Deposition of:

Coastal Zone Hearing

September 23, 2021

In the Matter of:

Coastal Zone Hearing

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BEFORE THE COASTAL ZONE INDUSTRIAL CONTROL BOARD
FOR THE STATE OF DELAWARE

JEANETTE SWAIN, COLLINS PARK CIVIC ASSOC.,	)	
Appellants,	)	
v.	)	CZICB Appeal No. 2021-01
THE STATE OF DELAWARE, DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,	)	
Appellee.	)	

VOLUME III

- - -

Virtual Public Hearing
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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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I N D E X

E X H I B I T S

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

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

THE COURT REPORTER: I am.

MS. MOHAMMED: I am.

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

MS. MEITNER: Thank you.

MS. MOHAMMED: You're welcome.

Mr. Baker?

MR. BAKER: Yes.

MS. MOHAMMED: Okay.

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

MR. LEGATSKI: Yes, please do.

MS. MEITNER: Thank you.

Mr. Whetzel, are you ready to proceed?

MS. PETERSON: Mr. Chairman, could we

call the roll just to establish a quorum?

MS. MEITNER: Good idea.

MR. LEGATSKI: Yes, please.

Sascha, would you call the roll?

MS. MOHAMMED: Mr. Richard Legatski?

MR. LEGATSKI: Present.

MS. MOHAMMED: Jamie Whitehouse?

MR. WHITEHOUSE: Present.

MS. MOHAMMED: Karen Peterson?

MS. PETERSON: Present.

MS. MOHAMMED: Pamela Meitner?

MS. MEITNER: Present.

MS. MOHAMMED: Jeffrey Draper?

MR. DRAPER: Present.

MS. MOHAMMED: Robert Baker?

MR. BAKER: Present.

MS. MEITNER: All members of the board are present?

MS. MOHAMMED: Yes.

MS. MEITNER: Okay. Thank you.

Mr. Whetzel?

MR. WHETZEL: Yes. Fuji is prepared to proceed.

Good morning, members of the board,

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

At this point, Fuji calls Mr. Richard Beringer.

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

- - -

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

- - -

DIRECT EXAMINATION

BY MR. WHETZEL:

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

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

Q. Would you briefly review your educational background?

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

Q. Experience doing what, Mr. Beringer?

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

Q. Where are you employed?

A. Duffield Associates, Wilmington, Delaware.

Q. What is Duffield Associates?

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

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

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

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

A. They have.

Q. Do you hold any professional licenses or certifications?

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

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

A. Yes, I have.

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

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

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

MS. MOHAMMED: Is that Fuji witness 2?

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

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

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

MS. MOHAMMED: Okay.

BY MR. WHETZEL:

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

A. It is.

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

A. Yes, it is.

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

A. I was asked to review the application and the

secretary's decision and provide expert testimony.

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

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

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

MR. WHETZEL: Yes.

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

MR. WHETZEL: Yes. Thank you.

We can take down the CV at this point.

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

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

MS. MEITNER: Thank you. Please proceed.

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

MS. MEITNER: Is there any objection

from the other parties?

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

MR. WHETZEL: Thank you.

BY MR. WHETZEL:

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

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

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

A. Yes, I have.

Q. Who specifically?

A. Melissa Toledo and Maureen Concordia, yeah.

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

A. I did not.

Q. But you reviewed it?

A. Yes, I have.

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

A. That the emissions have been appropriately

offset.

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

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

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

A. Yes, I was.

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

A. Yes, it does.

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

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

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

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

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

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

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

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

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

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

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

Q. Can you describe the size or types of boilers

that are in the application?

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

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

A. Natural gas.

Q. Anything else? Just natural gas?

A. Just natural gas.

Q. Are natural gas boilers commonly used?

A. Very commonly.

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

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

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

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

Q. Do the boilers of the Fuji permit application

require an air permit?

A. No, they don't.

Q. Why not?

A. They're too small.

Q. Can you elaborate?

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

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

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

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

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

Q. It is for home use?

A. Yes, it is.

Q. Used for cook tops?

A. Yes, it does.

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

A. Yes.

Q. As you said, used in other commercial

applications, correct?

A. Correct.

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

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

BY MR. WHETZEL:

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

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

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

A. What if we get the iPad working?

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

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

this format.

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

MS. MEITNER: Go ahead.

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

MR. MALONEY: That sounds reasonable to me.

Does other counsel have any objection to that approach?

MS. MEITNER: No.

MR. KRISTL: Not at this time.

MR. MALONEY: Understood.

MS. SCOTT: No objection.

MS. MEITNER: Well, let's proceed.

