

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
FOR THE STATE OF DELAWARE

JEFFREY RICHARDSON, MARIE )  
REED, KAREN CHEESEMAN, )  
SIMEON HAHN, AND MUJAHID )  
NYAHUMA, )

Appellants, )

) Appeal No. 2021-07

v. )

DEPARTMENT OF NATURAL )  
RESOURCES AND ENVIRONMENTAL )  
CONTROL, )

Appellee. )

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THE PHILADELPHIA REGIONAL )  
PORT AUTHORITY, )

Appellant, )

) Appeal No. 2021-08

DEPARTMENT OF NATURAL )  
RESOURCES AND ENVIRONMENTAL )  
CONTROL, )

Appellee. )

) (Continued on Page 2)

Remote Hearing  
Tuesday, July 26, 2022  
9:00 a.m.

VERITEXT LEGAL SOLUTIONS  
MID-ATLANTIC REGION  
300 Delaware Avenue - Suite 815  
Wilmington, DE 19801  
302-571-0510

1 GREENWICH TERMINALS LLC, et )  
 al. )  
 2 )  
 Appellants, )  
 3 )  
 v. ) Appeal No. 2021-09  
 4 )  
 DEPARTMENT OF NATURAL )  
 5 RESOURCES AND ENVIRONMENTAL )  
 CONTROL, )  
 6 )  
 Appellee. )  
 7 \_\_\_\_\_ )  
 — )  
 8 WALTER F. CURRAN, )  
 )  
 9 Appellant, ) Appeal No. 2021-10  
 v. )  
 10 )  
 DEPARTMENT OF NATURAL )  
 11 RESOURCES AND ENVIRONMENTAL )  
 CONTROL, )  
 12 )  
 Appellee.

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 14  
 15 A remote hearing was taken pursuant to  
 16 notice before Ellen Corbett Hannum, Registered Merit  
 17 Reporter, Wilmington, Delaware, on Tuesday, July 26,  
 18 2022, beginning at approximately 9:00 a.m., there being  
 19 present:

20  
 21 BEFORE: DEAN WALDEN, EAB CHAIRPERSON  
 RANDALL HORNE, EAB BOARD MEMBER (Recused)  
 MICHAEL HORSEY, EAB BOARD MEMBER  
 22 ROBERT MULROONEY, EAB BOARD MEMBER  
 FRANCES RIDDLE, EAB BOARD MEMBER  
 23  
 KEVIN MALONEY, DAG, EAB ATTORNEY  
 24 JANELLA SAPP, EAB ADMINISTRATIVE ASSISTANT

1 APPEARANCES:

2 JEFFERY RICHARDSON, Individual Appellant  
3 KAREN CHEESEMAN, Individual Appellant  
4 MARIE REED, Individual Appellant  
5 SIMEON HAHN, Individual Appellant

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and

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APPEARANCES (Continued):

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On behalf of Appellant Walter Curran

ALSO PRESENT:

JUSTIN THOMPSON, SIERRA CLUB  
GUY MARCOZZI, DUFFIELD ASSOCIATES  
RON DeJESUS, MANKO, GOLD, KUTCHER & FOX, LLP, IT

1                   CHAIRPERSON HOLDEN: Good morning. My  
2 name is Dean Holden.

3                   I'm the Chairperson of the Delaware  
4 Environmental Appeals Board. The purpose of today's  
5 hearing is the consideration of motions filed by various  
6 parties of the EAB appeals 2021-07, 08, 09 and 10. Those  
7 four appeals have been consolidated into one appeal  
8 process.

9                   The Board will hear oral arguments on  
10 motions in the following order today: DNREC's partial  
11 motion to dismiss, then we will move to the Port  
12 Operators and Walter Curran's joint motion for summary  
13 judgment. And then finally we will move to Walter  
14 Curran's motion for issuance of a subpoena for documents  
15 to DNREC.

16                   The order chosen for arguing the motions  
17 reflects the order in which they were filed. The moving  
18 party will be afforded up to 15 minutes to argue.  
19 Parties other than the movant will be afforded up to 10  
20 minutes to respond, and the moving party will be provided  
21 15 minutes for rebuttal argument.

22                   Please remember today's hearing is to  
23 address the aforementioned motions and only those  
24 motions. This is not the hearing on the merits of the

1 Secretary's decision. As you know, the merits hearing is  
2 scheduled for October 11th and October 25th, if  
3 necessary.

4 I will now introduce the board members. I  
5 am the Board Chairperson. We have with us Mr. Randall  
6 Horne, Mr. Robert Mulrooney, Ms. Frances Riddle, and  
7 Mr. Michael Horsey. The Board's Administrative Assistant  
8 with us today, Ms. Janelle Sapp, and the Board's DAG,  
9 Mr. Kevin Maloney.

10 Rather than introduce all the parties and  
11 their counsel, we ran through that preliminarily to  
12 ensure everybody is here.

13 Today's hearing is being held remotely via  
14 the WebEx video-conferencing platform.

15 With that being said, I ask that the  
16 participating individuals mute your microphone unless you  
17 are actively speaking. If you are having video-  
18 conferencing issues, you may try to make them known by  
19 using the chat function or call Ms. Sapp at  
20 (302)439-9009. Please also turn off ring tones or set  
21 them to silent, and mute your microphone when not  
22 actively speaking.

23 We will conclude the hearing no later than  
24 4:30 p.m. We may take a mid-morning break. We will take

1 a lunch break, if needed. And we will possibly take  
2 other breaks should the hearing run into the afternoon.

3 The Board may deliberate at any time and  
4 will do so in Executive Session as permitted by 7  
5 Delaware Code Section 6008A. Notice of today's hearing  
6 was posted to the State of Delaware Secretary of State  
7 Public Meeting Calendar and at the Richardson Robbins  
8 Building at 89 Kings Highway in Dover.

9 In addition, public notice of this hearing  
10 was published in the News Journal and the Delaware State  
11 News.

12 The Board is a quasi-judicial body created  
13 by the General Assembly to hear appeals of decisions of  
14 the Secretary. The manner in which the Board fulfills  
15 its duties and responsibilities, including conducting the  
16 hearing, is established and governed by Delaware Code,  
17 the Board's regulations, and case law. The Board intends  
18 to issue a written decision within 90 days of the  
19 conclusion of this hearing. Pursuant to 7 Delaware C.  
20 Section 6009A, any person or persons aggrieved by any  
21 decision of the Board can appeal to the Superior Court  
22 within 30 days of the receipt of the written opinion.

23 As a preliminary matter, I also want to  
24 address the motion to disqualify Board Member Horne and

1 Board Member Marcozzi submitted yesterday. Mr. Marcozzi  
2 has previously recused himself from this consolidated  
3 appeal. Mr. Horne has not, and I want to afford him a  
4 moment to quickly address the issue.

5 Mr. Horne.

6 BOARD MEMBER HORNE: I think the primary  
7 issue here is that everyone is under the impression or  
8 seems to be under the impression that I'm employed by  
9 Gulftainer, which I am not. I retired on December 31st,  
10 2019. So I am no longer in their employ. I derive  
11 absolutely no income from them whatsoever. I did, of  
12 course, work for them when they entered into their  
13 agreement with the State of Delaware. I worked for them  
14 for two years.

15 Prior to that, I was in the employ of  
16 Diamond State Port Corporation for 15 years. I derive no  
17 income from them at this point. I do have a pension from  
18 them, which is, I guess, independent from the corporation  
19 itself.

20 And although you didn't mention it, prior  
21 to that I did work for Duffield Associates for 18 years  
22 and, in fact, was a partner there at one point. I have  
23 absolutely zero financial interest in Duffield. I  
24 haven't honestly much thought of them in the last 17



1 years.

2                   And then with respect to the statements  
3 that I was involved in the permitting, that is not true.  
4 I was involved early on when, at the time it was Urban  
5 Engineers, I believe -- I don't even remember now. But  
6 they were doing a preliminary layout of landside work for  
7 the proposed construction. I had nothing to do with any  
8 of the permitting whatsoever. Anything that Duffield  
9 referenced in their reports would have been entirely  
10 related to preliminary or even schematic landside  
11 planning. I have never seen the permits. I don't know  
12 anything about what's in them at this point.

13                   So for that reason I don't feel that I  
14 have a real reason here to be disqualified from this  
15 hearing.

16                   CHAIRPERSON HOLDEN: Thank you, Mr. Horne.  
17                   One other matter. We haven't yet  
18 identified the court reporter. Could you please identify  
19 yourself.

20                   THE COURT REPORTER: Good morning, my name  
21 is Ellie Corbett Hannum.

22                   (Discussion with the court reporter.)

23                   MR. WEAVER: Mr. Chairman, this is  
24 Mr. Weaver on behalf of the Port Operators.

1 CHAIRPERSON HOLDEN: Mr. Weaver.

2 MR. WEAVER: In light of Mr. Horne's  
3 statement, is it the intention of the Board to permit  
4 Mr. Horne to sit as a member of the quasi-judicial  
5 tribunal that's ruling on the various issues that are  
6 before the Board? And the reason I ask is because the  
7 Wilmington Harbor Edgemoor Expansion Environmental  
8 Assessment document prepared by Duffield Associates  
9 expressly identifies Mr. Horne as one of the individuals  
10 consulted.

11 Furthermore, while Mr. Horne may have no  
12 current employment with Gulftainer, he has admitted that  
13 he gets a pension. And further, from his own statements,  
14 based upon my very quick math, he has at least 33 years  
15 of experience dealing with both Duffield Associates, the  
16 consultant being hired by the Applicant, and the Port  
17 itself.

18 CHAIRPERSON HOLDEN: Thank, Mr. Weaver.  
19 So Mr. Horne has identified that he doesn't have a  
20 financial interest in the outcome of the hearing and is  
21 going to remain on the Board for this hearing.

22 MR. WEAVER: I assume, then, Mr. Holden,  
23 that the application or the motion to disqualify is  
24 denied as regards Mr. Horne; am I correct then?

1                   CHAIRPERSON HOLDEN: Mr. Maloney, does the  
2 Board itself need to rule on those motions submitted  
3 yesterday?

4                   MR. MALONEY: Yes. I think it would be  
5 best to put the motion to disqualify to a Board vote.

6                   CHAIRPERSON HOLDEN: And is it your  
7 suggestion that we preempt the motion to dismiss and  
8 address that as a preliminary matter or address that at  
9 the conclusion of the hearing?

10                  MR. MALONEY: I'm sorry. Could you repeat  
11 that?

12                  CHAIRPERSON HOLDEN: Is it your direction  
13 to address that before we get into the partial motion to  
14 dismiss and other matters in front of us today or do we  
15 address it at the conclusion of the hearing?

16                  MR. MALONEY: No, I think it would be best  
17 to address it immediately because if Mr. Horne is going  
18 to sit, we would want to have previously denied the  
19 motion to disqualify.

20                  CHAIRPERSON HOLDEN: Understood. So let  
21 me move -- we have not heard from Ms. Scott or  
22 Mr. Tweedie. If you would also introduce yourselves,  
23 please, quickly.

24                  MS. SCOTT: Thank you, Chair Holden,

1 Members of the Board, Mr. Maloney, my name is Devera  
2 Scott. I'm a Deputy Attorney General, and I am here  
3 today with my colleague Jameson Tweedie, and we will be  
4 splitting the arguments for DNREC. Mr. Tweedie will be  
5 taking DNREC's response to the motion for summary  
6 judgment and I will be responding to the other motions,  
7 including our own motion for partial summary judgment.

8 CHAIRPERSON HOLDEN: Thank you, Ms. Scott.

9 So, Mr. Weaver, any other argument on your  
10 motion to disqualify Mr. Horne?

11 MR. WEAVER: Only to point out, Your  
12 Honor, that while you've mentioned that Mr. Horne  
13 receives no present benefit, he himself has acknowledged  
14 that he receives a pension. I think that that would  
15 clearly be acknowledged as a financial benefit.

