr. Beringer, if all the

1 pollutants released at the Fuji place are from the
2 combusting of natural gas, as many new houses as are
3 being built in Delaware right now, how many houses would
4 it take to release the same amount of pollutants that one
5 of those boilers is? Would you have an any idea on that?

6 MR. BERINGER: I don't have a specific
7 idea. If I were to assume that the average house has
8 about -- has a boiler, a natural gas boiler or heater
9 that's about .3 megawatts, it would take, you know --
10 you'd multiply the .3 by enough houses to get to the
11 equivalent of the boilers, which would be -- they're
12 about 13 1/2 megawatts.

13 MS. MEITNER: I'm sorry?

14 MR. BERINGER: It would take a lot of
15 houses.

16 MS. MEITNER: Say it again.

17 MR. DRAPER: It would --

18 MS. MEITNER: Please repeat that.

19 MR. DRAPER: -- take a lot of houses,
20 you're saying?

21 MR. BERINGER: I'm sorry. I didn't hear
22 the question.

23 MR. DRAPER: I said your conclusion is
24 it would take a lot of houses. I mean, would it take 500

1 houses? Would it take 250 houses? And it would be the
2 same exact pollutants, correct?

3 MR. BERINGER: They are the same
4 pollutants, yes.

5 MS. MEITNER: Mr. Beringer, I may have
6 walked on your answer. Did you come up with a number of
7 houses?

8 MR. BERINGER: I did not.

9 MS. MEITNER: Okay.

10 MR. DRAPER: Thank you.

11 MS. MEITNER: Any other questions from
12 the board?

13 MR. BAKER: Yes. Robert Baker here.

14 I would like to ask the witness if his
15 experience -- he's worked in this field for, I think he
16 said 30 years, and that act was enacted in the '90s, if
17 the department equitably and in an evenhanded way applies
18 the regulations?

19 MR. BERINGER: Are you referring to the
20 Clean Air Act or are you referring to the Coastal Zone?

21 MR. BAKER: Coastal Zone, specifically
22 what we're asking about. You work in this field, and I
23 know you're not involved in every project, but you are in
24 this particular one. But in general, as a person who

1 came out of a regulated industry, all we really hoped for
2 was that the regulations that we did not like were at
3 least evenhandedly applied.

4 MR. BERINGER: If your question is have
5 they been evenhandedly applied in the Coastal Zone
6 Program, I would say, yes.

7 MR. BAKER: Okay.

8 MR. BERINGER: The manufacturing
9 projects that I've been involved in looking for Coastal
10 Zone Permits, they've been treated pretty much the same
11 way by DNREC each and every time.

12 MR. BAKER: Okay, thank you.

13 MS. MEITNER: Are there any other
14 questions for this witness?

15 MR. DRAPER: Pam, one last question.
16 Jeff Draper again, Mr. Beringer.

17 The Clean Air Act, I believe that
18 pollutants are measured in parts per million. Am I
19 correct in thinking that?

20 MR. BERINGER: They are measured in many
21 different ways. They are -- for most of the permitting,
22 they are in tons per year, pounds per day. The
23 individual emission rates are sometimes presented in
24 parts per million.

1 MR. DRAPER: Would the amount of
2 increase that Fuji has, would that move any of the units
3 of measure other than the exact calculation as to what's
4 going out? So in other words, would the air quality be
5 reduced?

6 MR. BERINGER: The intent of the offsets
7 is to make sure that the air quality is not reduced.

8 MR. DRAPER: Thank you.

9 MS. MEITNER: Members of the board, any
10 other questions for this witness?

11 MR. DRAPER: Not for me. Thank you.

12 MS. MEITNER: Okay.

13 For the parties, is it fair to say that
14 all testimony has been presented?

15 MR. WHETZEL: For Fuji, I have one or
16 two housekeeping matters, but we have no further
17 witnesses.

18 MS. MEITNER: Members of the board, is
19 anybody in need of a very short break or do you wish to
20 continue?

21 MS. PETERSON: I'm for continuing.

22 MR. WHITEHOUSE: I'm all for continuing.

23 MS. MEITNER: Okay. Moving along.

24 Mr. Whetzel -- all right.

1 Hearing no objection, Mr. Whetzel, your
2 housekeeping items?

3 MR. WHETZEL: Yes. It was brought to my
4 attention that during examination on Monday, I failed to
5 mark the corporate document that we discussed with the
6 witness. I would like to now mark that as Fuji Exhibit 3
7 for identification. That was the certificate of
8 incorporation for the corporate appellant.

9 I would also like to move the admission
10 into evidence of Fuji Exhibits 1 through 4.

11 MS. MEITNER: Is there any objection?

12 MR. LEGATSKI: Any objections?

13 MR. KRISTL: No objections from the
14 appellant.

15 MR. LEGATSKI: Last call for any
16 objections.

17 Then the items offered for evidence are
18 accepted.

19 (Four documents were admitted as
20 FujiFilm Exhibits 1, 2, 3, and 4.)

21 MR. WHETZEL: Thank you.

22 With that, Fuji concludes its case.

23 MR. LEGATSKI: Does anyone have any
24 further comments or questions before we consider moving

1 to a decision?

2 MS. SCOTT: Chair Legatski, will the
3 parties have an opportunity to make closing statements?

4 DNREC would like to make a closing
5 statement if that's permitted.

6 MR. LEGATSKI: That's okay with me if...

7 MS. MEITNER: I think that's an
8 appropriate procedure. I'd like to hear closing
9 statements.

10 MR. LEGATSKI: Right. All right.

11 Who's going to make the closing
12 statement on behalf of the plaintiffs?

13 MR. KRISTL: Well, I will, Your Honor.
14 Your Honor -- Chairman Legatski.

15 MR. LEGATSKI: Thanks.

16 MR. KRISTL: Well, there you go. There
17 you go.

18 Yes, I will make a closing statement on
19 behalf of the appellants.

20 First, I want to, again, thank the board
21 for its time, its attention, and its flexibility in this
22 matter. The appellants appreciate the fact that you have
23 spent the time to hear the evidence and to consider the
24 arguments that we're making.

1 The merits of this appeal really revolve
2 around what we believe are two legal errors that DNREC
3 has committed. Legal error number one is allowing NOx
4 and VOC emission reduction credits to satisfy the
5 regulatory requirement to more than offset the emissions
6 of non-NOx and non-VOC pollutants. And the second one,
7 obviously, is the failure to require any offset for
8 carbon dioxide.

9 Before I get to those specific things, I
10 just want to say what I think is obvious, which is that
11 there's really no serious issue in this appeal that the
12 offset requirements of the Coastal Zone Act regulations
13 have been triggered. Section 9.1.1 of the regulations
14 says that if a project being permitted has any negative
15 environmental impacts, the applicant must more than
16 offset them.

17 And there is plenty of evidence in the
18 record before the board that there are negative
19 environmental impacts being triggered by these emissions
20 from the plant. Table -- the table from page 15 in the
21 application sets out those different amounts of increased
22 emissions. Ms. Mensch testified that DNREC's air quality
23 division checked, and what she said was "ground truthed"
24 the numbers and found them to be accurate. The

1 Secretary's Environment Assessment, which is joint
2 Exhibit 6, sets forth those same emission numbers, and
3 calls them negative environmental impacts, and Fuji
4 proposed an offset.

5 The table from page 33 that Mr. Beringer
6 was looking at just a few minutes ago set forth the
7 things that must be offset. And certainly both the
8 environmental assessment by the Secretary and the
9 Secretary's Order, which is Joint Exhibit 1, say that
10 those emissions must be offset. So it's clear we need to
11 have offsets.

12 So the question is what do the
13 regulations require, right? Because what Fuji has
14 proposed is to use these NOx and VOC credits to take out
15 three tons of pollutants, and then to get the last
16 1.3 tons per year of pollutants through the forklift
17 project to reduce carbon monoxide emissions. And it
18 doesn't, you know -- the forklifts don't reduce all
19 carbon monoxide. It just reduces part; 1.39 tons per
20 year out of the 2.324 tons per year that will be
21 increased in emissions. Right?

22 So what Fuji is proposing to do, and
23 what DNREC allowed them to do, is to use NOx and VOCs to
24 offset nine different pollutants. And, obviously,

1 they've set carbon dioxide aside. And so the legal
2 question is do the regulations allow that? And
3 appellants answer is a resounding "no." All right. And
4 I think the key here is the language in section 9.1.5.
5 And that's a section that we cited and DNREC, Ms. Mensch
6 cited that to support the respective positions here, so
7 it's really important that we focus on that language.

8 And I'm going to ask at this time,
9 Sascha, if you could set me up so I can share my screen
10 because I want to show that language.

11 And while she's getting that set up, let
12 me share. All right. And so we have the language in
13 section 9.1.5, and we're going to look at that in a
14 minute, but I think it's important to take a historical
15 note here, a slight detour, and I apologize. But during
16 Monday's hearing, Ms. Meitner asked the question, When
17 were the regulations issued? And there was a colloquy
18 between myself and Ms. Scott.

19 The regulations were originally issued
20 in 1999. There was some kind of a change done in 2001,
21 and then there was another issuance of the regulations in
22 2019. And there was some disagreement between myself and
23 Ms. Scott about what happened in 2019. So after the
24 session on Monday, I went to the Delaware Register of

1 Regulations and found the Secretary's Order, and then
2 this board's approval of the 2019 amendments to the
3 regulations, and so I just want to show you what those
4 are.

5 What that -- what it says, you know, it
6 sets forth, if we go to the first page here, it sets
7 forth, you know -- here's the Secretary's Order. It's
8 got all the language, and then what it does is it goes
9 through the regulations and shows by crossing out old
10 language and underlining new language, it shows you the
11 changes that were made in the regulations. And what's
12 interesting is that if you go to the section that is 9.0,
13 which governs now the offsets. If you look at the
14 language here, what it shows is that section 9.1.5 was
15 completely new language added in 2019.

16 This standard about what the section
17 says did not exist before then. So all this talk about
18 sort of the history of what DNREC has done may be
19 interesting, but there's a very short period of time
20 where the actual language of 9.1.5 has been in effect.
21 And so I think that that's important as we consider that
22 language.