THE COURT REPORTER: I apologize. Mr. Whetzel, I feel like I can see your mouth moving, but I can hear absolutely nothing.

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

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

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

BY MR. WHETZEL:

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

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

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

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

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

When these are mixed and burned, they

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

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

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

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

BY MR. WHETZEL:

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

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

MR. WHETZEL: Sure.

BY MR. WHETZEL:

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

"combustion"?

A. Fuel is burned and heat is generated.

Q. What's the heat used for?

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

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

A. Yes.

Q. Is there a relationship among those substances?

A. They are --

MS. MEITNER: Mr. Whetzel?

MR. BERINGER: They are proportionate to the --

MS. MEITNER: Excuse me, Mr. Whetzel.

MR. WHETZEL: Yes.

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

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

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

BY MR. WHETZEL:

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

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

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

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

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

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

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

A. They would all be eliminated.

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

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

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

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

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

MS. MEITNER: Thank you.

BY MR. WHETZEL:

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

A. Yes, it did.

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

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

MS. MEITNER: Can you enlarge that? Oh,

thank you.

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

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

Thank you, Mr. Kristl.

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

BY MR. WHETZEL:

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

A. Yes, I do.

Q. What is it?

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

MR. WHETZEL: Page 33 of Joint Exhibit 5.

MS. MEITNER: Thank you.

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

BY MR. WHETZEL:

Q. And did you review the emissions calculations?

A. Yes, I did.

Q. How are these emissions calculated?

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

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

A. They are all products of combustion.

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

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

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

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

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

BY MR. WHETZEL:

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

A. My answer is the same.

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

A. Correct.

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

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

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

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

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

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

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

A. Yes, I was.

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

A. Yes, I did.

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

A. Yes, it is.

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

What emission source does the forklift project eliminate?

A. It eliminates the combustion of propane.

Q. What is propane?

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

Q. Is it a fuel source?

A. Yes, it is.

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

A. Yes, that and small engines.

Q. And what does the combustion of propane emit?

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

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

A. The carbon monoxide.

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

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

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

A. Yes, they would.

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

First, what is emissions credit?

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

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

A. That is -- that is correct.

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

A. They often arise from plant shutdowns.

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

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

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

A. Yes, they have.

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

A. Yes, I have.

Q. What has your experience in that process been?

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

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

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

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

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

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

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

A. Yes.

Q. How so?

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

1 ton being reduced.

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

Mr. Beringer, can you give --

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

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

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

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

MR. BERINGER: Yes.

THE COURT REPORTER: Thank you.

BY MR. WHETZEL:

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

Would you repeat that answer for the court reporter?

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

Q. And I may have confused you.

The next question was is that a result

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

A. My answer was "yes."

Q. Thank you. My apologies.

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

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

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

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

Q. Thank you, Mr. Beringer.

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

BY MR. WHETZEL:

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

A. Yes, that's correct.

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

A. Correct.

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

A. Correct.

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

A. Yes, they do.

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

A. Yes, I am.

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

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

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

A. Yes, they do.

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

A. They did not.

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

A. Yes.

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

A. That is correct.

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

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

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

A. For natural gas, yes.

Q. So that includes nitrogen oxides?

A. Yes.
Q. Carbon monoxide?
A. Yes.
Q. Carbon dioxide?
A. Yes.
Q. Lead?
A. To the extent that the lead is in natural gas, yes.
Q. Nitrous oxide?
A. Yes.
Q. Particulate matter total?
A. Yes.
Q. PM condensable?
A. Yes.
Q. PM filterable?
A. Yes.
Q. Sulfur dioxide?
A. Yes.
Q. Total organic compounds?
A. Yes.
Q. Methane?
A. Yes.
Q. And volatile organic compounds?
A. Yes.

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

A. It would be exactly the same ratio.

Q. And why is that?

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

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

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

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

A. Yes. It's a good surrogate.

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

A. No.

Q. Does that affect the determination?

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

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

A. We don't specifically.

Q. And does that affect your determination?

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

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

A. Yes, I have.

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

A. Yes, it does.

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

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

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

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

A. It has not.

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

A. It has not.

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

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

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

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

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

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

A. Yes.

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

A. Yes, it is.

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

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

Q. Thank you. No further questions.

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

MR. KRISTL: I do. Thank you.

CROSS-EXAMINATION

BY MR. KRISTL:

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

precursors. Do you remember that testimony?

A. Yes, I do.

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

A. That's correct.

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

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

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

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

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

A. Correct.

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

Ambient Air Quality Standard says should be there, right?