16 And further, Your Honor, if Mr. Horne was  
17 in any other capacity before any other tribunal, he would  
18 not be able to sit. He has particularized knowledge over  
19 decades regarding the Port of Wilmington and its  
20 operations, including his previous service as the Port  
21 Engineer, the individual in charge of the engineering  
22 aspects of the port. That is not simply knowledge of a  
23 particular type of thing. For example, if you would have  
24 a scientist or an engineer sitting on this Board, this is

1 an individual that has knowledge of these operations due  
2 to his past experience, including past service with  
3 Duffield and past service with the Port itself.

4 We otherwise draw your attention to the  
5 papers, Your Honor. Thank you.

6 CHAIRPERSON HOLDEN: Thank you,  
7 Mr. Weaver.

8 Mr. Maloney, do we open the opportunity  
9 for argument or comment from the other appellants?

10 MR. MALONEY: I think that would be  
11 appropriate.

12 CHAIRPERSON HOLDEN: So I am going to go  
13 in order of what I have got listed here from 07 on  
14 through.

15 Mr. Richardson.

16 MR. RICHARDSON: Yes. Hello. Are you  
17 asking me if I have an opinion on the discussion that  
18 just took place?

19 CHAIRPERSON HOLDEN: Yes, sir.

20 MR. RICHARDSON: Is that what you are  
21 asking?

22 CHAIRPERSON HOLDEN: Yes, sir. We have a  
23 motion to disqualify Mr. Horne. Mr. Weaver has offered  
24 some argument and I am seeking your comment.

1 MR. RICHARDSON: Yes, he should be  
2 disqualified. It seems there is deep-rooted, a long-term  
3 history of relationship at multiple levels. It seems  
4 that there is an economic interest here involved with the  
5 pension. I think it was mentioned 30 years or more  
6 relationship. So those relationships do not dissipate,  
7 disappear simply because a person no longer works at an  
8 entity. So it's clear that there is an absolute conflict  
9 here.

10 So, yes, I agree with the motion that has  
11 been put forth that he not be allowed to participate in  
12 these proceedings. Thank you.

13 CHAIRPERSON HOLDEN: Ms. Cheeseman.

14 MS. CHEESEMAN: I also agree that he  
15 should be recused because of his time with Diamond State  
16 and the fact that he is still getting money from them.

17 CHAIRPERSON HOLDEN: Mr. Hahn.

18 MR. HAHN: Yes. I agree with the motion  
19 to dismiss him. In previous work I looked at the  
20 membership of the Board and it wasn't clear to me who  
21 actually comprised the Board, but I did identify a board  
22 member's relationship to Gulftainer. It's possible -- I  
23 don't know if the website is up to date, but I would like  
24 to see the background of all the members of the Board and

1 the relationship to the Port.

2 CHAIRPERSON HOLDEN: Thank you, sir.

3 MR. HAHN: I would be really surprised if  
4 it wasn't ruled that he didn't have a conflict of  
5 interest.

6 CHAIRPERSON HOLDEN: Ms. Reed.

7 MS. REED: Yes. Marie Reed here. I  
8 concur, because of his past relationship with Gulftainer.

9 CHAIRPERSON HOLDEN: Thank you, ma'am.  
10 Mr. Levine with the Port.

11 MR. LEVINE: Yes, the Port concurs with  
12 the pending motion.

13 CHAIRPERSON HOLDEN: We have heard from  
14 Mr. Weaver of the Port Operators.

15 Ms. Skjoldal.

16 MS. SKJOLDAL: Yes, we concur. We think  
17 just the appearance of impropriety is enough and that  
18 recusal should occur. Thank you.

19 CHAIRPERSON HOLDEN: Ms. Scott.

20 MS. SCOTT: This is Devera Scott on behalf  
21 of DNREC, and DNREC takes no position on this motion.

22 CHAIRPERSON HOLDEN: Thank you. Any  
23 questions from the Board itself?

24 (No response.)

1 CHAIRPERSON HOLDEN: Very good.

2 Mr. Weaver, any more commentary?

3 MR. WEAVER: I think Mr. Richardson said  
4 it better than I did, namely, just because a person  
5 stepped away from their old employer, it doesn't mean  
6 that those relationships go away.

7 Further, Your Honor, there is an old  
8 Supreme Court case called Joint Anti-Fascist v. McGrath,  
9 decided by, I think, Felix Frankfurter. And he observed  
10 that one who sits as a judge not only has to do justice,  
11 but he must be perceived as doing justice, seen as doing  
12 justice.

13 And having Mr. Horne, who is obviously  
14 otherwise capable and otherwise a civic-minded  
15 individual, sit on this board in this dispute is wholly  
16 inappropriate. It is not something that should be done  
17 here. And we think that the papers that we have  
18 submitted fully support that.

19 Thank you, Mr. Holden.

20 CHAIRPERSON HOLDEN: Thank you,  
21 Mr. Weaver.

22 Mr. Horne, any commentary before I asked  
23 for a motion for Executive Session?

24 BOARD MEMBER HORNE: If I were to recuse



1 myself, would that still give you a quorum to operate  
2 properly?

3 CHAIRPERSON HOLDEN: Yes, we still do have  
4 a quorum today.

5 BOARD MEMBER HORNE: Okay. Given the  
6 reticence here, I would say that it would be best if I  
7 recuse myself.

8 I will only make one comment and that's  
9 just purely personal in that I think my specific  
10 knowledge of the Port operations would actually be to  
11 everyone's benefit in understanding what will eventually  
12 become -- I don't know if they will today or not -- will  
13 become very technical and involved discussions and  
14 arguments going forward. So I personally think it's not  
15 a good move.

16 I understand everyone's position, but I  
17 guess that's all I can say. Given that, I will recuse  
18 myself, which I guess recuses me from all future hearings  
19 on this matter.

20 CHAIRPERSON HOLDEN: I believe that's the  
21 case, sir. I appreciate your consideration and comments.  
22 And with that, we would ask for your departure here  
23 today. Thank you very much for the preparation time and  
24 your presence.

1 BOARD MEMBER HORNE: Okay. Thank you.

2 (Board Member Horne withdrew from the  
3 hearing.)

4 CHAIRPERSON HOLDEN: With that matter  
5 addressed, I would ask if there are any other preliminary  
6 matters before we move on to DNREC's partial motion to  
7 dismiss from any of the parties?

8 MS. SCOTT: This is Devera Scott and I  
9 will be arguing DNREC's partial motion to dismiss, but I  
10 noted that motion includes our motion to dismiss the  
11 individuals. And I noted that the individuals filed a  
12 motion to bifurcate, and indicated that they might have  
13 found counsel.

14 Is that something that the Board is going  
15 to address today?

16 MR. MALONEY: Chairman Holden, this is  
17 Kevin Maloney, Counsel for the Board.

18 I think it would be more appropriate for  
19 the appellants themselves to address those efforts to the  
20 extent they exist, if they choose to.

21 CHAIRPERSON HOLDEN: Mr. Maloney, are you  
22 suggesting that we start with that matter or we start  
23 with DNREC's motion to dismiss?

24 MR. MALONEY: I think it would make sense

1 to give the individual appellants an opportunity to put  
2 on the record their efforts, if any, to find counsel to  
3 represent them in this matter.

4 CHAIRPERSON HOLDEN: Ms. Scott, I  
5 appreciate you bringing that issue up.

6 I would start again with Mr. Richardson,  
7 if you so choose.

8 MR. RICHARDSON: I do have a statement I  
9 would like to read. And it covers some of these issues.  
10 And I think you have stated that we have 15 minutes. Is  
11 that the case?

12 CHAIRPERSON HOLDEN: That is correct.

13 MR. RICHARDSON: All right. So my name is  
14 Jeffrey Richardson. I am with the Delaware Community  
15 Benefits Coalition. I am a resident of Wilmington,  
16 Delaware. I'm an educator, an activist working in  
17 community development at the community and national  
18 level. I spent the majority of my life working with and  
19 in communities to address issues of social, racial,  
20 economic, and environmental justice.

21 From the very beginning of the permitting  
22 process through today, DNREC has failed its own  
23 environmental justice mission by denying the community's  
24 involvement in the permit process and in these hearings

1 before the EAB. To that end --

2 CHAIRPERSON HOLDEN: Mr. Richardson, if I  
3 could interrupt you for one -- Mr. Richardson.

4 MR. RICHARDSON: I haven't finished yet.

5 CHAIRPERSON HOLDEN: I ask to interrupt  
6 you for one moment. And I just want to make clear that  
7 again today is very specific about initial motions and  
8 not to argue the merits of the case overall. I just ask  
9 you to make sure we are on the same page here.

10 And so I want to assure that you are  
11 addressing what has been raised about the issue of  
12 counsel, attempts to get counsel, and your motion to  
13 bifurcate.

14 Thank you. Go ahead.

15 MR. RICHARDSON: Well, we tried to get  
16 counsel, and I am going to speak to that, because in an  
17 attempt to get counsel, one of the things that we opposed  
18 from the very beginning is that we have not been allowed  
19 to participate. And having to get counsel is part of  
20 that process.

21 DNREC's own mission statement states that  
22 "environmental justice seeks equity for minority and  
23 low-income communities that may be disproportionately  
24 exposed - and vulnerable - to adverse environmental

1 impacts. Simply put, practicing environmental justice  
2 ensures that everyone has an equal seat at the table  
3 where decisions are made." Everyone, not just people who  
4 can afford attorneys, nor should people even have to get  
5 an attorney.

6 Further, the language of DNREC, the  
7 Delaware Department of Natural Resources and  
8 Environmental Control is committed to working with  
9 community members throughout the State to shape  
10 excellent, effective, and engaging two-way communication.

11 That does not entail forcing community  
12 groups to get attorneys. That is exclusionary. That is  
13 demeaning. That is unjust. Our organization of  
14 individuals living on the front lines of the proposed  
15 project came together to strengthen our voices as a  
16 coalition and community. We have been denied standing,  
17 we believe, in obvious error, for each of us have  
18 suffered actual imminent, concrete, and particularized  
19 injuries, in fact, all traceable to the subaqueous land  
20 permits granted by DNREC.

21 These injuries are addressable by EAB  
22 overturning DNREC's decision to grant the permit for the  
23 dangerous project. Organizational standing in this  
24 matter does not require the participation of DCBAC's

1 individual members in the claim asserted nor the relief  
2 requested. Yet individual members would, in fact, have  
3 standing otherwise.

4 Our participation in the current actions  
5 to overturn the granted permit is entirely germane to  
6 DCBAC's organizational purpose. Because the community  
7 has never been engaged in good faith by the applicant,  
8 DNREC, or EAB, our rights to participate in the legal  
9 processes that will change our lives in material ways  
10 have been violated. This failure of process is an injury  
11 in fact. The attempts by DNREC and the EAB to weaken our  
12 voices and organized community group by denying  
13 organizational standing is an injury in fact.

14 Individuals in this country and in  
15 Delaware have every right to organize to fight pollution  
16 in their communities, and ask agencies to respect and  
17 protect that right. Using the fact and backward tactics  
18 to cut organizations like ours down to individual size is  
19 a denigration of the folks these agencies have sworn by  
20 to protect and honor citizens and residents of the State  
21 of Delaware.

22 Individual members enjoy recreating in and  
23 around the waterways that will be negatively impacted by  
24 the subaqueous land permit at issue. We have materially

1 diminished our perceived plans to recreate in the ways we  
2 have come to --

3 CHAIRPERSON HOLDEN: Mr. Richardson, I am  
4 going to ask for a moment to interrupt and make a comment  
5 here. At the previous hearing we addressed whether the  
6 community organization could be represented at the appeal  
7 without a lawyer. I don't believe it's DNREC's position,  
8 I think it's Delaware law that demands that the community  
9 organization has to be represented by a lawyer.

10 I understand you don't agree with that,  
11 but I don't believe that's an issue at hand to be  
12 resolved here today. You certainly are welcome to share  
13 your displeasure about that but, again, I don't believe  
14 this hearing today benefits that outcome. Right? The  
15 previous decision removed the community organization.

16 MR. RICHARDSON: Let's talk about that.

17 CHAIRPERSON HOLDEN: Today is -- if you  
18 want to argue the previous decision --

19 MR. RICHARDSON: This is specifically to  
20 the point that you mentioned. Rule 6.1 of the Delaware  
21 Lawyers Rules of Professional Conduct, a lawyer should  
22 render public interest legal assistance. Further, quote,  
23 legal assistance and coping with the web of statutes,  
24 rules, and regulations is imperative for persons of

1 modest and limited means.