23 MS. MEITNER: Mr. Kristl?

24 MR. KRISTL: Yes?

1 MS. MEITNER: Could you enlarge that,
2 please?

3 MR. KRISTL: Sure. I can go larger if
4 you want.

5 MS. MEITNER: Yes, please.

6 MR. KRISTL: Okay.

7 MS. MEITNER: Thank you.

8 MR. KRISTL: All right. So we can use
9 this screen right here to talk about the language of
10 9.1.5. When you look at it, there's two sentences,
11 right? The first sentence says "If negative
12 environmental impacts involve the release of a pollutant,
13 the applicant shall attempt to offset the release by
14 eliminating or obtaining credits for the release of the
15 same pollutants if practicable." Right? So when we're
16 talking about -- it's now flashing, so hopefully I'm not
17 going to drop off here.

18 But we were talking about what the
19 sentence is saying that when the negative environmental
20 impact comes from the release of a pollutant, right, the
21 emissions that we're talking about in this case, the
22 applicant shall attempt to do one of two things. Either
23 eliminate a release of the same pollutant or obtain a
24 credit for release of the same pollutant. That's the

1 language there.

2 And you know what, in this case, Fuji's
3 actually trying to do both, right, because they are
4 eliminating some carbon monoxide by doing the forklift
5 project; that's elimination. They're obtaining credits
6 for NOx and VOC, and that helps to offset the NOx and VOC
7 emissions that are on that table on page 33 in the
8 application. So they're doing both of those things. But
9 notice that the first sentence has a qualifier. It says,
10 well, it says if it's practicable, then you eliminate or
11 obtain credits for the same pollutant.

12 What the second sentence says, though,
13 is that if it's not practicable to eliminate or obtain a
14 credit for release of the same pollutant, the applicant
15 may propose the elimination of a different pollutant that
16 affects humans, wildlife, or the environment in a way
17 that is similar to the effects of the pollutant that will
18 be released by the project.

19 So notice two things here. The first
20 clause in that second sentence repeats the language of
21 the first sentence, eliminate or obtain credits for the
22 same pollutant. But then in the second clause, it only
23 says "eliminate." It doesn't have the language of
24 obtaining credits. And so the structure here is, in the

1 first sentence, it says eliminate or obtain credits, same
2 pollutant. The second sentence, first clause, it says
3 eliminate or obtain credits for the same pollutant. But
4 in the last clause of the second sentence, it says if
5 we're talking about a different pollutant, you can only
6 eliminate a different pollutant.

7 Now, there's only one reasonable way to
8 interpret this language in 9.1.5. All right. When we're
9 talking about offsetting the same pollutant, you can
10 eliminate or obtain credits. But when we're talking
11 about a different pollutant, you can only eliminate. You
12 can't obtain credits. Now the real crux of the argument
13 here is that both Fuji and DNREC have said, Well, wait a
14 minute. Eliminate and obtain credit mean the same thing.
15 And so when we obtain a credit, we're really eliminating
16 in the second part of that second sentence. And the
17 justification is sort of this idea of, well, if there's
18 an elimination, you know, in order to create a credit,
19 there was some reduction in that pollutant someplace
20 else.

21 Now, here's the problem with that.
22 There's really three, but the biggest problem is this.
23 That's inconsistent with -- that violates Delaware law
24 about how you're supposed to interpret regulations.

1 Delaware law says you interpret regulations as a
2 harmonious whole. You have to give meaning to every term
3 in the regulation. A different way of saying that is --
4 and this is -- Courts have said this, that you should not
5 adopt interpretations that render terms in the regulation
6 meaningless. Or Courts sometimes say rendering the term
7 mere surplusage.

8 If eliminate and obtain credits mean the
9 same thing, then you don't need to say them twice in the
10 first sentence or in the first clause of the second
11 sentence, right? Because, look, if they mean the same
12 thing, then how you would read the first sentence -- the
13 last part of the first sentence would be the applicant
14 shall attempt to offset the release by eliminating or
15 eliminating the same pollutant. In the first clause of
16 the second sentence, it would be the same thing. If it's
17 not practicable to eliminate or eliminate the pollutant,
18 the same pollutant. You don't -- you wouldn't say it
19 that way. One of those terms is unnecessary if they mean
20 the same thing.

21 So the point here is that they must mean
22 something different. We have to give meaning to every
23 term, so if elimination and obtaining credits both have
24 meanings, they mean something different. So when we get

1 to the second sentence and it says your only option with
2 a different pollutant is to eliminate, you can't do it by
3 obtaining a credit. You have to eliminate it yourself.
4 Okay. And that's the fundamental legal problem with the
5 position that's being advocated here, right?

6 Proper regulatory interpretation
7 requires they mean different things, and here, they don't
8 if you're going to say they mean the same, right? That
9 just violates the rules, and that's the primary thing
10 here. So what does that mean? Well, you've got to,
11 then, eliminate, right? If you want to use a different
12 pollutant, you've got to propose the elimination of a
13 different pollutant. And what does elimination mean? It
14 means, like Fuji did with the forklifts, you go out and
15 you find some project yourself and cause an elimination.

16 You know, a second problem with relying
17 on the idea of, well, we'll just buy some credits because
18 somebody eliminated it somewhere else, right -- well,
19 that elimination has already occurred. You can't propose
20 an elimination that's already happened because it's
21 happened. Proposing an elimination by its very language
22 suggests that it's something new, like don't have five
23 propane driven forklifts, right?

24 That's the problem here. That's the

1 fundamental problem. To give 9.1.5 some meaning is that
2 you've got to treat those as different. And as soon as
3 you treat them as different, obtaining a credit for a
4 different pollutant is not satisfying the requirement of
5 the second sentence of 9.1.5.

6 Now, the other defense that's been
7 offered is this notion that, well, DNREC's been doing
8 this for a while, right? They've been using -- they've
9 been allowing the use of emission reduction credits.
10 Now, we don't know what that is under the 2019 version,
11 right? We have -- we don't have dates. All the stuff
12 that we heard about were projects that occurred many
13 years ago. But whatever the timing, all right, the fact
14 that DNREC has been saying, well, we'll use credits
15 doesn't make it right. DNREC has to follow the
16 regulations. And the regulations, as you can see on the
17 screen, say elimination only when we're talking about a
18 different pollutant.

19 I struggled for the last week and a half
20 to come up -- what's the -- what's the best analogy to
21 use here? All right. And I think the analogy here is
22 simply this. If you drive 95 miles an hour on Route 1
23 ten times, that doesn't change the speed limit. If you
24 get caught, it's not a defense to say, But I've done it

1 ten times before. You've got to follow what the law
2 requires.

3 What the law requires here is
4 elimination, not obtaining credits. And so the approach
5 here that DNREC took is simply wrong, and it's not
6 entitled to any deference when they aren't applying the
7 regulations that are written. And so that's the problem
8 with using NOx and VOCs to offset everything else because
9 the regulation just doesn't allow it.

10 Our second point is about carbon
11 dioxide. All right. Again, there's no dispute. Carbon
12 dioxide has negative environmental impacts. Appellants'
13 Exhibits 1 through 5 show you that. DNREC itself has
14 said there are bad effects from the emission of
15 greenhouse gases and carbon dioxide. Ms. Mensch admitted
16 repeatedly during her testimony that greenhouse gases and
17 CO2 have negative environmental impacts. Under the plain
18 language of 9.1.1, those impacts have to be offset. And
19 there's nothing in the regulations that says there's an
20 exception for carbon dioxide.

21 Regulations that were rewritten
22 substantively in 1999 -- or rather in 2019, there's no
23 exception for carbon dioxide. There's no exception which
24 says, you know what, if the environmental impact is

1 really big, you don't have to offset. There's simply
2 nothing there. It says any negative environmental impact
3 needs to be offset. And Ms. Mensch admitted, and
4 Mr. Beringer supports, DNREC doesn't require anything to
5 be done to offset CO2 emissions. The justification
6 offered by Ms. Mensch is, well, you know what, it has
7 such a big impact, that if we actually required some
8 offsetting, well, that would stop business from doing
9 things, and, you know, we have to balance things under
10 the Coastal Zone Act.

11 Well, Ms. Mensch is partially correct
12 that section 7001 of the Coastal Zone Act, the purpose
13 section of the act does talk about balancing two
14 interests. On the one hand, there's the interest in the
15 declared public policy of the State to encourage the
16 introduction of new industry into Delaware. And on the
17 other hand is the interest in the protection of the
18 environment, natural beauty, and recreation potential of
19 the state. Those are the two policies that need to be
20 balanced.

21 The problem is, is that when you don't
22 require any kind of effort to offset the negative
23 environmental impacts, there's no balancing. It's all
24 business and nothing goes on the environmental side of

1 the ledger. So that's not balancing to say, well, we're
2 just going to avoid it altogether, and that's not what
3 the regulation requires, right?

4 Now, Ms. Mensch stated several times
5 that -- how to treat carbon dioxide, that's a big issue.
6 It needs attention. It needs some policy change. You
7 know, it needs some focus. And so this board has the
8 opportunity to say, Time for DNREC to get focused. If
9 you say that they erred by failing to require any kind of
10 offset for CO2s, then all you're doing is allowing them
11 to continue to not confront that issue. It's
12 inconsistent with what the reg requirement requires, and
13 it's inconsistent with what at least I viewed as sort of
14 a plea that something needs to be done to address this.

15 You can send a message. You can tell
16 DNREC time to deal with carbon dioxide by requiring them
17 to create some offset approach. Here, they had none in
18 violation of what 9.1.1 requires, and so that's the
19 second legal issue.

20 Last thing: remedy. Right? Now, I said
21 in the prehearing filing that I had -- you have the
22 choice of denying or you have the choice of modifying.
23 If you modify it, you can say, listen, offset these
24 pollutants. The disadvantage of doing that, you're not

1 specifying what the offsets would be, right? If you deny
2 the permit, Fuji and DNREC can take another stab at it,
3 this time, getting the offsets right. And then those
4 correct offsets could be built into a new permit.

5 What's important here is that the
6 regulations be followed, and they weren't. And that's
7 why the appellants believe that you should deny the
8 permit. Modify it if you want to, but deny, we think, is
9 the preferable way to go so that attention can be paid to
10 the regulations that were issued by this board, and we
11 can have a process that moves forward consistent with
12 what the act seeks and requires.

13 Thank you.

14 I'll stop sharing the screen.

15 MR. LEGATSKI: Any questions for
16 Mr. Kristl before we move on?

17 MS. MEITNER: No.

18 MR. LEGATSKI: Then should we let Fuji
19 speak further -- rebut?

20 MS. MEITNER: Mr. Chair, I don't know,
21 but maybe DNREC would want to go next.

22 MR. WHETZEL: That was going to be my
23 suggestion, respectfully.

24 MR. MALONEY: That's the way we've been

1 doing it throughout, so I would -- I would also suggest
2 that this is an appropriate time for DNREC's closing
3 statement.