A. Once in a five-year period.

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

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

A. I said "correct."

Q. Okay. Okay. All right. Okay.

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

A. Yes.

Q. And Sussex County is in attainment, correct?

A. Yes.

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

A. Correct.

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

A. Speculatively, yes.

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

A. It's correct.

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

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

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

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

A. That would be anticipated, yes.

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

A. That is what I said.

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

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

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

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

A. It is awarded or not awarded.

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

A. That's correct.

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

A. Yes.

Q. And that happened what year?

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

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

A. I have no factual knowledge of that.

Q. How about the DuPont titanium dioxide plant,

that shut down more than a year ago, right?

A. Yes. That shut down in 2015.

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

A. It was 2008.

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

A. Yes.

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

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

A. Yes.

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

A. Correct. For the electric power industry.

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

A. In the electric power industry.

Q. I understand, but just that credits have been

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

A. That's correct.

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

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

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

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

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

A. In certain forms.

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

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

MS. MEITNER: One second, Mr. Whetzel.

Ms. Scott or Mr. Tweedie, did you have

any questions?

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

MS. MEITNER: Thank you.

Mr. Whetzel, yes. Go ahead.

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

REDIRECT EXAMINATION

BY MR. WHETZEL:

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

A. No.

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

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

A. Not at all.

Q. No further questions.

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

MR. WHETZEL: I did. Thank you. No

further questions.

MS. MEITNER: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

MR. BERINGER: In a case like the one we

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

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

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

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

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

MR. BERINGER: Yes.

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

MR. BERINGER: Absolutely. It's stoichiometric.

MS. PETERSON: All right. Explain to me

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

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

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

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

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

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

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

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

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

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

MS. PETERSON: Okay.

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

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

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

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

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

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

MR. BERINGER: That wipes out the sulfur dioxide.

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

MR. BERINGER: Yes.

MS. PETERSON: Okay. So the purchase of

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

MR. BERINGER: Correct.

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

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

MR. BERINGER: Okay.

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

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

MR. BERINGER: That's correct.

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

MR. BERINGER: That is correct.

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

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

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

MS. MEITNER: Okay.

MR. BERINGER: -- besides combustion.

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

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

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

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

MR. BERINGER: Correct.

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

And I believe I do have one more question.

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

MR. BERINGER: Yes.

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

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

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

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

MR. BERINGER: Yes.

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

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

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

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

MR. BERINGER: Yes.

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

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

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

MR. BERINGER: Yes.

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

Are there any other questions for this witness?

MR. WHITEHOUSE: Not from me.

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

MS. MEITNER: Yes, sir.

MR. DRAPER: Mr. Beringer, if all the

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

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

MS. MEITNER: I'm sorry?

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

MS. MEITNER: Say it again.

MR. DRAPER: It would --

MS. MEITNER: Please repeat that.

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

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

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

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

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

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

MR. BERINGER: I did not.

MS. MEITNER: Okay.

MR. DRAPER: Thank you.

MS. MEITNER: Any other questions from the board?

MR. BAKER: Yes. Robert Baker here.

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

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

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

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

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

MR. BAKER: Okay.

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

MR. BAKER: Okay, thank you.

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

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

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

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

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

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

MR. DRAPER: Thank you.

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

MR. DRAPER: Not for me. Thank you.

MS. MEITNER: Okay.

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

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

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

MS. PETERSON: I'm for continuing.

MR. WHITEHOUSE: I'm all for continuing.

MS. MEITNER: Okay. Moving along.

Mr. Whetzel -- all right.

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

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

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

MS. MEITNER: Is there any objection?

MR. LEGATSKI: Any objections?

MR. KRISTL: No objections from the appellant.

MR. LEGATSKI: Last call for any objections.

Then the items offered for evidence are accepted.

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

MR. WHETZEL: Thank you.

With that, Fuji concludes its case.

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

to a decision?

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

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

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

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

MR. LEGATSKI: Right. All right.

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

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

MR. LEGATSKI: Thanks.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. MEITNER: Mr. Kristl?

MR. KRISTL: Yes?

MS. MEITNER: Could you enlarge that, please?

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

MS. MEITNER: Yes, please.

MR. KRISTL: Okay.

MS. MEITNER: Thank you.

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

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

language there.

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

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

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

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

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

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

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

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

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

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

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

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

That's the problem here. That's the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

I'll stop sharing the screen.

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

MS. MEITNER: No.

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

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

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

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

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

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

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

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

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

department's permit decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And Ms. Swain's testimony urged an even

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

permit.

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

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

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

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

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

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

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

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

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

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

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

Thank you.

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

MS. MEITNER: No.

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

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

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

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

MR. LEGATSKI: Okay.

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

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

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

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

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

deference, and we would respectfully submit should be affirmed.