2 DNREC has not provided that. We have  
3 asked for that from DNREC. This is according to your  
4 rules. So if you are not going to provide us with legal  
5 assistance, to demand that and state that we could not do  
6 that is an enormous burden on residents of this community  
7 and of this state who have a right to voice their  
8 concerns. And this rule is not being followed. This is  
9 a rule, speaking to laws in the state of Delaware, as you  
10 have mentioned. I have now stated the law in the state  
11 of Delaware. Where is our representation?

12 We have received some guidance, and that  
13 guidance was clear that it is the duty of the State to  
14 provide legal assistance to residents. It is a sworn  
15 oath of those who are in your profession, the legal  
16 profession, to provide and ensure that residents have  
17 legal representation. That has not been done.

18 That speaks specifically to the case at  
19 hand. It speaks specifically to the issue of standing  
20 and it speaks specifically to the issues that we are  
21 working to address today -- our standing, our right to  
22 speak. Our right to not be burdened with having to get  
23 an attorney. We have stated this clearly. And, clearly,  
24 you do have a responsibility to address this and deal



1 with this in a positive way by securing legal assistance  
2 for us, assisting us in this ability to speak.

3 You are the State. We are citizens. And  
4 we have a right to speak. We asked for that from the  
5 beginning.

6 CHAIRPERSON HOLDEN: Mr. Richardson, I  
7 appreciate your bringing that to a concise point at the  
8 end. And as I understand that, and correct me here, your  
9 argument is that DNREC is mandated to provide you with  
10 legal representation? Is that paraphrasing accurate?

11 MR. RICHARDSON: Somewhat. The State of  
12 Delaware. We asked for that directly. We stated that we  
13 need legal assistance, and we asked you to provide it. I  
14 think that went to Kevin Maloney specifically and  
15 directly about providing legal assistance as part of the  
16 oath that you lawyers in your profession, that that  
17 should be done. That wasn't done.

18 CHAIRPERSON HOLDEN: I appreciate that  
19 argument.

20 I would ask if Ms. Cheeseman wants to, in  
21 a similar vein, have an argument or discussion around the  
22 point of legal representation?

23 MS. CHEESEMAN: No. I believe Jeffrey has  
24 said it all. The lawyer that has stepped up has

1       apparently been told he can't do it because he is not on  
2       the Delaware bar. So we can't get a Delaware lawyer to  
3       even appoint him. So basically we are left with no legal  
4       representation, so we have to do it on our own.

5                   CHAIRPERSON HOLDEN: Thank you, ma'am.

6                   Mr. Hahn.

7                   MR. HAHN: Yes, I agree with what's been  
8       mentioned by Mr. Richardson and Ms. Cheeseman. I didn't  
9       think that, based on the definition of persons -- that  
10      someone to file an appeal you had to have an attorney in  
11      looking at those regulations. So go back and look at the  
12      Delaware law, there was some other Delaware law.

13                   And I have some other things to say on  
14      that in the hearing as we proceed, but for today's  
15      purposes, it's my understanding that we -- I don't have  
16      an attorney representing me because of legal paperwork  
17      and timing. I'm excited to have identified a contact  
18      with vast experience, an attorney in environmental  
19      justice in these types of projects to help us in the  
20      community.

21                   I would think the Board -- again, I'm not  
22      a lawyer, so I don't know about how to make motions, but  
23      understanding that there was a request made of support to  
24      give us some time to see if we can finalize a legal

1 relationship with an attorney that we found through some  
2 sponsor. But if not, we are prepared to go to the  
3 hearing as individuals today, at least I am, and not that  
4 I can speak for the other people as well. Pro se is the  
5 term I am supposed to use, again, without being a lawyer.  
6 I would be pro se myself.

7 CHAIRPERSON HOLDEN: Thank you, sir.

8 Ms. Reed.

9 MS. REED: Marie Reed here. I concur with  
10 my colleagues on legal representation. If we can't have  
11 it, we will come in as individuals.

12 Thank you, so much.

13 CHAIRPERSON HOLDEN: Thank you, ma'am.

14 Ms. Scott.

15 MR. MALONEY: Chairman Holden. Before you  
16 go to Ms. Scott, I would like to briefly respond to some  
17 of the comments that have been made.

18 CHAIRPERSON HOLDEN: Mr. Maloney.

19 MR. MALONEY: Obviously, you are entitled  
20 to represent yourselves, that's what we are here for.  
21 The rules of the Delaware Supreme Court prohibit an  
22 entity from participating in an administrative tribunal  
23 without legal representation. And that's what the last  
24 hearing and the last order was about. You have the right

1 to obtain an attorney. No one is trying to suggest  
2 otherwise. In fact, nothing would please me more than to  
3 have you all represented by an attorney, but it just  
4 hasn't happened.

5 I totally disagree with the suggestion or  
6 the premise that somehow it's the Board's responsibility  
7 to provide appellants before it with a lawyer.

8 CHAIRPERSON HOLDEN: Thank you,  
9 Mr. Maloney.

10 Ms. Scott.

11 MS. SCOTT: Thank you, Chair Holden. I  
12 appreciate Mr. Richardson's and the other individuals'  
13 concerns about obtaining counsel, and I'm not going to  
14 reargue the motion to dismiss the organization, but I  
15 just wanted to point out that there is a public process  
16 which was held through a public hearing, through  
17 comments, faced to engage -- I'm sorry, Mr. Richardson,  
18 can you please mute.

19 MR. RICHARDSON: My sincere apologies. I  
20 am very sorry.

21 MS. SCOTT: Thank you.

22 There is a public process of a means for  
23 individuals to participate. I would also note that  
24 practicing before this Board pro se litigants are not an

1 unusual event. There are plenty of pro se individuals  
2 who have presented argument before this Board.

3 But in terms of process, we are at a  
4 different stage of the process here. This is not a  
5 collaborative proceeding, it is adversarial proceeding.  
6 The individuals are asking the Board to affirm or reverse  
7 or remand a decision of the Secretary. So it is  
8 necessarily an adversarial proceeding.

9 So to the extent that -- I'm not sure what  
10 motion is actually on the table. They have asked to  
11 bifurcate the proceedings for their opportunity to obtain  
12 counsel, but as I understand the proceedings today that  
13 the individuals have an attorney, an out-of-state  
14 attorney who is willing to represent them but does not  
15 have a Delaware counsel to sponsor their admission  
16 pro hac vice.

17 So I'm not sure of what I'm commenting on  
18 exactly, but I just wanted to put on the record DNREC's  
19 disagreement that we are somehow trying to prevent these  
20 individuals from participating. We are not. But this is  
21 not a collaborative process, it is an adversarial  
22 proceeding and we are proceeding accordingly.

23 MR. RICHARDSON: Can I respond to that,  
24 please?

1                   CHAIRPERSON HOLDEN:  Momentarily,  
2  Mr. Richardson.

3                   Ms. Scott, one question for you to comment  
4  on is what I heard from Mr. Richardson that it was  
5  DNREC's responsibility to provide legal counsel for  
6  appellants.

7                   MS. SCOTT:  I disagree with that  
8  statement.  DNREC, this is DNREC's permit decision that  
9  we are defending.  In order for us to have an obligation  
10 to provide counsel to a party that is contesting that  
11 decision, I think in itself does not support that  
12 argument.  And there is certainly no statutory or any  
13 other guidance that would require DNREC to provide  
14 counsel for individuals.

15                   As I've stated, there have been  
16 individuals in the past who have ably represented  
17 themselves before this Board.  There's no requirement for  
18 DNREC to provide counsel.

19                   CHAIRPERSON HOLDEN:  Thank you, Ms. Scott.  
20                   Mr. Richardson, comment quickly?

21                   MR. RICHARDSON:  Okay.  Yeah, a couple of  
22 things.  First of all, I wanted to respond to Attorney  
23 Scott there that we did not actually have an opportunity  
24 to participate.  The public hearing process was weak,

1 anemic, not clear, not substantive. It was a check-the-  
2 box kind of participation. We participated in one of  
3 those hearings. This is one of the largest projects in  
4 the state of Delaware. This was a hearing during COVID.  
5 Three people were online for one of your public hearings,  
6 three people.

7 CHAIRPERSON HOLDEN: Mr. Richardson, I'm  
8 sorry. Mr. Richardson --

9 MR. RICHARDSON: It was absolutely not  
10 effective. It did not constitute public outreach. It  
11 did not constitute participation. It was not good,  
12 workable. It was fraudulent, frankly.

13 CHAIRPERSON HOLDEN: Mr. Richardson, I  
14 would ask you to stop for a second, please, sir.

15 Today is not a hearing to litigate whether  
16 you felt like the permit -- sir, one second, please.  
17 This is not a day to litigate whether you felt like the  
18 permitting process was adequate. This is a day to  
19 address three specific motions in front of us. Right?  
20 So I would ask you to stay on track there.

21 We have heard -- one second, sir, please.  
22 We have heard DNREC say that you are certainly able to  
23 participate pro se, which was that we had a whole hearing  
24 about that to address whether the community association

1 could be or could not be an appellant without a lawyer.  
2 Your appeal was submitted nearly nine to ten months ago.  
3 There has been, in my personal view, adequate time to  
4 seek counsel. There are several lawyers that sit here  
5 against DNREC's decision. There are certainly lawyers  
6 that have always been willing to argue against DNREC  
7 decisions in my experience of over a decade on the  
8 Appeals Board, sir.

9 So if we can stay to the three motions  
10 that are in front of us today and not try to go back to  
11 litigating whether you liked the permitting process or  
12 not. Certainly, you had opportunity to do that in the  
13 press and elsewhere. Today at this hearing we have  
14 brought a lot of people together to address three  
15 specific motions that are in front of us.

16 MR. RICHARDSON: I appreciate that. I  
17 just wanted to respond -- since Attorney Scott brought  
18 that up, I hadn't brought it up. She brought it up and I  
19 just wanted to respond it was not a good process.

20 Two, everyone has the right to get legal  
21 counsel, but legal counsel costs money. Just like  
22 telling any person who is poor, "Well, you can live here  
23 too, it just costs \$5 million." So obviously they are  
24 not going to be able to live there.



1           So utilizing the specious argument that  
2 everyone has a right and can get legal counsel, it is not  
3 the case. Having a right and being able to exercise that  
4 right in a relationship which requires enormous amounts  
5 of money, which most community groups don't have, it  
6 means that that process does not work. It is structured  
7 to not work. I just wanted to point that out. It was a  
8 point of clarification.

9           So I will stop there with that.

10           MR. HAHN: This is Simeon. Can I make a  
11 quick comment, not being a lawyer, about this that an  
12 individual or group has made a motion to bifurcate? Can  
13 that be explained? What is a motion to bifurcate?

14           CHAIRPERSON HOLDEN: Mr. Maloney, can you  
15 comment on whether a legal motion to bifurcate has been  
16 received and is on the agenda for us today?

17           MR. MALONEY: It is not on the agenda for  
18 today.

19           MR. HAHN: That was the question that was  
20 asked by Ms. Scott, correct? I mean, because I think I  
21 responded that it's important -- we want to address, I  
22 want to address my individual standing. I think all of  
23 us individually do. We did make a statement about our  
24 group. I do have standing. I did make a suggestion that

1 us five proceed together in the hearing, because we  
2 haven't been able to participate in developing a schedule  
3 for this hearing for dates in October and such like that,  
4 because we weren't sure if we would even be around even  
5 after today.

6 So we have been focusing on standing and  
7 taking one step at a time. Thank you.

8 CHAIRPERSON HOLDEN: Thank you, Mr. Hahn.

9 Ms. Scott, unless you have other  
10 commentary to address this line of discussion, I would  
11 ask that you move into your partial motion to dismiss.

12 MS. SCOTT: I am happy to move on to the  
13 partial motion to dismiss. I just raised the issue of  
14 the motion to bifurcate because Mr. Hahn actually made  
15 that request and it was at the end of his statement of  
16 appeal. But if that is not going to be on the table  
17 today, I can move on to the partial motion to dismiss.