4 MR. LEGATSKI: Okay, thanks for the --
5 for correcting me on that. Let's go with DNREC's
6 witness.

7 MS. SCOTT: Good morning, Chair
8 Legatski, members of the board, Mr. Maloney. And DNREC
9 also would like to thank you for your time and attention
10 to this matter.

11 This application, this permit is related
12 to FujiFilm's proposal -- proposed project at its
13 existing manufacturing facility on Cherry Lane in New
14 Castle. FujiFilm applied for a Coastal Zone Permit to
15 expand its existing manufacturing operation within the
16 footprint of the buildings already onsite. The project
17 did not require additional buildings to be constructed.

18 And we're here today because appellants
19 are appealing FujiFilm's Coastal Zone Permit. The
20 appellants did not bring this appeal because they oppose
21 FujiFilm's project, which they've stated in their papers,
22 and Ms. Swain also testified the same. Appellants
23 brought this appeal to make legal arguments about the
24 application of the Coastal Zone Regulations to the

1 department's permit decision.

2 And, specifically, appellants' challenge
3 to FujiFilm's offset proposal are limited on two grounds,
4 as Mr. Kristl has stated. To quote their papers, the
5 Secretary -- the first argument they make is that the
6 Secretary and DNREC improperly issued the Coastal Zone
7 Act Permit because emission credits for one pollutant
8 cannot be used to offset another pollutant. And they
9 argue that section 9.1.5 does not recognize or allow the
10 use of a credit for one pollutant to offset the negative
11 environmental impacts from emissions from -- of a
12 different pollutant.

13 They argue that Fuji cannot use emission
14 reduction credits, ERCs, for NOx and VOCs to offset the
15 emissions of carbon monoxide, lead, nitrous oxide,
16 particulate matter, sulfur dioxide, and total organic
17 compounds, and methane. Therefore, they argue that Fuji
18 must either obtain credits for those specific
19 contaminants or eliminate other sources of emissions of
20 those specific pollutants -- oh, or eliminate some
21 different pollutant. The Secretary -- or eliminate.

22 The Secretary -- the second point or
23 argument that the appellants make is that the Secretary
24 and DNREC improperly issued the Coastal Zone Permit

1 because there's no offset for carbon dioxide emissions.
2 And they argue that carbon dioxide should have been
3 determined to be a negative environmental impact because
4 carbon monoxide is a greenhouse gas that contributes to
5 climate change, and appellants presentation here is
6 limited to those two arguments.

7 Appellants here bear the burden of
8 proof. The Delaware Supreme Court has determined that
9 when making factual determinations, the board shall take
10 due account of the experience and specialized competence
11 of the agency and the purposes of the basic law under
12 which the agency has acted. The board must consider
13 whether there's substantial evidence on the record before
14 the board.

15 The regulations here at issue were
16 promulgated by DNREC and approved by this board under the
17 authority vested by the General Assembly in Title VII,
18 section 7005. The Delaware Supreme Court has also held
19 that an administrative agency's interpretation of its
20 regulations are entitled to deference. And an
21 administrative agency's interpretations of its
22 regulations are presumptively correct. And that the
23 board shall give deference to an administrative agency's
24 construction of its own rules in recognition of its

1 expertise in any given -- in its given field. And that
2 the board cannot reverse an agency's interpretation of
3 its own regulations unless that interpretation is clearly
4 wrong.

5 It's DNREC's position that the
6 appellants have not satisfied their burden of proving
7 that DNREC's interpretation of its regulations regarding
8 the offset proposal requirements for a Coastal Zone Act
9 Permit was clearly wrong.

10 And the board has ruled that Ms. Swain
11 has standing to bring her claim, but that decision is not
12 dispositive. Ultimately, the appellants must prove the
13 merits of their case. And here, again, as I've said,
14 they're limited to the two arguments that they've raised.
15 The first one being related to the offset proposal
16 requirements found in section 9.1 of the regulations,
17 specifically 9.1.5 are directly relevant to the
18 appellants' arguments -- for their first argument.

19 Appellants focus on -- and I'll just
20 restate what that argument is, that the Secretary and
21 DNREC improperly issued the Coastal Zone Act Permit
22 because emission credits for one pollutant cannot be used
23 to offset another pollutant. Appellants' focus on
24 section 9.1.5 can argue that it does not recognize or

1 allow the use of a credit for one pollutant to offset the
2 negative environmental impacts from emissions of a
3 different pollutant. They argue here that Fuji can't use
4 ERCs obtained for NOx and VOCs to offset the emissions of
5 other contaminants.

6 And in Mr. Kristl's closing, he showed
7 the board the strike-out version of the regulations.
8 Mr. Kristl is asking the board to substitute his
9 interpretation of the regulations for DNREC's
10 interpretation of the regulations, and that is not what
11 the law allows. The law requires that the board give
12 deference to DNREC's interpretations of its own
13 regulations. Mr. Kristl's suggestion that the board
14 defer to his interpretation as a fact -- as a fact would
15 be an error of law. And DNREC maintains that their
16 interpretation of section 9.1.5 is correct. And 9.1.5
17 must be read in conjunction with the section 9.1 as a
18 whole.

19 And that section as a whole makes it
20 clear that its purpose is to offset the negative
21 environmental impacts of a project. With the 9.1.1, I
22 quote, "Offset projects shall more than offset the
23 negative environmental impacts associated with the
24 proposed project. The applicant shall propose an offset

1 project that is clearly and demonstrably more beneficial
2 to the environment in Delaware than the harm done by the
3 negative environmental impacts associated with the
4 project."

5 This distinction is important as
6 Ms. Swain testified that she did not, in fact, know if
7 any of the pollutants would reach her house or the
8 Collins Park neighborhood in quantities that would be
9 harmful to health. That is, whether there would or would
10 not be a negative impact as distinct from emissions.
11 Read in its entirety, section 9.1 is clear that
12 appellants' -- applicant's proposal, Fuji's proposal, and
13 the offset proposal that DNREC approves needs to focus on
14 ensuring that a project's overall benefits to Delaware's
15 environment are greater than its negative environmental
16 impacts, not as appellants here assert, engage in a
17 formulaic pollutant by pollutant measurement.

18 Any offset proposal must be measured
19 against all of the factors identified in section 9.1, not
20 just to focus on pollutant by pollutant review urged by
21 appellants. Thus "Any project," and I quote 9.1.4,
22 "shall be well defined and contain measurable goals or
23 accomplishments which can be verified." And in 9.1.7,
24 offsets can be at another location other than the project

1 site, but, and I quote, "only if the applicant
2 demonstrates to the satisfaction of the department that
3 it is not feasible to execute the offset on the project
4 site."

5 At least two of the other subsections of
6 9.1 -- 9.0 are at odds with appellants' interpretation of
7 9.1.5. Specifically, 9.1.2 provides that, quote,
8 "Applicants who have undertaken past voluntarily
9 improvements may be required to provide less of an offset
10 than applicants without a similar record of past such
11 events." And here, appellants' interpretation of a
12 formulaic pollutant by pollutant approach would be
13 inconsistent with the possibility of a lesser offset
14 requirement that is allowed by 9.1.2.

15 And, similarly, in section 9.1.6, which
16 allows an applicant to, and I quote, "Propose an offset
17 project that affects a different environmental medium
18 from that which will receive negative impacts," end
19 quote, but only if the department determines that it was
20 not feasible to achieve an offset in the same medium.
21 And, again, that flexibility allowed by 9.1.6 is
22 inconsistent with the interpretation -- with appellants'
23 interpretation of 9.1.5.

24 And Ms. Swain's testimony urged an even

1 more restrictive approach. Ms. Swain testified that
2 offsets or credits should not be allowed at all and she
3 wanted no increase in emissions whatsoever. And
4 Mr. Kristl, in his cross of Fuji's consultant, attempted
5 to discredit the ERC program by questioning the dates
6 that certain facilities closed, or highlighting the dates
7 that certain facilities closed. But Mr. Kristl
8 disregards the fact that the emissions savings from the
9 closures of those plants don't end when the plants are
10 closed. Those emissions savings are continuous, and
11 every year that the plants are closed, the emissions from
12 those plants are savings. The regulations which DNREC
13 promulgated, and this board approved, allowed ERCs to be
14 used to offset negative environmental impacts.

15 And on Monday, you heard testimony from
16 Laura Mensch, the principal planner of the Coastal Zone
17 Act Program in DNREC's Division of Climate, Coastal and
18 Energy. And Ms. Mensch testified that -- testified about
19 the extensive conversations that DNREC had with the
20 applicant about the offset proposal. She also testified
21 about the changes that DNREC required the applicant to
22 make to their original offset proposals, including
23 changes that would ensure that the benefits from the --
24 from the carbon monoxide reductions were onsite and,

1 thus, would most -- be most beneficial to the neighboring
2 communities.

3 Ms. Mensch also testified that the only
4 emissions credits available are for NOx and VOCs. Could
5 there be other pollutants eliminated in association with
6 activities being in involved with the ERC generation?
7 Yes, but they aren't recorded for purposes of buying and
8 selling credits, unfortunately. And, here, DNREC
9 determined that the offsets for NOx and VOCs as ozone
10 precursors were appropriate to offset the pollutants that
11 were impractical to eliminate or offset in kind.

12 And as you heard on Monday, all of the
13 pollutants that appellants complain about are the result
14 of combustion from the boilers for this project. And the
15 ERCs that Fuji would purchase here would likely be
16 similarly related to reductions or eliminations of a
17 combustion process. Thus all -- although only NOx and
18 VOCs are recorded as credits, those reduced or eliminated
19 combustion processes would also have eliminated many of
20 the other pollutants that appellants are concerned with.

21 And DNREC's interpretation of its
22 regulations, 9.1.5, that offset credits for one pollutant
23 can be used to offset another pollutant when an in kind
24 offset or elimination is impracticable is entitled to

1 deference. And DNREC's interpretation here is not wrong.
2 In fact, it would be -- if you follow appellants' logic,
3 then their interpretation is contrary to -- it would be
4 illogical to read that 9.1.5 would prescribe that
5 approach.