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

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

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

welcome and encourage.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

should be affirmed.

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

Thank you.

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

MR. LEGATSKI: Yeah.

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

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

The other thing, this whole notion of,

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

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

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

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

MR. LEGATSKI: All right.

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

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

MR. LEGATSKI: Right.

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

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

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

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

MR. LEGATSKI: Oh, okay.

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

MS. MEITNER: I think --

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

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

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

MS. MOHAMMED: Okay. Hold on a moment.

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

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

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

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

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

MS. MOHAMMED: Thank you.

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

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

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

MS. WILLIAMS: I would.

MS. MOHAMMED: Yes. Okay, thank you.

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

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

MS. MOHAMMED: Thank you.

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

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

MS. COLE: I will not being be making comment.

MS. MOHAMMED: Thank you.

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

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

MS. MOHAMMED: Thank you.

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

MS. MILLER: No, no comments.

MS. MOHAMMED: Thank you.

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

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

MS. MOHAMMED: Thank you.

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

MS. SMITHERS: No comment.

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

MS. MEITNER: That was my --

MR. LEGATSKI: That's what I got.

MS. MOHAMMED: Yeah.

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

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

MR. WHITEHOUSE: Thank you.

MR. LEGATSKI: Given --

MS. MEITNER: I'll support that.

MR. LEGATSKI: -- the time of day.

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

MR. LEGATSKI: Yes.

MS. MOHAMMED: One moment.

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

MR. LEGATSKI: Yes.

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

MR. LEGATSKI: That's fine with me.

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

MS. MEITNER: Yes.

MS. PETERSON: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

MS. MOHAMMED: Thank you, Mr. Dunn.

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

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

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

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

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

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

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

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

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

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

Thank you for this opportunity.

MS. MOHAMMED: Thank you, Ms. Williams.

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

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

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

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

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

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

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

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

What else do I have to say?

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

interest at --

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

MS. RODDEN: What? Hello?

MS. MOHAMMED: Go on, Ms. Rodden.

MR. LEGATSKI: Hello?

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

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

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

MS. MOHAMMED: Thank you, Ms. Rodden.

MS. RODDEN: Thank you for this hearing.

MS. MOHAMMED: Yep.

MR. LEGATSKI: Any last remarks or

questions before we move to the next step?

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

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

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

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

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

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

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

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

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

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

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

Thank you, Mr. Chairman.

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

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

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

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

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

Thank you.

MR. LEGATSKI: Any additional comments, remarks?

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

MR. LEGATSKI: All right.

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

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

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

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

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

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

MS. PETERSON: Mr. Chairman?

MR. LEGATSKI: Yes.

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

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

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

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

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

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

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

MR. LEGATSKI: Any further comments,

questions?

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

MR. LEGATSKI: All right.

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

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

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

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

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

Thank you.

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

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

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

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

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

MR. LEGATSKI: Do I hear a motion?

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

MR. LEGATSKI: Thank you.

MS. MEITNER: I'll second --

MR. LEGATSKI: Ms. Meitner?

MS. MEITNER: I'll second the motion.

MR. LEGATSKI: Ms. Peterson?

MS. PETERSON: No.

MR. LEGATSKI: Okay.

Mr. Baker?

MR. BAKER: Yes.

MR. LEGATSKI: Mr. Whitehouse?

MR. WHITEHOUSE: Aye, for my reasons.

MR. LEGATSKI: And I vote aye.

Did I miss someone? Anyone?

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

MR. LEGATSKI: Oh, I'm sorry.

MS. MEITNER: But I --

MR. LEGATSKI: Okay.

MS. MEITNER: I vote aye.

MR. LEGATSKI: All right. Thank you.

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

Any further closing comments or questions?

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

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

MS. MOHAMMED: My pleasure.

MR. DRAPER: Thank you.

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

MR. MALONEY: Mr. Chairman --

MR. LEGATSKI: Thank you, everybody.

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

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

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

MR. LEGATSKI: Right.

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

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

MS. PETERSON: Mr. --

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

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

MS. MEITNER: And when are you going to

try to have it to us?

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

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

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

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

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

One is to try to make the issuance of

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

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

Thank you.

MR. LEGATSKI: Thank you, everybody.

MS. PETERSON: I'll move to adjourn.

MR. DRAPER: Second.

MR. LEGATSKI: Second. Any nay --

MS. MEITNER: Mr. Chair?

MR. LEGATSKI: Any nay votes?

Yes?

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

MR. LEGATSKI: We are adjourned.

(The hearing adjourned at 11:57 a.m.)

C E R T I F I C A T E

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.

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Notary Public

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