18 CHAIRPERSON HOLDEN: Mr. Maloney, what  
19 guidance would you offer here?

20 MR. MALONEY: Thank you, Ms. Scott.  
21 Please do move on to the motion to dismiss.

22 MS. SCOTT: Thank you.

23 MR. HAHN: Can I ask a question too?  
24 Since there were seven motions, I believe, two that are

1 of interest to us, and not being lawyers very vested in  
2 those topics, but then the five against the individual  
3 appellants, will they go in the order that the document  
4 was received?

5 MR. MALONEY: Mr. Hahn, each of the  
6 individual appellants will be given an opportunity to  
7 respond when Ms. Scott finishes her argument on the  
8 motion to dismiss.

9 MR. HAHN: I am just saying is she going  
10 to speak on all of them together or is there a certain  
11 order for the individual motions?

12 MR. MALONEY: She is going to speak to the  
13 motion that was filed by DNREC, the partial motion to  
14 dismiss based on private subject matter jurisdiction and  
15 standing. So each of the individual appellants will have  
16 an opportunity to address both of those aspects after  
17 Ms. Scott is given an opportunity to make her  
18 presentation.

19 MR. HAHN: Thank you.

20 MR. MALONEY: You are welcome.

21 MS. SCOTT: Okay. Thank you, Chairman and  
22 Members of the Board, Mr. Maloney.

23 DNREC's partial motion to dismiss is  
24 divided into, I would say, two different sections. One

1 is the motion to dismiss the individuals for lack of  
2 standing and the other motion is to dismiss specific  
3 claims filed by the parties.

4 So I was going to start with the motion to  
5 dismiss the individuals. And then if you want to give  
6 the individuals and the other parties an opportunity to  
7 comment on that, or I can argue all of the substance of  
8 that motion now.

9 MR. MALONEY: My suggestion would be to  
10 argue the whole of the motion and then give the  
11 individual appellants an opportunity to respond to the  
12 whole of the motion rather than further fragment.

13 CHAIRPERSON HOLDEN: Ms. Scott, please  
14 proceed as Mr. Maloney has suggested.

15 MS. SCOTT: Okay. Thank you.

16 Standard of review before the Board is  
17 well known. Under Section 6008 of Title 7, it's the  
18 appellants' burden to show that the decision was not  
19 supported by the evidence on the record before the Board.  
20 This is not an opportunity to argue that there was  
21 technical evidence that the Secretary rejected, but here  
22 we are at the dispositive motion stage. So I will just  
23 proceed with those arguments.

24 We have argued the motion that the

1 individuals should be dismissed. At the April hearing  
2 the Board issued an order that dismissed the organization  
3 for lack of counsel. And I'm not going to reargue that,  
4 but the individuals were given the opportunity to file  
5 their own statements of appeal. And they were required  
6 to provide affidavits, declarations establishing how they  
7 were injured, what their standing is in this matter.

8 For the most part, the statements of  
9 appeal that were received -- and correct me if I'm wrong,  
10 but all of the individuals did not file their own  
11 statements of appeal -- but the ones that were received  
12 were basically identical. They were cut and pasted. The  
13 names, the addresses, were replaced and the standing for  
14 each was also essentially cut and pasted. No one  
15 provided any particularized individual harm.

16 So for that reason DNREC is asking that  
17 the individuals be dismissed from this case for failing  
18 to comply with the Board's order in establishing how they  
19 have standing to present their case here.

20 The other argument that we have made is  
21 that certain issues should be dismissed from this case  
22 because the Board does not have jurisdiction, they were  
23 untimely filed or they are just not ripe for  
24 consideration.

1 I will start with Mr. Curran's claims. He  
2 filed an amended -- and we have argued that his amended  
3 statement of appeal is untimely, that it was filed beyond  
4 the date for the 20 days for an appellant to challenge  
5 the Secretary's decision. There was no stipulation by  
6 the parties agreeing for an extension or for this amended  
7 statement of appeal to be filed. So we request that the  
8 amended statement of appeal be dismissed.

9 With respect to the water quality  
10 certification claim, that again we claim was not timely  
11 filed, the argument that Mr. Curran makes in his amended  
12 statement of appeal also predates the Secretary's order,  
13 and those should also be dismissed. And I will not  
14 repeat the arguments that we have made in the papers, but  
15 just go through all of the arguments.

16 Also, the Board lacks jurisdiction,  
17 subject matter jurisdiction over Mr. Curran's claims.  
18 With respect to the federal consistency determination,  
19 that is a federal law that requires -- gives DNREC the  
20 opportunity to comment. Those appeals go directly to the  
21 United States Department of Commerce and not to this  
22 Board. The requirement is based on a federal law. And  
23 this Board is without jurisdiction to consider those  
24 complaints.

1                   And likewise, the Section 401 Water  
2                   Quality Certification, as we have noted in our papers,  
3                   the DNREC regulations themselves do not require DNREC to  
4                   file a response to the Corps' water quality certification  
5                   if there is a subaqueous land permit also at play,  
6                   because those issues are duplicative. So to save time,  
7                   the regulations state that DNREC does not need to provide  
8                   that response, that 401 response.

9                   So to the extent there is any argument  
10                  that DNREC should have made a statement, should have  
11                  responded to the water quality certification, our  
12                  position is that it wasn't required. And water quality  
13                  certifications, again, that is part of the Army Corps  
14                  permitting process, which is still ongoing. And  
15                  therefore, regardless of whether the Board has  
16                  jurisdiction, it's unripe to be heard today because that  
17                  process is still ongoing.

18                  Can I reserve some time to respond after  
19                  the individuals and the other parties have made their  
20                  arguments?

21                  CHAIRPERSON HOLDEN: Yes, you can,  
22                  Ms. Scott.

23                  MS. SCOTT: Okay. Thank you. I will stop  
24                  there and respond after those arguments.

1 CHAIRPERSON HOLDEN: All right. Thank  
2 you, Ms. Scott.

3 I think, first, I would ask the parties of  
4 07 to respond to lack of standing due to not sharing  
5 particularized -- as I understand it, Ms. Scott, not  
6 sharing particularized injury or harm, right, if your  
7 statements of appeal are identical.

8 Mr. Richardson, would you like to start?

9 MR. RICHARDSON: So I want to speak to  
10 this issue as an individual and deal with this whole  
11 issue of particularized damage and harm.

12 I mentioned that I'm a resident of  
13 Wilmington, Delaware, that I'm an educator and activist.  
14 I have worked in community economic development at the  
15 community and national level. I have spent the majority  
16 of my life working in and with communities to address  
17 issues of racial, social and economic and now  
18 environmental justice.

19 The decision by DNREC and the EAB to  
20 exclude local front-line communities from participating  
21 in critical decisions concerning the proposed expansion  
22 of the Port of Wilmington is a pattern that reveals a  
23 level of dismissal and animus that is, frankly,  
24 dehumanizing. The people of the community that surround



1 the Port deserve to be heard as the proposed expansion  
2 will leave an indelible mark on their lives and the lives  
3 of all who are concerned about environmental justice, who  
4 recreate in and want to preserve the natural environment.

5 The current, anemic, and cynical  
6 noncommunity participation that we are dealing with now  
7 by DNREC in practice has amounted to a campaign  
8 reflecting denigration. We are human beings. We are  
9 citizens of this state. We demand and deserve a public  
10 participation process that is real, substantive,  
11 transparent, and undergirded by a commitment to enforce  
12 the laws developed to protect human health, our air,  
13 water, and communities, all of which will be severely  
14 degraded if the current permit is not reversed, and the  
15 knowledge and voices of community residents continue to  
16 be blunted or otherwise diminished.

17 I think it is worth restating the process  
18 issues that need to be followed when, according to DNREC  
19 and EAB, your own mission statement. Environmental  
20 justice seeks equity for minority and low-income  
21 communities that may be disproportionately exposed and  
22 vulnerable to adverse environmental impacts. Simply put,  
23 practicing environmental justice ensures that everyone  
24 has an equal seat at this table where decisions are being

1 made. It is not being done.

2 Further, your own statement, the Delaware  
3 Department of National Resources & Environmental Control  
4 is committed to working with community members throughout  
5 the state to shape excellent and effective and engage in  
6 two-way communication.

7 That is not being done. And this  
8 challenge to our standing absolutely exposes this is not  
9 what is being done. This is clearly, clearly, not the  
10 practice that we are experiencing.

11 We have been injured, injured by a mean-  
12 spirited and heavy-handed use of codes, the law and a sea  
13 of legal documents simply because we --

14 CHAIRPERSON HOLDEN: Mr. Richardson, my  
15 apologies. Mr. Richardson. Mr. Richardson, I ask you to  
16 pause. Would you pause for a second, please, sir?

17 I would ask you to focus your time on  
18 argument against dismissing yourself and your fellow  
19 appellants for lack of standing. I understand you don't  
20 like the process, but the argument is you don't have  
21 standing. You haven't provided particularized injury.

22 MR. RICHARDSON: I am speaking to that  
23 now.

24 CHAIRPERSON HOLDEN: And I would like to

1 hear argument specifically to that, sir.

2 MR. RICHARDSON: I am speaking about that  
3 now.

4 When I talk about the issue of protection  
5 of overburdened black, brown, working class communities  
6 from toxins like Fa-toxin, mercury, and PCBs, I am  
7 speaking specifically about the issue of damage. And as  
8 a result of that, we do have standing.

9 Our persons, our communities are being  
10 injured by this process. We have standing because we  
11 have a monumental stake in the outcome of this process  
12 and the decisions that are being made related to the  
13 expansion of the Port. Communities have already suffered  
14 cumulative impact. And the truck traffic that will be a  
15 result of this expansion will be exponentially greater.  
16 We will have truck traffic with enormous levels of diesel  
17 emissions. We breathe the air. We will be injured.

18 These injuries will deepen if this permit  
19 process is not reversed. We have standing because we are  
20 citizens. We will be injured. We have a right to speak  
21 and to be heard. I don't know how anyone who is a  
22 citizen of the state who pays taxes in the state does not  
23 have a right to speak about and protect their  
24 communities. And why that it's even necessary for the

1 State to attack communities.

2 We have standing as citizens. We have  
3 standing as human beings. We have standing because we  
4 have a right to be heard -- it's in your own documents.  
5 That standing should not be challenged. That standing  
6 should be upheld immediately if you are fulfilling your  
7 required goals and objectives related to environmental  
8 justice relating to community participation.

9 And it was even stated by Attorney, I  
10 guess, Scott here, about there being a process. Well,  
11 okay, so that's actually clearly an admission that you do  
12 have some type of process, so we do have standing to  
13 speak, but we don't have standing to ask questions.  
14 That's what it seems that we are dealing with here.

15 We have standing to come to a public  
16 hearing, but that is not very effective, but we do not  
17 have standing to ask questions. We do not have standing  
18 to be heard. We do not have standing to be respected. I  
19 am speaking specifically with respect to standing. And  
20 that standing needs to be respected.

21 This is abuse is what is occurring here.  
22 Abuse under the guidelines of a thinly veiled legal  
23 process that you have yourself stated is not an official  
24 court proceeding. And you are addressing community

1 residents as if this is a high court and not a process  
2 where there should be two-way communication and our  
3 standing should be respected. We have a right to speak.  
4 That's what this process is about. We have always  
5 entered into that being willing to speak, but that has  
6 not been returned.

7 So we are clearly speaking -- and I am  
8 speaking to the damage that has occurred, I am impaired  
9 just because of this process itself, participation in  
10 this. Going through all of these meetings, the sea of  
11 paper that we have been flooded with. We have standing  
12 as citizens, residents of this community, of this state.  
13 Our rights should be respected.

14 I don't know what other standing arguments  
15 we need to make. How come a company has more standing  
16 than a human being? How come the Port can expand but  
17 whole communities are not heard? Where does that come  
18 from? How can you justify that? What gives them  
19 standing? Is it just money? Money above human lives?  
20 Money above our health? Our standing is that we live  
21 here, we will be impacted by this. We have a right to  
22 know what is going to be happening, a right to  
23 transparency, a right to accountability, and a right to  
24 see the State follow its guidelines and regulations and

1 protect the public. That is our right. We do have  
2 standing.