6 Appellants' interpretation is contrary
7 to the stated purpose of the Coastal Zone Act in section
8 7001, which is to balance the declared public policy of
9 the State, to encourage the introduction of new industry
10 to Delaware with the State's interest in protecting the
11 environment, natural beauty, and recreation potential of
12 the state.

13 Appellants' interpretation also
14 disregards regulation 9.1, which I quote, offset -- which
15 is the offset proposal requirement, which requires a
16 proposal to offset any negative environmental impacts
17 that may result from a project that benefits Delaware.

18 And appellants' last argument is that
19 the Secretary and DNREC improperly issued the Coastal
20 Zone Act Permit because there is no offset for carbon
21 dioxide emissions. Carbon dioxide, they argue, should
22 have been determined to be a negative environmental -- to
23 be a pollutant because carbon dioxide is a greenhouse gas
24 that contributes to climate change.

1 Again, DNREC's interpretation of the
2 regulations here is entitled to deference and is not
3 clearly wrong. And Mr. Kristl makes much of the fact
4 that the regulations do not exempt carbon dioxide. What
5 he ignores, however, is that the regulations do not
6 define pollutants by specific contaminants. But more
7 importantly, there is no definition of negative
8 environmental impacts. And DNREC, here, is entitled to
9 deference in determining how a project -- what the
10 negative environmental impacts for a project are when
11 determining, you know -- assessing the -- an offset
12 proposal.

13 And on Monday, Ms. Mensch testified that
14 the CZA, the Coastal Zone Program has historically not
15 considered carbon dioxide an emission that needed to be
16 offset. Ms. Mensch also testified that the approach for
17 FujiFilm's permit is consistent with past practice. That
18 when the Coastal Zone Act statute was passed in 1971,
19 carbon dioxide emissions and climate change were not yet
20 a widely held concern and clearly were not contemplated
21 by the Coastal Zone Act.

22 Similarly, when the Coastal Zone Act
23 regulations were first adopted in 1999, climate change
24 and carbon dioxide emissions were not the concern they

1 are now, nor were they considered in the development of
2 the offset requirements.

3 Ms. Mensch also testified that the
4 Coastal Zone Program relies on other programs within
5 DNREC to be the subject matter experts. For example, the
6 program, the Coastal Zone Program consulted with the
7 Division of Water to discuss stormwater impacts. They
8 consulted with the Division of Water Stewardship. They
9 considered land erosion. They consulted with the
10 Division of Solid and Hazardous Waste to determine if
11 there were any -- some hazardous waste impacts related
12 with this project. And they consulted with the Division
13 of Fish and Wildlife to ask if there were any concerns to
14 threatened or endangered species. They also consulted
15 with the Division of Water related to impacts to wetlands
16 or habitat for flora and fauna. And all of these
17 consultations are documented in the hearing officer's
18 report, which is at Joint Exhibit 3.

19 And, finally, the Division of Air
20 Quality was consulted on the air emissions, including the
21 carbon dioxide emissions. At this time, the Division of
22 Air Quality doesn't require carbon dioxide offsets, which
23 is consistent with the historic practice of the Coastal
24 Zone Program. And this approach that the program takes

1 to consult with, you know, their counterparts within the
2 division, within the department is really a belt and
3 suspenders approach. Not only are the other programs
4 consulted as the subject matter experts, but, you know,
5 if those programs, those other divisions identified a
6 concern, then they would raise those concerns separately
7 and take the appropriate action.

8 For example, if the Division of Air
9 Quality, you know, when consulted about this project
10 reviewed the air-related concerns, they would have
11 then -- they would have determined -- they did determine
12 that there was no air quality permit required because the
13 amount of emissions did not require an air quality
14 permit. So to the extent that Air Quality is not only
15 acting as the expert -- as subject matter experts for the
16 Coastal Zone Act interpretation, it also allows those
17 other programs to take independent action if they
18 determine, after reviewing the materials, that, oh, Fuji
19 needed an air quality permit too.

20 When in fact that -- so, you know, that,
21 again, sort of supports this multilayered review process.
22 And, again, Air Quality did not -- reviewed the materials
23 and determined that an Air Quality Permit was not
24 required because the amount of emissions didn't warrant a

1 permit.

2 And Ms. Mensch testified that the ERC
3 program doesn't record carbon dioxide emission
4 reductions. But, in fact, those reductions exist.
5 Any ERC is likely to come from reductions or elimination
6 of a combustion process. So those credits would have
7 coincided with the significant reduction of carbon
8 dioxide emissions, as well as the emissions from
9 combustion such as many of those complained about in
10 appellants' first argument. And if those reductions were
11 calculated, those reductions -- Ms. Mensch testified that
12 they would -- those reductions would be huge. So the ERC
13 program is an appropriate and beneficial way to address
14 negative environmental impacts.

15 In fact, Mr. Beringer testified just
16 earlier that one NOx credit necessarily includes
17 2,400 tons of carbon dioxide. So, in addition to the
18 latent carbon dioxide emissions reductions from ERC
19 purchases, Ms. Mensch testified that DNREC was aware of
20 other known, but not documented, carbon dioxide savings
21 from eliminating the cross-Atlantic shipping of raw
22 ingredients from Scotland, and truck traffic from New
23 York in taking those shipments that would land in New
24 York, and then have to travel to New Castle by truck.

1 Also, the carbon dioxide emissions would
2 be included in those eliminated through the replacement
3 of the five propane operated forklifts with electrical
4 equipment. The department's interpretation of the
5 regulations, which focuses on offsetting the negative
6 environmental impacts of a project is consistent with
7 both the language and the intent of the regulations.

8 Appellants seek to focus on pollutants
9 rather than negative environmental impacts, which is not
10 the intent of the regulations. The department's
11 interpretation of that -- that an applicant may offset
12 pollutants with credits for the release of another
13 pollutant with an in kind offset is not practicable is
14 also entitled to deference and consistent with the
15 regulations. And the department's interpretation is not
16 clearly wrong.

17 The department's interpretation of the
18 regulations which does not mandate an offset for any
19 specific pollutant, including carbon dioxide, is also
20 entitled to deference and the department's interpretation
21 is not clearly wrong.

22 The board must also consider the purpose
23 of the basic law under which the department has acted.
24 And, here, that basic law is the Coastal Zone Regulations

1 which require offsets to address the overall negative
2 impact -- environmental impacts of a project. The offset
3 provisions of the regulations do not require that myopic
4 interpretation that appellants demand, that appellants
5 would not allow the use of offset credits if the credits
6 are for the same pollutant emitted.

7 And that interpretation would lead to an
8 illogical result. A pollutant that's impact -- that is
9 impractical to offset through elimination or credits
10 would be stuck in regulatory limbo. This is directly at
11 odds with the explicit statutory purpose of the Coastal
12 Zone Act, namely to balance the declared public policy of
13 the State to encourage the introduction of new industry
14 into Delaware with the protection of the environment,
15 natural beauty, and recreation potential of the state.
16 Again, that's from section 7001.

17 The intent of the offset proposal is to
18 give -- is to address negative environmental impacts. An
19 interpretation of the regulation that does not allow a
20 pollutant to be offset by credits from another pollutant
21 when offsetting the original pollutant is impracticable,
22 is contrary to the intent of the regulations, and is
23 clearly wrong. Likewise, the department's interpretation
24 that the regulations do not require offsets by specific

1 contaminates is not clearly wrong. Therefore, the
2 department's decision that the offset proposal did not
3 have to include carbon dioxide was entitled to deference
4 and should not be disturbed.

5 The department respectfully requests
6 that the board uphold its decision regarding the offset
7 proposal, and thereby uphold its decision to grant
8 FujiFilm a Coastal Zone Permit.

9 Thank you.

10 MR. LEGATSKI: Any questions? Any
11 follow-up for this witness?

12 MS. MEITNER: No.

13 MR. LEGATSKI: Then is it appropriate
14 for the board to move to a vote?

15 MS. MEITNER: I think we still need to
16 hear from Fuji's counsel.

17 MR. LEGATSKI: I'm sorry. I must
18 be too -- I had a really long day yesterday. I'm still a
19 little fuzzy.

20 MS. MEITNER: And I'm not sure --

21 MR. LEGATSKI: Okay.

22 MS. MEITNER: I'm not sure, Mr. Chair,
23 but I think the public is allowed to comment before the
24 vote. I mean, we could check with Mr. Maloney on that.

1 MR. LEGATSKI: I respectfully agree with
2 you then. I apologize for getting ahead of things.

3 MR. WHETZEL: Mr. Chairman, members of
4 the board, first I thank you for your careful attention
5 and consideration to these proceedings. I know it's been
6 a long process. I also recognize that I may be one of
7 the last things standing between you and deciding this
8 case, and I promise I will be as brief and concise as I
9 can be consistent with my obligation to present the
10 points that are keenly important to Fuji in connection
11 with this matter.

12 Fuji's a good company, as you've heard,
13 has a compelling project, and it followed all of the
14 rules as DNREC has consistently applied them. Under the
15 Coastal Zone Act, DNREC is vested with the responsibility
16 to assess the environmental impact of a project in
17 addition to a number of other factors, and DNREC is
18 charged with offsetting what it determines to be the
19 negative environmental impact of that project.

20 That is precisely what DNREC has done in
21 this case. That's their job. They made a fact-specific
22 determination based on their technical assessment of this
23 project as to what the impact was, what was required to
24 offset it, and that determination is entitled to

1 deference, and we would respectfully submit should be
2 affirmed.

3 Now, during the course of the testimony,
4 you heard about Fuji, you heard Ms. Toledo testify about
5 the company, its environmental policy, its commitment to
6 environmental improvement, and some of the voluntary
7 environmental initiatives that it's undertaken not
8 compelled by any law or regulation. And I respectfully
9 submit that's precisely the kind of company that we
10 should encourage to move forward with projects in
11 Delaware.

12 And as for the specific project, I don't
13 think there's any dispute that Fuji has a compelling
14 project. The merits speak for themselves. There's no
15 real dispute about that, I don't believe. We'll source
16 local -- we'll source raw material manufacturing locally.
17 We'll eliminate significant oceanic and road
18 transportation from Scotland to Delaware. And as
19 Ms. Toledo told you, there are significant economic
20 advantages for Delaware.

21 The environmental impacts of this
22 project are minimal, and they've been more than offset,
23 as I'll discuss in a moment, and this is exactly the type
24 of project, we submit with respect, that Delaware should

1 welcome and encourage.

2 We've also heard that the Fuji site is
3 one that has historically been used for industrial
4 activity. In fact, going back to times long before the
5 Coastal Zone Act, as the application makes clear, the
6 site -- the Fuji site is on a piece of the historical ICI
7 Atlas Point site. It has a fascinating history, but I
8 won't -- I won't belabor that before the board. Suffice
9 it to say, there have been extensive site improvements
10 since that time.

11 Fuji brings clean and desirable
12 manufacturing activity to what was once a much more
13 intensively and impactfully used heavy industry site. As
14 the board is aware, the recent amendments to the Coastal
15 Zone Act were for the express purpose of revitalizing
16 these sites. And as the board is also aware, that is a
17 significant interest as articulated by the State and its
18 senior leadership, including the Governor.

19 Fuji followed all of the rules here.
20 Fuji met and consulted with DNREC. It submitted a
21 detailed and thorough application. It carefully
22 calculated all of the emissions from its boilers and its
23 natural gas combustion sources. As you've heard, those
24 boilers are so small and the emissions are so low, they

1 don't even require a permit. I note that those
2 regulatory thresholds are set to protect human health.
3 And the fact that these units are below those thresholds
4 by itself is compelling evidence of a lack of any
5 significant negative environmental impact.

6 As I said, Fuji presented detailed
7 emissions calculations, and we've been through the
8 table -- you know, the table on page 33 of the
9 application. The board is now, you know, well familiar
10 with that document. And we explained, Ms. Mensch
11 explained, and Mr. Beringer explained how the offset
12 proposal, in fact, meets the DNREC requirements.

13 Significantly, Mr. Beringer explained to
14 you how the impact of this project is really from
15 combustion and the by-products or co-pollutants that come
16 from combustion of natural gas, primarily NOx and VOCs,
17 and also other substances. Those constituents are
18 converted to heat and energy and the co-pollutants are
19 produced.

20 And as Mr. Beringer explained and as
21 Ms. Meitner and Ms. Peterson, I think, helpfully
22 clarified with Mr. Beringer, when natural gas combustion
23 is reduced, all of the resulting co-pollutant emissions
24 are, in fact, reduced. And, in fact, the Fuji offset

1 proposal does address each pollutant via the reductions
2 from the forklifts and the credits.

3 You've heard that the forklifts were
4 specifically included to address CO, but they also
5 address and reduce other pollutants. You've heard that
6 the NOx credits in particular reflect actual reduction in
7 emissions and actual offsets of each and every credit in
8 the table. And you'll recall, and I know it was tedious,
9 but I had Mr. Beringer go through the table on page 33,
10 and I asked him about each and every pollutant on that
11 table, and he says, Yes, those are addressed by NOx
12 emissions reduction credits.

13 It's no accident that DNREC runs its
14 emission banking and trading program based on NOx and
15 VOCs as Ms. Mensch explained to you and as Mr. Beringer
16 also discussed. Those are, in fact, the ozone precursor
17 compounds that are appropriate to consider for air
18 quality regulation generally. And more importantly, as
19 you've heard today, NOx in particular as a surrogate for
20 the co-pollutants and emissions that arise from natural
21 gas combustion.

22 Now, Mr. Kristl would have you focus on
23 his interpretation or appellants' interpretation of
24 section 9.1.5 of the regulations, and I won't repeat all

1 of the arguments that Ms. Scott has made as to why that's
2 the wrong interpretation. The board should, as Ms. Scott
3 indicated, defer to the longstanding regulatory
4 interpretation that DNREC has given to the regulation
5 that it promulgated. And as Mr. Beringer testified,
6 DNREC has applied a consistent approach to applications
7 under the Coastal Zone for a long time. And that by
8 itself is strong evidence of the correctness of DNREC's
9 interpretation.

10 I'd also note that the appellants
11 haven't brought any technical witnesses or presented any
12 technical evidence to you as to any actual negative
13 environmental impact from this project. That is a
14 threshold determination that is vested in the Secretary.
15 And, respectfully, the only evidence before this board is
16 the Secretary's determination on that issue backed up by
17 all of the air quality engineers and other subject matter
18 experts in the department and Mr. Beringer's testimony,
19 which explained to you, I hope, how the department made
20 that determination and why that determination just makes
21 sense.

22 Appellants really focus on the wrong
23 provision of the regulatory language. Mr. Kristl spent a
24 lot of time talking about the second and third sentences

1 of that regulatory provision. But if you look at the
2 first sentence of that regulatory provision, it talks
3 about elimination, reduction, or credits for each
4 pollutant. That's exactly what Fuji did with its offset
5 proposal as Mr. Beringer explained with reference to the
6 table on page 33.

7 Now I want to address carbon dioxide
8 because that's clearly a concern of the board's and it's
9 a concern, you know, well beyond the board. The board
10 has heard a lot about carbon dioxide, and may
11 legitimately be concerned about carbon dioxide. But
12 first and foremost, in the context of this project,
13 carbon dioxide has been offset by virtue of the NOx
14 reduction credits and the propane combustion elimination,
15 and there is nothing in the record before the board to
16 the contrary, period.

17 There is also nothing in the record
18 before the board that the very small emissions from this
19 project, CO2 or otherwise, and specifically CO2, would
20 cause or create a negative environmental impact in the
21 coastal zone or anywhere else.

22 Now, you may believe that -- and,
23 actually, let me -- let me digress there. I know the
24 ratios and the relationship between NOx and CO2 from

1 table 23 and from natural gas combustion, let's face it,
2 that's a little bit technically challenging, and that's
3 not easy or intuitive to understand necessarily. I
4 think, as Ms. Meitner clarified in her questions with
5 Mr. Beringer, that is something that air quality
6 engineers understand and they consider and they speak
7 about in their -- in their technical language.

8 I'm going to try and put it more simply
9 if I can. When natural gas is combusted, there's a
10 certain amount of NOx that's released. There's a certain
11 amount of CO2 that's released, and there's a ratio there,
12 and it's not 1 for 1. In fact, we've heard that for a
13 ton of NOx, there's a significantly greater amount of CO2
14 that's released, and accordingly, that is also true. If
15 the same amount of NOx is reduced, a much, much larger
16 amount, same ratio, of CO2 is reduced, and that's how the
17 offsets work.

18 Stoichiometric -- stoichiometry is a
19 word that I remember from high school chemistry, and
20 that's a little challenging. But I think in the end,
21 what it really distills down to, is the ratio between NOx
22 emissions and carbon dioxide emissions. And as
23 Mr. Beringer explained, the CO2 really has been offset
24 here.

1 But, you know, the board may think that
2 DNREC should do more on CO2, and that's certainly what
3 appellants are advocating. I'd simply remind the board
4 that it sits today in the capacity of a permit-reviewing
5 body reviewing a DNREC permit determination on the merits
6 and on the specific facts of this project, the offsets,
7 the determinations made by the Secretary, and the
8 evidence that's presented by the board. If there's more
9 to be done on CO2, respectfully, that is a legislative or
10 a regulatory function that should be vested in the bodies
11 that are best suited to do that based on the best
12 available science, full and robust dialogue from all
13 stakeholders, and not, respectfully, by this board acting
14 in the capacity in which it sits today.

15 Fuji's permit shouldn't be held hostage
16 given the de minimis nature of the emissions and the
17 compelling offset proposal that it's provided while a
18 broader discussion and debate about CO2 may play out in
19 the agencies or the legislature or elsewhere.

20 And Mr. Kristl talked a lot about
21 messages. The board has ample opportunity to send
22 messages to DNREC about what it wants to do and what it
23 thinks should be done or to other bodies in the State of
24 Delaware. Again, Fuji's permit appeal is not, with

1 respect, an appropriate vehicle to send that message or
2 even the best vehicle to send that message.

3 If we want to talk about messages, the
4 message that's sent to Fuji and other companies like that
5 who followed all the rules, who tried to do the right
6 thing, who bent over backwards to come up with a
7 compelling offset proposal, for that kind of a permit to
8 be denied, that sends a very, very negative message to
9 companies like that. And with respect, I'd encourage the
10 board to be very careful about not sending such a
11 message.

12 So as I've said, and you've heard,
13 Fuji's invested significant time and resources in its
14 project. It followed the rules. It's not fair to change
15 the rules in midstream. It's not fair to hold Fuji to a
16 standard that, frankly, hasn't ever been applied to any
17 Coastal Zone Permit applicant before it. Fuji has
18 established and, indeed, vested rights in its plant and
19 in its project, and to change the rules midstream, I
20 suggest with all respect, raises some fundamental
21 questions of fairness and even due process.

22 As Ms. Scott articulated -- and I'll try
23 not to be redundant here -- it is appellants' burden to
24 prove their case on the merits. And under the applicable

1 legal standards, the DNREC decision should be affirmed.
2 It was supported by substantial evidence. It is here.
3 And the board should defer to the specialized competence
4 and technical expertise of DNREC.

5 Secretary Garvin made a decision here
6 based on his review, based on a review of the DNREC
7 technical staff, based on the detailed assessment of the
8 permit application, and based on a hearing officer's
9 report. And DNREC and Ms. Mensch have talked to you
10 about the thorough and careful review they conducted of
11 the application and the offset proposal. And you've also
12 heard from Mr. Beringer and the Fuji witnesses to much of
13 the same effect. You've heard from the DNREC people.
14 You've heard from DNREC technical staff. You've heard
15 from Mr. Beringer.

16 With respect to appellants, all you've
17 really heard is lawyer argument and not competent
18 technical evidence. And indeed, even Ms. Swain
19 acknowledged in her testimony that these technical
20 evaluations should be made by DNREC. And on that point,
21 I think DNREC agrees and Fuji agrees. That's where the
22 Coastal Zone Act and the General Assembly have vested the
23 discretion to make those decisions. Secretary Garvin
24 made that decision. He got it right, and his decision

1 should be affirmed.

2 So in conclusion, Fuji comes before you
3 as the permittee, respectfully submits that it's a good
4 company with a compelling project. They followed the
5 rules. The Coastal Zone Act expressly provides the
6 policy of the State is to encourage new industry balanced
7 with environmental protection. You have before you
8 exactly the kind of project that should be allowed. You
9 even have a permit that DNREC issued after due and
10 careful consideration, and we respectfully encourage the
11 board to affirm the decision of the Secretary granting
12 the permit.