3 I will stop there.

4 CHAIRPERSON HOLDEN: Thank you,  
5 Mr. Richardson.

6 Ms. Cheeseman.

7 MS. CHEESEMAN: Yes. I have standing  
8 strictly because that Port that is going to happen is  
9 literally right down the street from where I currently  
10 reside, where I grew up in, where my grandkids are in.  
11 And everything that's going to be done down there is  
12 going to affect, one, the use of the park. Two, the air  
13 quality because of the trucks and the dioxins that are  
14 going to be released into the air.

15 So how I don't have standing is a mystery  
16 to me. I literally live less than a half a mile from  
17 where this Port is going to be.

18 Thank you.

19 CHAIRPERSON HOLDEN: Thank you, ma'am.

20 Mr. Hahn. Mr. Hahn, do you have argument  
21 you want to share?

22 MR. HAHN: Yes. I take exception to  
23 DNREC's assertion that the individual appeals were just  
24 different addresses and not substantive, if you will.

1 Again, not knowing the legal terms. In my amended  
2 individual appeal, I indicated where I lived, which is  
3 within one mile of the Port expansion area. I indicated  
4 I am a frequent recreational user of the Delaware River  
5 in the immediate vicinity of the project site at Fox  
6 Point State Park, and these uses include but are not  
7 limited to walking, hiking, recreational fishing, boating  
8 other water contact things. And also, restoring habitat  
9 and promote -- and trying to conserve biodiversity.  
10 Doing cleanups.

11 I'm not sure in this hearing -- I was  
12 going to ask, I think I did ask, and I never get answers  
13 to any of my questions. But I could share, if I had  
14 Screen Share I could show you pictures with me, with  
15 showing Garvin, with the Governor, with Senator Carper  
16 picking up trash at the Fox Point State Park cleanup.  
17 Okay?

18 So this is very much something that I care  
19 about and that I work on. And I bring kids from the  
20 community, basketball players. Again, I have pictures to  
21 show you this.

22 The lack of shoreline access in this area  
23 is horrible. I have photos where DNREC has restricted  
24 shoreline access at the park, and people still get to the

1 shoreline. So there's been cumulative impacts to  
2 recreation in this area from a lack of access to the  
3 Delaware River. There's been significant impacts to  
4 natural resources, including shorelines and endangered  
5 species like the Atlantic sturgeon.

6 I have a lot of -- I will give some more  
7 background on myself. Again, I'm not sure when the right  
8 time for this is, but I have a Master's from the  
9 University of Delaware, over 30 years' experience in  
10 cleanups, habitat restoration, environmental justice  
11 projects, very much -- a lot of experience on  
12 contamination from environmental dredging, habitat  
13 restoration, scaling impacts. I know -- and I am here to  
14 present evidence when the time comes -- that there was  
15 insufficient analysis, insufficient data used as even  
16 indicated by resource agencies.

17 CHAIRPERSON HOLDEN: Mr. Hahn, I would  
18 ask, too, that you focus on your standing against DNREC's  
19 argument that you don't have standing or particularized  
20 interest.

21 MR. HAHN: Can you give me a suggestion of  
22 where I went off topic?

23 CHAIRPERSON HOLDEN: Your educational and  
24 professional background doesn't, in my opinion,



1 necessarily speak to the argument that you don't have  
2 standing.

3 MR. HAHN: It does when it relates to my  
4 contribution and participation and efforts to restore  
5 migratory fish in the Wilmington area, to restore  
6 wetlands and other habitats. So I was just trying to get  
7 some background -- and I appreciate any citizen  
8 environment, but as a scientist, I lead and helped  
9 develop a lot of these community efforts, and my  
10 experience was very pertinent to that.

11 And I am very interested in mitigation  
12 that's required as part of this. And I would like to  
13 talk about that process of mitigation. I worked for -- I  
14 am retired.

15 CHAIRPERSON HOLDEN: Mr. Hahn, again, you  
16 are getting into issues that potentially are part of the  
17 merits of the case. The issue at hand is DNREC's arguing  
18 that you don't have standing, and not whether you have  
19 technical expertise that could speak to portions of the  
20 merits. Right?

21 So I would ask you to focus on the issue  
22 of standing, and why specifically you have standing here  
23 at this point in this process.

24 MR. HAHN: Again, I will emphasize my

1 extensive recreational use. Okay? My -- I will restate  
2 my participation in habitat restoration at Fox Point Park  
3 and other areas on the Delaware River in the vicinity.  
4 So that's part of my community time.

5 I would agree, as a taxpayer, for this  
6 particular project with so much taxpayer funding,  
7 taxpayers should be considered as having standing. But,  
8 you know, I also -- and I will conclude with this, but I  
9 am prepared to present it maybe in summary and in next  
10 steps.

11 I have quotes from different transcripts  
12 of standings where this issue has been addressed, where a  
13 quote from Mr. Maloney, from Senator Peterson and stuff  
14 about -- against other people in a similar manner of  
15 myself. And I would end with kind of paraphrasing what  
16 they have said. If I don't have standing, then who the  
17 hell does?

18 Thank you.

19 CHAIRPERSON HOLDEN: Thank you, Mr. Hahn.

20 Ms. Reed.

21 MS. REED: Yes. As a lifelong resident of  
22 Southbridge, how can you say that I don't have standing?  
23 From the community health impact of the Port of  
24 Wilmington in my neighborhood, from the heavy truck

1 traffic, from the heavy truck traffic that I see coming  
2 down my street, which is a residential street, from the  
3 smoke that's blowing every day through my community from  
4 the Port, from the high cancer rate, from the numerous  
5 people I have seen die over the years from cancer who  
6 worked at the Port, how can you say that I don't have  
7 standing? How can you say that the residents and the  
8 people of my community don't have standing?

9 I think you need to take another look in  
10 the mirror. Look at yourselves. How can you speak on  
11 something that you have never experienced? Come to my  
12 neighborhood for a day. Walk the streets. Talk to the  
13 people who live right next to the Port, because the Port  
14 is in my backyard. And how can you say that we don't  
15 have standing?

16 I am one of a thousand people from  
17 Southbridge. I am the oldest person in this group from  
18 Southbridge. And how can you say that I do not have  
19 standing? I beg to differ with you. I am being quite  
20 nice. I am really telling you that you are a damn liar  
21 because I do have standing.

22 Thank you very much.

23 CHAIRPERSON HOLDEN: Thank you, Ms. Reed.

24 I am going to pause here and offer the

1 Board an opportunity to ask the four appellants that just  
2 spoke any questions they have about these arguments.

3 (No response.)

4 I have a question of Mr. Hahn. Mr. Hahn,  
5 if the project moves forward, would you intend to no  
6 longer recreate in the area? How does that impact your  
7 recreational use?

8 MR. HAHN: That would definitely impact my  
9 -- and I would recreate less. The entrance to Fox Point  
10 Park already is congested and has a lot of vehicular  
11 issues. With the Port there, I can't imagine. And so,  
12 yes, and also the habitat impacts that will occur will  
13 impact shorelines and other access points to do things  
14 like fishing and kayaking, all activities which I do in  
15 that vicinity.

16 So, yes, both land-based and water-based  
17 recreational activities would be reduced, some  
18 eliminated.

19 CHAIRPERSON HOLDEN: Thank you, Mr. Hahn.

20 I'm going to ask if Ms. Scott wants to  
21 offer a bit of rebuttal to those comments, and then  
22 following that I want to move to Ms. Skjoldal to address  
23 Ms. Scott's comments on specifics of Appeal 21-10.

24 MR. RICHARDSON: Mr. Holden, can I make

1 one quick statement that I forgot to make in my  
2 statement?

3 CHAIRPERSON HOLDEN: Quickly.

4 MR. RICHARDSON: I don't like our group to  
5 be -- we came to you as a group, and then we filed as  
6 individuals, so we shouldn't be ruled on as a group. We  
7 are four individuals. I gave my individual statement, as  
8 did the others, so I believe we all deserve an individual  
9 ruling and not being ruled on as a group.

10 Thank you.

11 CHAIRPERSON HOLDEN: Ms. Scott.

12 MS. SCOTT: Standing is not something that  
13 DNREC decides arbitrarily. It's established by statute,  
14 Section 6008, and by case law. And the Delaware Supreme  
15 Court has provided guidance on when a party has standing.  
16 And this is from Nichols v. Coastal Zone Industrial  
17 Control Board, which is the same standing requirement for  
18 this Board. That the appellant suffered injury-in-fact  
19 that's concrete and particularized, that the appellant's  
20 injury is fairly traceable to the challenged action of  
21 the defendant, and that the appellant's injury must be  
22 capable of being remedied by a favorable ruling by the  
23 Board.

24 And it is the appellant's burden to prove

1 that he or she has standing to bring the action. All  
2 three elements are required in order to establish  
3 standing. This is what the Delaware Supreme Court has  
4 ruled. It's the rule of law. And that is what guides  
5 the decision here.

6 I would also note that the Board's  
7 decision in the April order that dismissed the  
8 organization for failing to have an attorney required  
9 that the individuals may proceed contingent upon the  
10 filing of individual amended statements of appeal and  
11 affidavits or declarations designed to establish their  
12 basis for standing. The Board held that failure to make  
13 such findings shall constitute grounds for dismissal of  
14 the individual appellant's appeal without further  
15 hearing.

16 Today Mr. Hahn and Ms. Reed and Ms.  
17 Cheeseman have testified that one of their interests is  
18 their proximity to the Port and their concerns about air  
19 pollution. Had they provided that information in their  
20 statements or in the affidavit that they were required to  
21 file 30 days after that order, we would not be making  
22 this argument.

23 But, unfortunately, that didn't happen.  
24 We did not hear those -- we did not receive that

1 information as was required by the Board's order.  
2 Unfortunately, the individual appellants did not provide  
3 that information, despite the fact that the Board issued  
4 a clear order for those individuals to provide that  
5 information.

6 So this is not -- again, it's just guided  
7 by case law and by the statute that requires this showing  
8 in order to establish standing.

9 That's all I have.

10 CHAIRPERSON HOLDEN: Thank you, Ms. Scott.  
11 I would like to ask Ms. Skjoldal to speak to DNREC's  
12 motion to dismiss issues surrounding the current appeal.

13 MS. SKJOLDAL: Thank you, Mr. Chairman. I  
14 am going to pass it along to my colleague, David Rockman.  
15 This falls under his area today. So I will mute myself  
16 and let Mr. Rockman speak.

17 MR. ROCKMAN: Thanks, Michelle.

18 Chairman Holden, I am going to respond to  
19 that part of the motion that is directed solely at  
20 Mr. Curran's appeal regarding the 401, Clean Water Act,  
21 Section 401, Water Quality Certification.

22 To the extent of the federal consistency  
23 certification, the parties having coordinated in advance  
24 of this hearing, that primary argument response is going

1 to be provided by the Port Operators' counsel.

2 So if taking the 401 water quality  
3 certification issue next is okay, I will respond to  
4 DNREC's arguments there.

5 CHAIRPERSON HOLDEN: Yes, please proceed.

6 MR. ROCKMAN: Sure. I guess in today's  
7 arguments, you know, Ms. Scott, I think I heard, seemed  
8 to reframe the motion as a dismissal of the amended  
9 petition rather than just seeking to dismiss a perceived  
10 claim or certain sections of the amended appeal petition.  
11 That may actually be a distinction without a difference  
12 since the only real change from the original appeal  
13 petition to the amended one is the addition of the 401  
14 water quality certification issue.

15 There was one other correction we made  
16 just with the math on the commendatory mitigation  
17 section. I'm assuming that that correction is not at  
18 issue here. Although, the correction would disappear if  
19 the amended petition were to be dismissed and we reverted  
20 back to the original petition.

21 In any case, our primary response to  
22 DNREC's motion is to clarify and confirm that we are not  
23 seeking to overturn DNREC's failure to respond on the  
24 Section 401 water quality certification issue. Paragraph



1 50 of the amended petition remains the same word for word  
2 as the original as to the relief requested, which is  
3 challenging the subaqueous lands permit and the federal  
4 consistency certification, but not seeking any relief  
5 with respect to the 401 water quality certification  
6 issue.

7 So while DNREC makes an interesting  
8 argument that we are both too late and too soon to  
9 challenge that issue, which would probably be a fun  
10 viewpoint to explore, we think that's really beside the  
11 point.

12 Again, the 401 water quality certification  
13 issue was inserted as a line of evidence and it is not a  
14 separate claim. We think it's a very interesting element  
15 of the overall permitting process since DNREC responded  
16 to the U.S. Army Corps of Engineers on May 20th of 2020  
17 requesting more time to respond to the Corps, and  
18 pointing out just the unique magnitude of the project and  
19 the need for careful review at DNREC. That letter,  
20 interestingly enough, is completely silent on the issue  
21 of whether DNREC needed to respond to the Army Corps,  
22 which is the argument that they now advance in their  
23 brief and in the arguments today.

24 So since that letter, DNREC has apparently

1 changed its position on its obligation regarding response  
2 to the U.S. Army Corps on the 401 water quality  
3 certification request. Today, and in their brief, they  
4 said they don't have to respond since this is a  
5 subaqueous lands permit at issue, and therefore, I guess,  
6 presumably the evaluation that DNREC would do to an  
7 independent 401 water quality certification from the U.S.  
8 Army Corps, unrelated to its subaqueous permits, in this  
9 case was bound up in their very review of that permit  
10 application.

11 You know, to the extent that argument is  
12 correct, we think it just highlights the relevance of  
13 DNREC's letter to the Army Corps to the actual permit  
14 contest here even more closely.

15 Overall, our argument is that DNREC was  
16 correct about the importance of the project in the May  
17 20th letter, was correct about the significance of the  
18 review that they had to undertake for this unique and  
19 large project, but ultimately, that DNREC dropped the  
20 ball and did not give due consideration to all the  
21 important and unprecedented aspects, implications and  
22 effects of the Port project.

23 So that's sort of our response, which is  
24 perhaps not the response that DNREC was expecting. And

1 we sort of concur that we are not seeking relief on the  
2 particular inaction as DNREC to respond to the Army Corps  
3 401 water quality certification request on time.

4 CHAIRPERSON HOLDEN: Mr. Rockman, if you  
5 could distill down for me -- there was a lot of  
6 discussion in there. Specifically around the 401  
7 certification, what impact or what action are you asking  
8 for the Board relative to that narrative?

9 MR. ROCKMAN: None. The facts and  
10 circumstances of that interaction between DNREC and the  
11 Army Corps, we think are evidential of DNREC's initial  
12 recognition of the importance of this project and the  
13 level of scrutiny it required. But then, the rest of our  
14 position on the merits is that they didn't follow through  
15 on that adequately enough to meet the requirements of the  
16 regulations, all to be addressed at the merits hearing.

17 I think the issue before the Board this  
18 morning, I guess, is whether to, you know, sustain the  
19 amended petition which puts DNREC on notice of this  
20 particular line of argument. Although, I think we would  
21 intend to raise it. I think we are well within our  
22 rights to raise it and introduce the facts and  
23 circumstances of DNREC's response to the Army Corps at  
24 the hearing, whether or not it has been specifically

1 called out in the amended petition.

2 CHAIRPERSON HOLDEN: And, Mr. Rockman, are  
3 you also going to speak to DNREC's argument that the  
4 amended statement of appeal was not timely and thus not  
5 valid?

6 MR. ROCKMAN: Sure. I will address that  
7 again. As I said at the outset, we had understood from  
8 the papers DNREC's motion was seeking to strike a couple  
9 of paragraphs within the amended petition and not strike  
10 the amended petition itself. Yet, the amended petition  
11 was -- does not, as I noted, change the relief requested  
12 or really add anything to the underlying challenge in  
13 terms of what is being challenged in terms of which DNREC  
14 actions the Secretary's order that is the focus of all of  
15 the appeals here.

16 So it was a clarification of arguments,  
17 but it was not a new argument such that the argument that  
18 DNREC has advanced that you have to submit an appeal  
19 within 20 days of the DNREC decision being announced, we  
20 think is sort of not well applied here because the  
21 original petition was timely filed. We are not seeking  
22 any new relief. We are adding a new fact to put them on  
23 notice.

24 So we don't think that the belated filing

1 argument has any real merit or applicability here really.

2 CHAIRPERSON HOLDEN: Thank you,

3 Mr. Rockman.

4 So are we moving to Mr. Levine to speak to  
5 the federal consistency issue?

6 MR. HAHN: Can I ask about the water  
7 quality certificate? Is that allowed?

8 CHAIRPERSON HOLDEN: Who is speaking?

9 MR. HAHN: This is Simeon Hahn.

10 CHAIRPERSON HOLDEN: Mr. Hahn, let us move  
11 through to Mr. Levine and we can circle back for some  
12 discussion in a bit.

13 MR. HAHN: Because I do have a comment on  
14 the water quality certificate. Thank you.

15 MR. LEVINE: Yes, this is Andy Levine. It  
16 really wasn't our motion. We were concurring with the  
17 Port Operators and with Walter Curran's motion.

18 MS. SCHILLER: Chairman, this is Suzanne  
19 Schiller, and I am the one who will be addressing the  
20 consistency certification.

21 CHAIRPERSON HOLDEN: Thank you, Ms.  
22 Schiller. Go ahead.

23 MS. SCHILLER: First of all, I want to  
24 make sure, Ron, do you have capability?

1 MR. DeJESUS: Yes.

2 MS. SCHILLER: Great. All right.

3 So, first, I want to preference my  
4 argument with the fact that actually until yesterday  
5 morning I had not planned on being the one arguing today.  
6 My co-counsel, Steve Daly, was, but he and his wife  
7 welcomed a son yesterday a little bit sooner than  
8 expected. Everybody is fine.

9 CHAIRPERSON HOLDEN: Congratulations.

10 MS. SCHILLER: Yes, it's a wonderful  
11 event. But I hope you will forgive me if from time to  
12 time it may take me a bit longer to find my place or I  
13 may need to rely on other counsel.

14 The partial motion to dismiss challenges  
15 this Board's jurisdiction to hear the Port Operators'  
16 appeal of the federal consistency certification which was  
17 issued under the Coastal Zone Management Act. That the  
18 certification was issued under the CZMA is important here  
19 because the only case that DNREC sites for the  
20 proposition that this Board lacks jurisdiction is a case  
21 that arose under an entirely different, although somewhat  
22 similarly named, act, the Coastal Zone Act. So different  
23 statutes, different avenues of appeal, and so case  
24 applicability is not really there.

1           The CZMA, the one that applies here,  
2 allows states to review federal projects that affect  
3 state's coastal zones. The certification that we are  
4 appealing is one that is issued by the DNREC Secretary,  
5 Secretary Gavin, which states that the project is  
6 consistent not with federal law, but with Delaware's  
7 specific coastal zone policies.

8           So the heart of an appeal of a federal  
9 consistency certification is whether Delaware's policies  
10 have been applied.

11           And so, Ron, if you could pull up the  
12 consistency certification.

13           BOARD MEMBER HORSEY: I apologize. Ms.  
14 Schiller, are you going to start sharing documents? Are  
15 we labeling them as exhibits?

16           MS. SCHILLER: We can. They are attached  
17 as exhibits to our papers, but we can certainly do that.  
18 I would be happy to do so.

19           CHAIRPERSON HOLDEN: Mr. Horsey, if they  
20 are already a part of the documents of the case that have  
21 been submitted, Ms. Schiller, if you can direct us to  
22 what document or submission they were attached to, and I  
23 think that will clear up the record issue, Mr. Horsey,  
24 that you are addressing here.

1 MS. SCHILLER: Unfortunately, again,  
2 because I just prepared for this, I can't say  
3 specifically while we are arguing. I can either present  
4 that in writing after the fact or we can go ahead and  
5 identify them as exhibits. Either way. I think it would  
6 be -- it would take a lot of time for me right now in the  
7 middle of my argument to identify where they came from.

8 So the Board, whichever you would prefer,  
9 I can identify them as exhibits or after the hearing  
10 today I can send an email or a letter identifying where  
11 each of them are.

12 CHAIRPERSON HOLDEN: If you can come forth  
13 and say to us that they are in the submission documents,  
14 I am fine to allow you to continue, unless there's any  
15 other issue from the appellants with that.

16 MS. SCHILLER: I think they all are. If  
17 any of them aren't, we will submit it separately. I can  
18 submit a whole -- for your consideration, actually, we  
19 can submit essentially an index of all the documents at  
20 the close of the hearing. Will that work?

21 CHAIRPERSON HOLDEN: Please do.

22 MS. SCHILLER: Okay. We will do it that  
23 way.

24 So anyway, what we have on the screen here



1 is the consistency certification. And if you look at the  
2 certification, beginning at page 3, it goes paragraph by  
3 paragraph. And it lists each of the sections and the  
4 subsections of the Delaware Administrative Code that are  
5 applicable, and why the plan complies with the  
6 provisions.

7 So we are talking about not a federal  
8 question. It comes squarely within the Board's  
9 jurisdiction under Section 6008A.

10 And thank you, Ron. If we can pull up  
11 6008A.

12 So as you can see, that section says that  
13 any person whose interest is substantially affected by  
14 any action of the Secretary may appeal to the  
15 Environmental Appeals Board within 20 days. And this  
16 is -- there's no dispute. This is an action of the  
17 Secretary.

18 And while 6008A doesn't limit itself to  
19 actions of the Secretary taken pursuant to Chapter 60,  
20 one of the arguments that was made by DNREC is that it  
21 does. Again, we disagree with that as a legal  
22 proposition, but that really doesn't matter because,  
23 contrary to their assertion, issuance of the  
24 certification is an act taken pursuant to Chapter 60.

1                   Specifically, if we look at Chapter 6010D,  
2                   that Section 6010D states that the Secretary may  
3                   formulate, amend, adopt, and implement after public  
4                   hearing a statewide Water Pollution Management Plan to  
5                   achieve the purposes of this chapter and comply with  
6                   applicable federal laws and regulations.

7                   And so if we go then back and we actually  
8                   look at these regulations and the policies that are at  
9                   play.

10                  Ron, if we could pull them up.

11                  And you look right here at the final  
12                  regulations very clearly states that the final  
13                  regulations are being issued pursuant to 7 Delaware Code,  
14                  Section 6010 part of Chapter 60. So we meet all the  
15                  requirements.

16                  Getting back to the Sierra Club case,  
17                  which is the case DNREC cited in its motion. Again, that  
18                  was a case that dealt with a different act, the Coastal  
19                  Zone Act. And the Coastal Zone Act is different because  
20                  it has its own entire appeals board, the Coastal Zone  
21                  Industrial Control Board, different avenues of appeal,  
22                  different case law, different applicability.

23                  The final argument that was made by DNREC  
24                  is that this properly belongs before the Secretary of

1 Commerce because it's an appeal related to federal law.  
2 As I just explained, it's not a federal law appeal. It's  
3 an appeal of state law -- of an action undertaken by a  
4 Secretary under state law.

5 And if we go into the actual federal law  
6 that we are talking about, the CZMA, If we look at 1645  
7 (c)3(a), it's very clear what the limitations of the  
8 Secretary of Commerce's appeal jurisdiction is. That  
9 section says that no license or permit shall be granted  
10 by the federal agency until the State or its designated  
11 agency has concurred with the applicant's certification  
12 or until, by the State's failure to act, the concurrence  
13 is conclusively presumed, unless the Secretary, on his  
14 own initiative, or on appeal by the applicant, finds  
15 after approving a reasonable opportunity and so forth.

16 What the CZMA does is it provides  
17 applicants with an avenue of appeal because if the State  
18 rejects the certification, then that's the only avenue  
19 that exists, because it's a matter -- it becomes a matter  
20 of federal law.