13 Thank you.

14 MR. KRISTL: Mr. Chair, can I just have
15 30 seconds? I would -- I just --

16 MR. LEGATSKI: Yeah.

17 MR. KRISTL: A couple of very short
18 points I want to make. All right.

19 Two things. Number one, Ms. Scott said,
20 you know, we're overly focused on pollutants, that
21 there's this bigger picture here. And you know what,
22 9.1.5 is specific to pollutants, right, so the language
23 there really calls for it.

24 The other thing, this whole notion of,

1 well, we haven't shown you that there's going to be some
2 kind of an impact to Ms. Swain or in the local area --
3 listen to what Ms. Scott argued and what Ms. Mensch
4 testified about. DNREC pushed really, really hard to
5 have that forklift project be part of the offset. Why?
6 Because they wanted to reduce the nearby impact of the
7 emissions. It makes no sense for DNREC to be concerned
8 about the people of Collins Park, Ms. Swain, and the
9 other people who live nearby, and insist that the
10 forklifts be done, but then on the other hand say, Well,
11 it doesn't matter. It doesn't effect those people at
12 all.

13 That is the strongest proof, probably
14 stronger than I could ever offer through an expert. I
15 think you need to take that into consideration as well,
16 and I'll stop.

17 MR. LEGATSKI: Where are we procedurally
18 given that both parties have had their -- a chance to
19 make their case?

20 MR. WHITEHOUSE: I believe there is the
21 public, Mr. Chairman.

22 MR. LEGATSKI: All right.

23 Are there members of the public present
24 who wish to testify?

1 MS. MEITNER: Mr. Chair, given time
2 constraints, I wonder if -- and there are certainly
3 numerous participants on the -- on this call at the
4 moment. The screen's showing 31 participants. But --

5 MR. LEGATSKI: Right.

6 MS. MEITNER: -- obviously, not all of
7 those participants may wish to speak. And I wonder if we
8 could determine how many participants wish to speak and
9 then perhaps impose a time limit on each participant.

10 MR. LEGATSKI: I think that's a good
11 idea.

12 Sascha, would you poll the nonmember
13 participants for whether they wish to speak or not and
14 keep a list of who those people are who say "yes"?

15 MS. MOHAMMED: Do you want me to just go
16 ahead and -- we have roughly ten attendees.

17 MR. LEGATSKI: Oh, okay.

18 MS. MOHAMMED: What's the time limit
19 that you would like me to...

20 MS. MEITNER: I think --

21 MR. LEGATSKI: I think that may depend
22 on how many people we come up with who want to -- want to
23 say something.

24 MS. MEITNER: Yeah. I agree. I don't

1 know that all the ten participants want to speak. So if
2 we knew how many want to speak, then we could figure out
3 the appropriate time.

4 MS. MOHAMMED: Okay. Hold on a moment.

5 Bill Dunn has indicated in the chat that
6 he would like to speak, so that is --

7 There is a user call-in with a phone
8 number starting with 646-354. I will unmute you. Please
9 indicate if you would like to make comment.

10 UNIDENTIFIED SPEAKER: I would not like
11 to make any comments.

12 MS. MOHAMMED: Thank you. I will unmute
13 Christian Wisniewski, and please indicate if you would
14 like to make a comment.

15 MR. WISNIEWSKI: I would not like to
16 make a comment.

17 MS. MOHAMMED: Thank you.

18 I will unmute Dora Williams. Please
19 indicate if you would like to make a comment.

20 MS. WILLIAMS: I would like to make a
21 comment, please.

22 MS. MOHAMMED: Just to confirm, you said
23 you would like to make a comment?

24 MS. WILLIAMS: I would.

1 MS. MOHAMMED: Yes. Okay, thank you.

2 I will unmute Emily Rodden. Please
3 indicate if you would like to make a comment.

4 MS. RODDEN: Yes, I would like to make a
5 comment.

6 MS. MOHAMMED: Thank you.

7 I will unmute Erik Wright. Please
8 indicate if you would like to make a comment. Erik
9 Wright? Okay, I did not get a response from Erik Wright.
10 I am moving on.

11 Kimberly Cole, I will unmute you.
12 Please indicate if you would like to make a comment.

13 MS. COLE: I will not be making
14 comment.

15 MS. MOHAMMED: Thank you.

16 Lauren McCrea, I will unmute you.
17 Please indicate if you would like to make a comment.

18 MS. MCCREA: No, I would like to -- I
19 would not like to make a comment.

20 MS. MOHAMMED: Thank you.

21 Miranda Miller, I will unmute you.
22 Please indicate if you would like to make a comment.

23 MS. MILLER: No, no comments.

24 MS. MOHAMMED: Thank you.

1 Renae Held, I will unmute you. Please
2 indicate if you would like to make a comment.

3 MS. HELD: No, I would not like to make
4 a comment.

5 MS. MOHAMMED: Thank you.

6 And the final -- Sandra Smithers, I will
7 unmute you. Please indicate if you would like to make a
8 comment.

9 MS. SMITHERS: No comment.

10 MS. MOHAMMED: Thank you. So we have a
11 total of three that I counted.

12 MS. MEITNER: That was my --

13 MR. LEGATSKI: That's what I got.

14 MS. MOHAMMED: Yeah.

15 MR. WHITEHOUSE: I would suggest,
16 Mr. Chairman, it's Jamie Whitehouse here, as we only have
17 three speakers, and the interest of time that we could
18 allow a little longer than five minutes, but I would
19 suggest no more that ten minutes per speaker.

20 MR. LEGATSKI: I was just about to
21 suggest that we go with not more than ten.

22 MR. WHITEHOUSE: Thank you.

23 MR. LEGATSKI: Given --

24 MS. MEITNER: I'll support that.

1 MR. LEGATSKI: -- the time of day.

2 MS. MOHAMMED: Okay. For the purpose of
3 time, I will share a timer if that's okay with everyone.

4 MR. LEGATSKI: Yes.

5 MS. MOHAMMED: One moment.

6 MS. MEITNER: Mr. Chair, should we just
7 proceed in the --

8 MR. LEGATSKI: Yes.

9 MS. MEITNER: -- in the manner in which
10 the parties were polled?

11 MR. LEGATSKI: That's fine with me.

12 MS. MOHAMMED: Okay. Can everyone see
13 the timer?

14 MS. MEITNER: Yes.

15 MS. PETERSON: Yes.

16 MS. MOHAMMED: Okay. I will go ahead
17 and unmute Bill Dunn. Please state your name and
18 spelling for the record.

19 MR. DUNN: My full name is William H.
20 Dunn. I am vice president of the Civic League for New
21 Castle County, and through a meeting we had last night, I
22 am authorized to speak on behalf of the organization.

23 Also notable in my testimony is the fact
24 that I worked for DuPont in research and development at

1 the Experimental Station for 31 years starting as a lab
2 technician and ending as a staff technologist in the
3 engineering division working in a group that was
4 identified as measurement systems technology, meaning
5 that we put instrumentation into processes to evaluate
6 concentration of different constituents, both in gaseous
7 form and liquid form. Although I didn't work on gaseous
8 form things, it was -- it utilizes Raman IR spectroscopy.
9 And, actually, other people in my group were responsible
10 for putting in these type of instruments into the Edge
11 Moor facility that DuPont had to evaluate what was coming
12 out of their stacks.

13 I've listened to most of the testimony.
14 I was on for probably four hours of Monday's meeting and
15 the last hour and a half of this meeting. There are many
16 things -- the focus, I believe, from Ms. Swain is her
17 interest in knowing that the community is not being
18 exposed to any more chemicals than necessary and to have
19 proper oversight and evaluation as to what is being
20 outputted by their processes.

21 I -- the way DNREC has handled these
22 type situations to this point in time is very arbitrary
23 and it's a growth, respond, and evaluation type process
24 where both in my career and my interest in the community,

1 I think a much more specific evaluation as to what they
2 are producing and what is getting released into the
3 atmosphere and how it may be impacting residential
4 communities in close proximity is very important.

5 Ms. Scott, I was listening to her
6 closing, and she talked about kind of a general
7 evaluation of the chemicals and things that are being
8 outputted. Let me tell you from career experience, not
9 being an expert, but working for experts for years, each
10 individual constituent and pollutant is very important.
11 And there are clear distinctions between every chemical
12 compound and how it's released into the atmosphere.

13 The other thing that came to mind
14 listening to arguments made at the end there, that second
15 clause that Mr. Kristl talked about, obviously, DNREC
16 participated in defining these reevaluations of how the
17 rules were written. They wrote it. They approved it,
18 and put it forward the way they wanted it written, so I
19 think that's clearly distinctive.

20 Specifically, dating back to 1962 -- has
21 taken a great deal of interest in industrial land
22 development, commercial land development, and residential
23 land development, and how these things impact the rest of
24 the existing community in New Castle County with the

1 authorization in 2017 to reutilize these industrial sites
2 along the Delaware River. Industrial operations are
3 becoming much more important, both from a standpoint of
4 how it's going to impact residential communities, how
5 it's going to impact traffic, how it's going to impact
6 the quality of life of everyone in New Castle County,
7 and, obviously, much more specifically, people in close
8 proximity.

9 I think the arguments have been made --
10 have been good ones as to what the interest of Collins
11 Park and Ms. Swain are -- and for the Industrial Control
12 Board to go back to Fuji and say, You need to apply
13 better, stricter or more accurate evaluations of what
14 you're going to put into the air because of these people
15 living so close by.

16 Something that I thought was notable and
17 I would inject here, there was a speech given by
18 President Biden on March 5th where he specifically talked
19 about the Route 9 corridor in Delaware and the
20 environmental problems that exist there. This is the
21 Industrial Control Board's opportunity to start looking
22 at what is a long-known problem and come up with
23 solutions that are appropriate for the broader public.

24 Thank you.

1 MS. MOHAMMED: Thank you, Mr. Dunn.

2 We're now going to move on to
3 Ms. Williams. Ms. Williams, please state your name and
4 spelling for the record.

5 MS. WILLIAMS: My name is Dora Williams,
6 D-O-R-A, Williams, W-I-L-L-I-A-M-S. I live along the
7 Route 9 corridor. I'm also active in the Rose Hill
8 Garden Civic Association --

9 THE COURT REPORTER: I'm sorry. This is
10 the court reporter. I cannot hear you. I apologize.

11 MS. WILLIAMS: No, I apologize. My name
12 is Dora Williams, that's, D-O-R-A, last name Williams,
13 W-I-L-L-I-A-M-S. I live along the Route 9 corridor. I
14 am active in my Rose Hill Garden Civic Association, which
15 is my community. And I'd just like to say a couple of
16 remarks on the communities of the past, which have been
17 given by our civic association president.