21 That's not the case here. The one thing  
22 DNREC is correct about is that the CZMA itself does not  
23 provide for a private right of action, that is, for a  
24 party such as the Port Operators to appeal to the United

1 States Commerce Secretary a decision by a State to issue  
2 a certification. That's precisely why the avenue of  
3 appeal for the Port Operators with respect to the federal  
4 consistency certification is to this Board and to no  
5 other authority.

6 Thank you.

7 CHAIRPERSON HOLDEN: Thank you,  
8 Ms. Schiller.

9 Ms. Scott, any rebuttal?

10 MS. SCOTT: Thank you, Chair Holden. So  
11 as I understand the water quality certification issue,  
12 that is not on the table anymore because the appellants  
13 have now stated that it is not a separate claim, that  
14 it's just something that they intend to use as evidence  
15 to demonstrate the importance of the project and other  
16 arguments that they intend to make.

17 So to the extent that that part of our  
18 motion is uncontested, I can move on to the federal  
19 consistency certification. And not every action that the  
20 Secretary takes is subject to judicial review. Here we  
21 have a federal consistency certification. DNREC has  
22 argued that it's part of this Coastal Zone Management  
23 Act. The federal law, that is guided by -- it's guided  
24 by that federal law.

1           Notwithstanding the fact that there is no  
2 private right of action in the federal law for parties  
3 other than the applicant or the Secretary to challenge a  
4 Coastal Zone Management Act federal consistency  
5 certification does not mean that, well, it's not  
6 contained in the federal law so it must be provided in  
7 state law.

8           Again, not every action of the Secretary  
9 is subject to a private right of action. Here it's clear  
10 that any appeals to a federal consistency certification  
11 go to the United States Department of Commerce, that the  
12 Board does not have jurisdiction over that act, the same  
13 act that requires the state to develop regulations for a  
14 federal consistency process.

15           So we object to the argument that without  
16 that private right of action at the federal level that we  
17 need to leap frog over to state law and find some ability  
18 to appeal that decision to this Board. And we object to  
19 that, as stated in our papers.

20           The regulations were issued in order to  
21 maintain DNREC's ability to participate in the federal  
22 program. They were required by the federal program. And  
23 everything that flows down to DNREC is guided by that  
24 federal law. So, again, because the Board does not have

1 jurisdiction over federal law or this consistency  
2 certification, we are objecting to this claim being in  
3 the appeal for the Board's lack of jurisdiction.

4 Thank you.

5 MS. SCHILLER: Can I respond, briefly,  
6 Chairman?

7 CHAIRPERSON HOLDEN: Ms. Schiller.

8 MS. SCHILLER: Yes. Very briefly. There  
9 are a lot of state laws that are enacted pursuant to  
10 federal laws. State laws are enacted pursuant to the  
11 Clean Water Act, to the Clean Air Act. And actions taken  
12 by the state, pursuant to their state laws enacted under  
13 those federal laws, come before this Board and other  
14 state boards all the time.

15 So this is no different than any of those  
16 appeals that come before this Board, nor is there any  
17 leapfrogging going on here. As I stated in my argument  
18 and in our papers, 6008A specifically says that an appeal  
19 of an action, of any action of the Secretary comes before  
20 this Board. And so, again, I would only say there's no  
21 leapfrogging and it is very routine for appeals of state  
22 statutes and regulations, enacted under federal laws, to  
23 come before this Board and to come before other state  
24 administrative boards.

1 CHAIRPERSON HOLDEN: Thank you,  
2 Ms. Schiller.

3 I am going to at this point ask if the  
4 Board has any questions on these two issues? Or I  
5 suppose three issues, we have timeliness, federal  
6 consistency, and the 401.

7 MR. ROCKMAN: Mr. Chairman, I apologize, I  
8 had myself on mute; I wanted to offer a very brief  
9 statement.

10 CHAIRPERSON HOLDEN: Mr. Rockman, please  
11 go ahead.

12 MR. ROCKMAN: On the 401 water quality  
13 certification, Ms. Scott, you said your motion was  
14 unopposed, and I would contest that. It most certainly  
15 is opposed. I think or I hope that we landed on the  
16 conclusion that it is, I guess, moot or unnecessary  
17 rather than unopposed. Thank you.

18 CHAIRPERSON HOLDEN: Thank you, sir.  
19 Board members, any questions for the  
20 parties here?

21 BOARD MEMBER RIDDLE: Mr. Holden, this is  
22 Fran Riddle speaking. I do have a few questions, if I  
23 could.

24 CHAIRPERSON HOLDEN: Ms. Riddle, please go

1 ahead.

2 BOARD MEMBER RIDDLE: I apologize for lack  
3 of camera, so you have to imagine me here.

4 My questions are primarily for Ms. Scott,  
5 and the first would be related to the Walter Curran  
6 appeal, and it might circle back to the other attorneys  
7 related to that. But if the amended appeal, if those  
8 particular water quality issues were disregarded, do you  
9 have objections to the other aspects of that appeal with  
10 respect to standing?

11 MS. SCOTT: Thank you, Board Member  
12 Riddle.

13 Without the water quality certification  
14 issue at play, we would maintain our objection that the  
15 amended statement of appeal was filed beyond the time  
16 allowed by statute. That answers your question. That  
17 the entire amended appeal was filed outside of the time  
18 allowed by law and without permission from the Board or  
19 by stipulation of the parties.

20 BOARD MEMBER RIDDLE: So let me make sure  
21 that I am understanding. So then your position would be  
22 based on that timeliness issue, that that appeal would go  
23 away altogether? There would be nothing left? The  
24 original appeal would not still stand?



1 MS. SCOTT: No. The original appeal, as  
2 timely filed, would stand, but the amended statement of  
3 appeal that was untimely should be stricken, and any new  
4 arguments raised therein would be also accordingly  
5 stricken from this proceeding.

6 BOARD MEMBER RIDDLE: So the Board would  
7 then go back and consider the original appeal of  
8 Mr. Curran, correct?

9 MS. SCOTT: Yes.

10 BOARD MEMBER RIDDLE: And do you have any  
11 issues with that original appeal?

12 MS. SCOTT: To the extent that the water  
13 quality certification was raised, only the amended -- the  
14 issues that we have raised today are the issues that we  
15 are seeking to dismiss.

16 BOARD MEMBER RIDDLE: Okay.

17 MS. SCOTT: I'm sorry, just to be clear.  
18 It's DNREC's position that the only decision that is  
19 subject to the Board's jurisdiction is the Subaqueous  
20 Lands Act decision cited by Chapter 72 of Title 7, which  
21 specifically provides that appeals of decisions for  
22 subaqueous lands permit applications go to the Board.

23 So if there's federal consistency, water  
24 quality certification issues in the original statement,

1 then our arguments would -- we would still seek to strike  
2 those arguments and just limit the proceedings here to  
3 subaqueous lands permit decision.

4 BOARD MEMBER RIDDLE: Okay. I guess my  
5 follow-up question related to that, then, is as I read  
6 the original Curran appeal, it sounds similar in some  
7 respects to the appeals of the five individuals with  
8 respect to the harm that he suggests, the particularized  
9 harm being his ability to pursue recreational activities,  
10 as well as his concern about adverse impacts to the  
11 environment. And I am wondering why the standing would  
12 be questioned for the five individuals on that ground but  
13 not for this particular appeal. And I am making this,  
14 reading all of this, but I am a little confused on that  
15 point.

16 MS. SCOTT: We did not challenge the  
17 standing of Mr. Curran because he didn't provide that  
18 information in his statement of appeal. We are  
19 challenging the standing of the other individuals because  
20 there was the issue of counsel and who was representing  
21 the parties that was addressed at the April hearing, and  
22 because Mr. Richardson was speaking for most of those  
23 individuals. And the Board determined that, at that  
24 hearing, that the individuals, if they wanted to stay in

1 the case, had to file their own statements of appeals and  
2 file their own affidavits supporting their own standing  
3 in this case.

4 And we are challenging their standing  
5 because they didn't comply with the Court's order. That  
6 they all filed essentially the same information, and that  
7 there was no particularized harm alleged. So going  
8 through the standard provided by Nichols v. Coastal Zone  
9 Industrial Control Board that they have suffered an  
10 injury-in-fact that's concrete and particularized, that  
11 their injury is fairly traceable to the action that's  
12 being challenged, and that the Board has the ability to  
13 remedy that harm.

14 And because that information wasn't  
15 provided in the time required by the Board, and in their  
16 subsequent statements of appeals that some but not all of  
17 the individuals filed, that the statements -- there were  
18 no separate affidavits filed by the individuals.  
19 Everything was included in their own statements of  
20 appeal.

21 But again, that those were not  
22 individualized and geared towards each person, as we have  
23 heard today some different information about how  
24 Mr. Hahn, Ms. Cheeseman, Ms. Reed live close to the Port,

1 were concerned about pollution. Had that information  
2 been provided in a timely fashion, according to the  
3 Court's order, we probably wouldn't be arguing that  
4 today.

5 Mr. Richardson, however, is still relying  
6 on his statement, and makes more broad statements about  
7 fairness and things like that that are really not  
8 concrete or particularized to demonstrate his harm with  
9 respect to DNREC's decision to grant a subaqueous lands  
10 permit here. So that's the difference. I hope I  
11 answered your question.

12 MR. HAHN: Are we allowed to responded to  
13 this?

14 CHAIRPERSON HOLDEN: Mr. Hahn, not at this  
15 time. We have got some questions for the Board which are  
16 specific questions for the Board to ask and to be  
17 answered.

18 MR. HAHN: There have been a lot of  
19 statements repeated about the documents the same, and  
20 about the sharing the document. I asked about that.  
21 That's simple to pull up my document and compare it to  
22 other people's documents and it would show it's  
23 different. What I talked about --

24 CHAIRPERSON HOLDEN: Mr. Hahn, I would ask

1 you to stop for a second.

2 MR. HAHN: You didn't give us enough time  
3 to respond.

4 CHAIRPERSON HOLDEN: I am giving Board  
5 Member Riddle an opportunity to talk about her questions  
6 to Ms. Scott. So would you please respect that time.  
7 Thank you, sir.

8 Ms. Riddle.

9 BOARD MEMBER RIDDLE: Yes, Mr. Hahn, I  
10 think I am through at this point with those questions.

11 CHAIRPERSON HOLDEN: Thank you very much.  
12 Mr. Mulrooney or Mr. Horsey?

13 BOARD MEMBER MULROONEY: Yes, I do have  
14 one question concerning the federal consistency  
15 certification. I guess -- I don't quite understand why  
16 the decision on -- I guess this was directed to  
17 Ms. Scott -- but the decision regarding the federal  
18 consistency certification was part of what the --  
19 Secretary's order. And since the Environmental Appeals  
20 Board hears actions taken by the Secretary, I'm not sure  
21 I understand why that would not be something that the  
22 Board would address.

23 I understand it's a federal process and a  
24 federal appeals process for this, but since there are

1 things in that decision that are specific to Delaware  
2 law, I'm not sure I understand the position that DNREC  
3 has taken that that is not something that the Appeals  
4 Board would hear.

5 MS. SCOTT: Thank you, Board Member  
6 Mulrooney. Our position is that the Board was created  
7 under Chapter 60, Section 6008 and hears appeals of  
8 decisions of the Secretary made under that chapter.  
9 There are other chapters in Title 7 that also give  
10 specific jurisdiction to the Board, such as Chapter 72,  
11 which is the Subaqueous Lands Act. And this permit, the  
12 Subaqueous Lands Act permit, which was issued under  
13 Chapter 72, the regulations also that were codified under  
14 Chapter 72 give the Board jurisdiction over that issue.

15 With respect to the federal consistency  
16 determination, that process is guided by federal law.  
17 And the regulations that DNREC was required to enact in  
18 order to participate in that federal program do not give  
19 the Board necessarily jurisdiction over that. Our  
20 argument is that this is a federal program that has a  
21 judicial review process, that federal consistency itself  
22 is not addressed by Chapter 60, which gives the Board its  
23 authority, jurisdiction to act. And that is the reason  
24 that we are challenging the federal consistency, the

1 jurisdiction of the Board to hear that decision.