18 The first thing I'd like to address is
19 Mrs. Jeanette's confidence in DNREC to be able to
20 advocate on the behalf of the people, and I agree with
21 her, we do. I also agree that this board -- and I'd like
22 to thank the board and those who -- or saw what would be
23 happening at this time that the public would be able to
24 weigh in, and I appreciate this opportunity, which is my

1 next statement -- is that if, at that time, if we want to
2 call our forefathers, did not foresee that this
3 opportunity needed to exist in the rules of other things
4 that might happen and interpretation, they would not have
5 put this in place.

6 So I agree that the public -- that we
7 are here by that mandate and that because of that
8 mandate, what is being said by the public should weigh in
9 because the interjection here is to say, Wait. We don't
10 think that this process is totally community-friendly.
11 There's a couple things here that you need to look at.
12 Maybe the CO2. We know that, you know, CO2 is part of
13 the ecosystem, but we know that beyond that, it could be
14 very dangerous, and it does have a negative impact, and
15 it very well should be counted in.

16 The other thing that I'd like to say is
17 that the injection -- again, I say the interjection of
18 the public at this point in the process before the vote
19 is weighed in I think is important because it is the last
20 stop that says, you know, we're depending on the board
21 now. We're not depending on DNREC anymore. The public,
22 the community, the people are now depending on the board,
23 the last stop to say, We're, you know -- we're depending
24 on you now to make the right decision on our behalf.

1 And, again, I say this step in the process was put right
2 before the vote for a reason.

3 So I thank the board. I pray that the
4 board does the right thing, not just because it might
5 cause a little bit more work on the State's behalf, but
6 for this millennium, I mean, are we afraid? I mean, can
7 we not meet the mandate of a little more work with all
8 the technology that we have? It should be the snap of a
9 fingers. So I thank the board for its intercession.

10 Thank you for this opportunity.

11 MS. MOHAMMED: Thank you, Ms. Williams.

12 The next -- the next comment will be
13 from Ms. Rodden. Ms. Rodden, I will unmute you. Please
14 state and spell your last name for the record.

15 MS. RODDEN: Hi. My name's Emily
16 Rodden, E-M-I-L-Y, R-O-D-D-E-N. And -- yeah. Where do I
17 start?

18 A lot of things have been addressed in
19 this meeting, and I haven't been -- in this hearing, and
20 I haven't been -- I haven't been a part of it for the
21 entire time. I guess my first point would be the fact
22 that this is supposed to be a public hearing and it's
23 taking place at a time that usually isn't accessible to
24 most people who have jobs.

1 The next thing I wanted to address --
2 oh, oh, I'm a -- I'm a part of the New Castle Prevention
3 Coalition, and I don't live in the Route 9 corridor, but
4 I do know a little bit about the environmental impacts
5 that people in the Route 9 corridor are currently exposed
6 to.

7 I know that FujiFilm isn't entirely
8 responsible for those environmental impacts, those
9 pollutants, but I understand that the heavy industry in
10 the area is, and that any increase in environmental
11 pollutants to this community is going to be detrimental.
12 I mean, they're already exposed to a lot of environmental
13 pollutants and industrial pollutants from the other
14 industry in the area as well.

15 And I -- again, I haven't been a part of
16 this hearing for the entire thing, but my understanding
17 of the credits it's still vague. I -- yeah, I don't -- I
18 don't really understand how you are going to prevent
19 these pollutants from affecting these communities. It's
20 still -- I understand that in the -- in the application
21 that FujiFilm has placed, they have talked about how they
22 are going to offset these pollutants, but it's still
23 going to be an increase in pollutants towards the people
24 in these communities.

1 And on the note of -- who was speaking
2 before? I can't remember his name. But I guess the --
3 there was -- it -- it was brought up the appellants had
4 no technical evidence to provide, but I think community
5 members coming to you and saying that this isn't
6 something that they want in their community should be
7 enough evidence to you to maybe, like, reassess the
8 decision or maybe reassess your offset plan.

9 And that's honestly what I think should
10 happen. I think there should be stricter restrictions on
11 companies like this because I don't think -- any increase
12 in pollutants is harmful. I mean, it already is harmful.
13 We're already seeing the effects of these pollutants on
14 this community and other communities. We're acting like
15 this is a singularized event when it really affects
16 everyone.

17 What else do I have to say?

18 I guess -- yeah. On the -- on the point
19 that Dora had made, which was a very good point that
20 DNREC is supposed to be advocating on behalf of the
21 public, and the public is showing up and saying that they
22 aren't doing a good enough job of that, that the people
23 in this community are disillusioned by DNREC. You know,
24 they don't believe that DNREC actually has their full

1 interest at --

2 MR. LEGATSKI: This is the final wrap-up
3 witness.

4 MS. RODDEN: What? Hello?

5 MS. MOHAMMED: Go on, Ms. Rodden.

6 MR. LEGATSKI: Hello?

7 MS. RODDEN: Okay. And also I think
8 that one of the points that I wanted to make as well is
9 that the public hasn't been informed of these hearings
10 and hasn't been informed of what is going on in their
11 communities well enough. You know, like, the problem
12 that, you know, the -- Ms. Swain wasn't informed of this
13 until recently, you know. The public should be informed
14 of these things as they are happening.

15 And I think FujiFilm should have someone
16 to discuss these things with the community because
17 they're going to be directly impacted by this decision
18 and by your expansion.

19 And I think that's it for me. Thank
20 you.

21 MS. MOHAMMED: Thank you, Ms. Rodden.

22 MS. RODDEN: Thank you for this hearing.

23 MS. MOHAMMED: Yep.

24 MR. LEGATSKI: Any last remarks or

1 questions before we move to the next step?

2 MS. PETERSON: Mr. Chairman, we have an
3 opportunity now to make remarks before the vote.

4 MR. LEGATSKI: Yes. If the board
5 members wish to make remarks, let's try to limit it to
6 about five minutes each.

7 MS. PETERSON: Okay. Mr. Chairman, this
8 is Karen Peterson.

9 I just want to say a couple of things.
10 First is that any time I've turned on the news for the
11 past two days, every newscast has included a discussion
12 about climate change. That's because the United Nations
13 this week was focusing on it, and many nations around the
14 world have set aside weeks during the month of September
15 to discuss the issue of climate change. And, of course,
16 one of the main contributors to climate change is CO2,
17 which of course is absent from the calculations in this
18 case because DNREC at some point decided that it did not
19 need to be included.

20 We've heard about how we are required by
21 the courts to give deference to DNREC's interpretation of
22 the regs, which of course was to exclude CO2 from the
23 offset requirements. And that might have been true prior
24 to 2019, but in 2019 we, the board, adopted new

1 regulations. So any interpretations that occurred prior
2 to 2019 are, to me, irrelevant because we were very clear
3 two years ago when we promulgated regulations as to what
4 we thought about offsets.

5 And I believe that section 9.1.5 of the
6 regs that we adopted two years ago are very clear in
7 terms of how pollutants are to be treated in the case of
8 an application. Even DNREC's witness, Ms. Mensch,
9 conceded that CO2 needs to be addressed, needs to be
10 talked about, needs to be, you know, discussed by DNREC
11 and addressed at some point.

12 Well, Mr. Chairman, I think this might
13 be that point at which we address it. Because if we
14 don't address it today, then we're giving our stamp of
15 approval for DNREC to continue to ignore the effects of
16 CO2 on our environment.

17 Now, if the NOx credits cover CO2, as
18 Mr. Baringer testified, then fine, add that 4,755 tons
19 per year of CO2 to the calculations, and let them buy
20 credits to offset that. Based on what we were told about
21 the cost of credits, that would cost roughly about \$8,000
22 to offset the CO2 emissions.

23 So, you know, I know we wanted to keep
24 this short. I don't think that the negative

1 environmental impacts talked about in the regs have been
2 offset in accordance with the requirements of section
3 9.1.5 of the regulations, which I think is written in
4 clear English. And for that reason, I believe that the
5 permit should be denied.

6 Thank you, Mr. Chairman.

7 MR. LEGATSKI: Any other members of the
8 board want to make a final remark?

9 MR. BAKER: Yes. Robert Baker here.
10 We're facing a problem here as the board in that there
11 are a number of regulations, whether it's nationally the
12 Clean Air Act or regional, REGI, or here with the Coastal
13 Zone that is intended to be local, but it really is
14 statewide. And we're being asked to give a local
15 community relief when I'm not sure that's allowed in what
16 we're tasked to do.

17 We're faced with the problem of how do
18 we get around the way the rules are written. They've
19 been -- whether it's 2019 or 1999 or whenever it was, I'm
20 not a lawyer, so I'm not aware of the regulations as they
21 are, but it seems to me that we've got to move forward
22 with an industry that can't be competitively
23 disadvantaged because of the way that things are written
24 now.

1 If the regulators say you've got a
2 hundred hoops to jump through, if you jump through 100
3 hoops, you get what you've permitted for by right. I
4 don't think -- we could modify the permit, perhaps, and
5 go back and say, We want you to include carbon dioxide.
6 But it has not been included.

7 And in my industry, if we were, as a
8 state or regionally, given a set of rule changes that
9 disadvantaged us, we would be out of business. I don't
10 think -- if we have problems with the regulations, the
11 way they're written, we could make a statement now or --
12 and make an effort to rewrite the rules, but you can't
13 rewrite the rules midstream.

14 Thank you.

15 MR. LEGATSKI: Any additional comments,
16 remarks?

17 MS. MEITNER: Mr. Chair, it's
18 Ms. Meitner. I would like to make a few comments.

19 MR. LEGATSKI: All right.

20 MS. MEITNER: And, first, I would like
21 to thank the members of the public for attending the
22 hearing today. I think it's important to have the input
23 from the public. I think it's important to have members
24 of the public involved in these matters, and I commend

1 you for putting your time into this effort. And I'd also
2 like to just take a moment to thank Ms. Mohammed, who's
3 done a wonderful job in supporting our efforts in
4 managing this hearing.

5 Now, turning to the merits of the case,
6 I think -- I support what Ms. Peterson has said insofar
7 as I think DNREC would be well served by making it more
8 clear to the public that CO2 has, in fact, been addressed
9 in this permit. It was accounted for in the emission
10 credits. I myself was quite confused about this, but
11 when Mr. Beringer explained today that NOx is a surrogate
12 in the combustion process and that skilled practitioners
13 understand that a credit of NOx includes a significant --
14 I think it's something like 2,400 tons -- it's somewhere
15 in that neighborhood -- per day of CO2 reduction for
16 every ton of NOx reduction, I felt more comfortable that,
17 in fact, the CO2 issue was being addressed in this
18 permit.

19 And, similarly, the explanation that NOx
20 is a surrogate in this process for other contaminants of
21 combustion. And so the list that is provided in the
22 table of smaller quantities of materials that are so
23 small that they do not have banks established for them --
24 it's a somewhat confusing situation -- but the

1 explanation that NOx is a surrogate, and that when you
2 have a NOx credit and you -- and you use that credit,
3 that also indicates some of those -- or all of those
4 other minor contaminants are also being eliminated.

5 So with that explanation, I feel much
6 more comfortable that DNREC did address, as required
7 under the regulations, all of the contaminants that are
8 being emitted in this process. And I feel that this
9 permit is reasonable as written and vote to approve.

10 MS. PETERSON: Mr. Chairman?

11 MR. LEGATSKI: Yes.

12 MS. PETERSON: Karen Peterson. I just
13 want to add something to Ms. Meitner's remarks.

14 If that were the case that the CO2 is
15 included in the NOx calculations, then that should be
16 included in the total tons per year, and I might be more
17 convinced of that if it were, because that would take the
18 total offset required to 9,556. But they have omitted
19 the 4,755 tons per year of the CO2, so I'm not convinced
20 that that NOx credit completely offsets the additional
21 4,755 tons per year. If they had included that, I would
22 probably agree with you.

23 MS. MEITNER: Yeah, I -- Ms. Peterson, I
24 would have to say that it is extremely difficult to

1 understand the chart and the way it was published by
2 DNREC, and that I certainly interpreted it the way you
3 are interpreting it all through this hearing, through all
4 the explanations until today.

5 And when Mr. Beringer testified and
6 explained his expert opinion on what's -- what other
7 contaminants are included in that NOx permit, I found it
8 a persuasive commentary. And there's nothing in the
9 record of a technical nature to suggest that he isn't
10 correct. And so I just -- that is the evidence that we
11 have from an expert, and I cannot find any way to
12 overcome that.

13 MS. PETERSON: Mr. Chairman, just one
14 quick response.

15 And I, too, heard what Mr. Beringer said
16 about each credit covering 2,400 tons per year of CO2.
17 However, we've never been told what else those two
18 credits cover. That is, we don't know if there's -- if
19 there are 2,400 tons per year left over in that number to
20 cover the CO2 because we've not been given a breakdown.
21 I'm sure it covers other things, but we don't know how
22 much of the other things it's covering, so without that
23 information, I'm just not convinced.

24 MR. LEGATSKI: Any further comments,

1 questions?

2 MR. WHITEHOUSE: Mr. Chairman, it's
3 Jamie Whitehouse here. I just had a few remarks. In
4 looking --

5 MR. LEGATSKI: All right.

6 MR. WHITEHOUSE: -- at this appeal,
7 we're being asked to consider whether the Secretary erred
8 particularly with regard to sections 9.1 and 9.2 of the
9 regulations. And in looking at those, my eye is drawn
10 particularly to the appellants' arguments specifically
11 relating to the difference between offsetting and
12 eliminating.

13 And we did hear from Ms. Mensch, and we
14 heard that a comprehensive review has taken place,
15 including consideration of CO₂, and that it will be
16 indirectly offset as part of the proposal in itself. And
17 I did take note of that.

18 But it's the last sentence of section
19 9.1.5 of the regulations that the appellants have drawn
20 the board's attention that -- the difference between the
21 word "eliminating" and "offsetting." But in mind, Fuji
22 will offset CO₂ by eliminating the forklifts. And to my
23 mind, there was elimination of CO, 1.392 tons per year of
24 CO that will be eliminated by the removal of those

1 propane operated forklifts and the utilization of those
2 electric forklifts, and that is measurable. We heard
3 evidence from Ms. Mensch that DNREC goes out and inspects
4 that. It's directly measurable, and they will be
5 eliminated in my mind.

6 So to me, I'm struggling to see that the
7 Secretary erred in the way section 9.1.5 was applied in
8 this case. That's just my view.

9 Thank you.

10 MR. LEGATSKI: Anyone else or are we
11 ready to proceed to a decision?

12 MR. MALONEY: This is -- this is Kevin
13 Maloney.

14 I'd just like to make a couple of
15 comments before the board members vote. The standard is,
16 as has been mentioned numerous times, whether DNREC's
17 interpretation of the two regulations at issue is clearly
18 erroneous.

19 The other thing that I need to bring to
20 the board's attention is in making a decision on a motion
21 that I anticipate being made is that we're going to need
22 five votes in favor of any motion made for that motion to
23 be carried, and that's the result of the statutory
24 language.

1 So with that, I'm willing to turn it
2 over to a board member or board members to make their
3 motions and the vote be conducted.

4 MR. LEGATSKI: Do I hear a motion?

5 MR. DRAPER: Mr. Chairman, it's Jeff
6 Draper, and I move that the permit for Fuji be approved.

7 MR. LEGATSKI: Thank you.

8 MS. MEITNER: I'll second --

9 MR. LEGATSKI: Ms. Meitner?

10 MS. MEITNER: I'll second the motion.

11 MR. LEGATSKI: Ms. Peterson?

12 MS. PETERSON: No.

13 MR. LEGATSKI: Okay.

14 Mr. Baker?

15 MR. BAKER: Yes.

16 MR. LEGATSKI: Mr. Whitehouse?

17 MR. WHITEHOUSE: Aye, for my reasons.

18 MR. LEGATSKI: And I vote aye.

19 Did I miss someone? Anyone?

20 MS. MEITNER: I'm not sure it's clear on
21 the record, Mr. Chair, because I was seconding the motion
22 earlier.

23 MR. LEGATSKI: Oh, I'm sorry.

24 MS. MEITNER: But I --

1 MR. LEGATSKI: Okay.

2 MS. MEITNER: I vote aye.

3 MR. LEGATSKI: All right. Thank you.

4 Then I count five votes in favor and one
5 opposed. The motion passes. The -- DNREC's action is
6 approved.

7 Any further closing comments or
8 questions?

9 MS. PETERSON: Mr. Chairman, I'd like to
10 echo what Ms. Meitner said earlier about Sascha
11 Mohammed's Herculean work in keeping this all together
12 over three days and keeping us informed.

13 So, Sascha, thank you so much for all of
14 your successful efforts.

15 MS. MOHAMMED: My pleasure.

16 MR. DRAPER: Thank you.

17 MR. LEGATSKI: I think we all owe Sascha
18 and Kevin a vote of thanks and look forward to working
19 with them again as cases bring it along.

20 MR. MALONEY: Mr. Chairman --

21 MR. LEGATSKI: Thank you, everybody.

22 MR. MALONEY: Mr. Chairman, there's just
23 one more thing --

24 MR. LEGATSKI: I'm sorry. Go ahead.

1 MR. MALONEY: There's just one more
2 thing I'd like to say and that is, as you know, following
3 the opinion, an order for this matter has to be prepared
4 and served on the parties by October 13th. I'm going to
5 make --

6 MR. LEGATSKI: Right.

7 MR. MALONEY: Actually, I don't think
8 that is right. I think it's the 11th. I'm going to make
9 every effort to get a draft out for the board members to
10 review and comment on, but I would please urge you to try
11 to do that as quickly as you can because, regardless of
12 when I get the draft out, it's going to be a very tight
13 schedule for us to comply with the 60-day mandate in the
14 statute.

15 And with that, I'm finished except to
16 say thank you to all the board members for your
17 cooperation.

18 MS. PETERSON: Mr. --

19 MS. MEITNER: Mr. Maloney, what was that
20 date?

21 MR. MALONEY: I'm going to double-check
22 that. I said the 13th, but I don't think that's correct.
23 Let me --

24 MS. MEITNER: And when are you going to

1 try to have it to us?

2 MR. MALONEY: Bear with me just a
3 second. I'll pulling up my calendar where I do have it
4 recorded. It's due on the -- it's due to be served on
5 Monday the 11th according to my math. I will try to have
6 it to you given that that's -- there's a weekend
7 immediately before that, I will try to get it to you by
8 no later than the 7th, Thursday, the 7th of October,
9 which will give two days if there's any necessary back
10 and forth.

11 MS. PETERSON: And, Mr. Maloney, how
12 will we be signing those? Electronically? Or do we need
13 to sign them and mail them back?

14 MR. MALONEY: No. You can sign them
15 electronically. What you'll need to do is communicate
16 with Sascha and let her know that the use of your
17 electronic signature is acceptable.

18 MS. PETERSON: Okay. Then I'll make a
19 motion to adjourn.

20 MS. MEITNER: I wanted to make one more
21 comment for -- I think someone during the meeting today
22 said we need to send a message to DNREC. And I think
23 there are a couple that we might want to send.

24 One is to try to make the issuance of

1 their permit and the process a little more obvious to
2 members of the general public so that they have a -- and
3 I know that's an extremely difficult task, but anything
4 they could do to make it easier for the public to
5 understand how these things are being addressed would be
6 of great benefit.

7 And, similarly, although there is no
8 specific provision in the regulations or the statute for
9 DNREC and the parties to confer before they come to the
10 board with some of these very technical issues,
11 certainly, that is a process that happens with the
12 Environmental Appeals Board. And I would encourage
13 DNREC, when an appeal is filed, to meet with the parties
14 to see if any explanation can -- if there's any way to
15 work out the differences without bringing it to the
16 board so -- my message to DNREC.

17 Thank you.

18 MR. LEGATSKI: Thank you, everybody.

19 MS. PETERSON: I'll move to adjourn.

20 MR. DRAPER: Second.

21 MR. LEGATSKI: Second. Any nay --

22 MS. MEITNER: Mr. Chair?

23 MR. LEGATSKI: Any nay votes?

24 Yes?

1 MS. MEITNER: Just that I think you have
2 the power.

3 MR. LEGATSKI: We are adjourned.

4 (The hearing adjourned at 11:57 a.m.)
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I do hereby certify that the foregoing hearing was taken before me, pursuant to notice, at the time and place indicated; that the statements of participants were correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the transcript is a true record of the statements made by the participants; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this 1st day of October A.D. 2021.



Notary Public

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