2 And I would also just note that not every  
3 action of the Secretary is subject to review by the  
4 Board, only those actions in Chapter 60 or another  
5 chapter, such as 72, that specifically gives the Board  
6 the jurisdiction to hear those matters.

7 BOARD MEMBER MULROONEY: So the only  
8 portion of this that the Board -- what you are saying --  
9 should hear is regarding the subaqueous lands; is that  
10 correct?

11 MS. SCOTT: That's correct.

12 BOARD MEMBER MULROONEY: Thank you.

13 MS. SCHILLER: If I could respond very  
14 briefly.

15 CHAIRPERSON HOLDEN: Ms. Schiller.

16 MS. SCHILLER: I just very briefly want to  
17 reiterate that, again, there are many, many actions that  
18 DNREC and the Secretary take that are under the heading  
19 of a federal law, but they are Delaware regulations or  
20 statutes that are enacted pursuant to that federal law.  
21 And that's exactly what this is.

22 And I would also note that, again, these  
23 federal consistency regulations fall squarely within and  
24 are issued pursuant to Chapter 60, pursuant to Section

1 6010. So to the extent that -- and again, we disagree,  
2 but to the extent that DNREC argues that only Chapter 60  
3 actions by the Secretary are covered by Section 6008A,  
4 this is one of them and so falls right within that  
5 provision.

6 CHAIRPERSON HOLDEN: Thank you,  
7 Ms. Schiller.

8 Mr. Mulrooney, any more questions?

9 BOARD MEMBER MULROONEY: No, thank you.

10 CHAIRPERSON HOLDEN: Mr. Horsey, any  
11 questions, sir?

12 BOARD MEMBER HORSEY: I want to go back to  
13 Ms. Scott. I just want to make sure I am clear in  
14 understanding what she is trying to say. I was looking  
15 at the -- I just looked at the statements of appeal  
16 declarations that everybody filed. And, Ms. Scott,  
17 whether we debate that they were cut and pasted, that's a  
18 different story, but you are talking about the timing  
19 being the 20 days, where as far as Ms. Cheeseman's was  
20 emailed in on the -- up at the top of the document that I  
21 have anyway, it says that it was emailed in on May 27th  
22 about our April 28th decision. That's what you are  
23 trying to say that it's out of time? Because they do  
24 have all the same things that they were talking about.



1 CHAIRPERSON HOLDEN: Mr. Horsey, I think  
2 the issue of timing is the current amended appeal. I  
3 think that's the issue of timing that DNREC has raised.

4 BOARD MEMBER HORSEY: So it's not to do  
5 with the other parties that are on here: Cheeseman and  
6 Hahn and Richards?

7 CHAIRPERSON HOLDEN: I don't think so.

8 Ms. Scott, am I correct that you have not  
9 raised issue with the timing of the 2021-07 amended  
10 individual appeals?

11 MS. SCOTT: We are making the argument  
12 that -- yes, we do not challenge the timing. We  
13 challenge the substance, that the substance of those  
14 statements do not comply with the Board's order. There  
15 were not separate affidavits discuss extending, those  
16 statements were made in the statement of appeal.

17 MR. HAHN: The question about the timing,  
18 isn't that answered? This is what happens, Attorney  
19 Scott --

20 CHAIRPERSON HOLDEN: Mr. Hahn, would you  
21 let Ms. Scott answer the question?

22 MR. HAHN: She did answer it. She said,  
23 no, it wasn't filed for timing.

24 CHAIRPERSON HOLDEN: Mr. Hahn, you are

1 interrupting.

2 Please, Ms. Scott.

3 MS. SCOTT: Our argument is that they did  
4 not comply with the Board's order. That they did not  
5 provide a statement that would support their standing, it  
6 wasn't concrete, particularized. I would also note that  
7 in order to -- that they have to also show that their  
8 interest is distinguishable from the public at large.  
9 This is from Food and Water Watch. And that -- which is  
10 2018 Westlaw 4062112. And that they will realize the  
11 direct harm from the challenged government action.

12 So any arguments just about fairness to  
13 the public at large is not a basis to grant the  
14 individuals standing. They have to have concrete,  
15 particularized injuries that can be distinguished from  
16 other members of the public.

17 CHAIRPERSON HOLDEN: Mr. Horsey.

18 BOARD MEMBER HORSEY: That's it. Thank  
19 you.

20 CHAIRPERSON HOLDEN: A question for  
21 Ms. Skjoldal or Mr. Rockman. I don't know that I'm clear  
22 on whether you agree with or contest DNREC's argument  
23 that the amended appeal wasn't timely and thus should be  
24 voided or removed from the record.

1 Can you speak directly to that, please?

2 MR. ROCKMAN: Sure. We disagree with that  
3 contention because what is being challenged is the  
4 subaqueous lands permit and the federal consistency  
5 certification. The challenges to those two, and the  
6 request to overturn and reverse both of those, were  
7 timely filed within 20 days.

8 The amended appeal, as I said before, did  
9 two things. One, it corrected a math error that appears  
10 to not be an issue here. And, second, it added an  
11 additional set of arguments in support of the original  
12 appeal regarding the 401 water quality certification  
13 because those had just come to our attention. There  
14 don't appear to be any Board rules that regard amending  
15 appeals. It was filed. It was accepted by the Board  
16 without question or comment at the time.

17 Had there been question or comment, we  
18 certainly could have filed a motion in the interim and  
19 then we would have addressed this previously. So we  
20 don't think that -- to sort of conclude, we don't see the  
21 20-day limitation on filing an appeal to identify the  
22 action of the department that's being challenged is at  
23 all at issue here, and sort of the minor clarification to  
24 add an additional fact that's one of our lines of

1 argument just to put the department on notice. The  
2 20-day rule there is to identify what it is you're  
3 challenging and do it within those 20 days, and that  
4 remains identical between the two appeals.

5 CHAIRPERSON HOLDEN: So I will ask you and  
6 then I would like to know from Ms. Scott, too. I'm not  
7 clear if the action of the Secretary that you have  
8 alleged in the original appeal was invalid and provided  
9 the other information in the original appeal. If the  
10 amended appeal is stricken, what removes your ability to  
11 raise other issues that support your original appeal,  
12 right? Why does striking an amended appeal damage your  
13 efforts or expected future effort?

14 MR. ROCKMAN: Honestly, Mr. Chairman, we  
15 don't think that it does. As we have noted, the appeals  
16 are identical except for the math correction and then the  
17 couple of paragraphs that are focused solely on the 401  
18 water quality certification. Everything else remains the  
19 same. The department's action remains the same, the  
20 relief requested remains the same, and it's all word-for-  
21 word verbatim. It was just a couple of paragraphs added  
22 to the original document.

23 So we don't think it changes anything.  
24 And at this point I guess we have accomplished our goal

1 of putting the Department on notice of what our arguments  
2 are going to be. We don't think, however, that striking  
3 it is merited because we don't think that the 20-day rule  
4 applies to a minor modification like this that wasn't  
5 previously challenged and was accepted by the Board, but  
6 ultimately, in terms of what happens and the scope of our  
7 issues at the appeal hearing, we think it's identical  
8 whatever the Board's decision on this particular  
9 question.

10 CHAIRPERSON HOLDEN: Ms. Scott, do you get  
11 my question there? What keeps them -- if we get to a  
12 point of the merits -- keeps them from raising issues  
13 around the 401 water quality certification as it relates  
14 to the subaqueous lands permit assuming the amended  
15 appeal statement is stricken?

16 MS. SCOTT: Well, I would say, first, that  
17 there is a deadline for filing an appeal to put the  
18 parties on notice about what the appellants intend to  
19 raise at the hearing. Twenty days after that statement  
20 of appeal is filed, DNREC is obligated to provide the  
21 chronology, and the process starts moving.

22 Anything provided in an amended statement  
23 of appeal that was not timely filed, here their amended  
24 appeal was filed, I believe it was in January, if I find

1 the correct page, which is like two months, I think,  
2 after the original statement of appeal. I think then the  
3 Board would at the hearing need just determine -- there  
4 would be issues of relevance. Any issues that appellants  
5 intended to raise regarding the subaqueous lands permit  
6 decision, it's our opinion, as guided by what was in the  
7 record before the Secretary, of course.

8 So if the water quality certification is  
9 going to be raised to demonstrate DNREC's process, you  
10 know, how they made a subaqueous lands decision that was  
11 somehow defective and they are going to point to the  
12 water quality certification issue as evidence of that  
13 argument, then we would definitely argue at the hearing  
14 that it's irrelevant and that the Board shouldn't  
15 consider it because the consideration should be the  
16 subaqueous lands permit decision itself, what was  
17 provided, what is required by the regulations for the  
18 applicant to submit, and what is required for the  
19 Department to make their decision, and were those  
20 regulations followed.

21 We would argue that anything related to  
22 water quality certification is irrelevant to that permit  
23 decision.

24 CHAIRPERSON HOLDEN: Thank you, Ms. Scott.

1                   And, Mr. Hahn, I saw your comment you  
2 raised an issue around the water quality certification.  
3 My question or area of concern is I don't know that that  
4 relates to DNREC's motion to dismiss as it relates to  
5 your appeal and your fellow appellants, and so I don't  
6 know how it's pertinent. And you are certainly not here  
7 in front of us as an expert witness.

8                   And so assuming I am on line there, do you  
9 have -- you argue that your commentary is appropriate,  
10 and I think others might contest that, but I give you an  
11 opportunity here to speak quickly.

12                   MR. HAHN: Okay. Well, I have some  
13 concerns from health and safety issues related to  
14 dredging of those contaminated sediments. I have  
15 experience and knowledge of the contaminants there and  
16 the monitoring or lack thereof that is going to be done  
17 for water quality and for contamination and fish.

18                   CHAIRPERSON HOLDEN: Mr. Hahn, I don't  
19 know that that is necessarily pertinent to your issue of  
20 standing right now. Right?

21                   MR. HAHN: I intend to present evidence on  
22 the water quality certificate. I believe I will be  
23 harmed by water quality impacts. I believe that pertains  
24 to my issue of standing.

1                   I wish that -- I find it very disturbing  
2 that only the individuals are interrupted when they try  
3 to speak, but the other attorneys get to speak  
4 uninterrupted.

5                   But when I went to the website about the  
6 Port, it said that a water quality certificate would be  
7 required. It's still on the website for the chronology  
8 and such. And then when I went to the -- and this is the  
9 federal connection, the Corps, the Army Corps of  
10 Engineers' mitigation plan which was put out for public  
11 comment. We commented on that, and it talked about the  
12 water quality certificate, and it said that DNREC waived  
13 it.

14                   So we are trying to find out what really  
15 happened with this water quality certificate. And we are  
16 very concerned about dredging of contaminated sediments,  
17 including for PCBs, which already have fish consumption  
18 advisories, which have been going down but will increase  
19 the level of PCBs in fish in that local area.

20                   Thank you.

21                   CHAIRPERSON HOLDEN: Thank you, Mr. Hahn.

22                   MR. RICHARDSON: Are we going to get  
23 another chance to speak because I've another comment  
24 directly related to the standing issue?



1                   CHAIRPERSON HOLDEN: Yes, Mr. Richardson.  
2 Please keep it to your issue of standing.

3                   MR. RICHARDSON: Can I speak now? I can't  
4 hear. I will speak.

5                   So let me do a couple of things. One, let  
6 me make a specific piece related to this. I am going to  
7 kind of follow up on the things that Attorney Scott  
8 mentioned.

9                   First, all members of the Delaware  
10 Community Benefits Coalition who have been participating  
11 in this process have standing and should have standing,  
12 and that should not be challenged. I am going to raise  
13 this to injury. Many injuries unrelated to property  
14 values or landownership at issue here, including harm to  
15 the local ecology and wildlife, loss of recreational  
16 activities and contamination of air quality are more than  
17 enough to establish particularized harm to talk  
18 specifically about what you addressed.

19                   The Delaware Supreme Court and the United  
20 States Supreme court are clear about this. In Sierra  
21 Club v. Morton in 1972, the Supreme Court held that  
22 injuries due to loss of benefits that might be derived  
23 from natural resources, such as camping, hiking, fishing,  
24 sight-seeing and the like is similarly an intangible

1 character, and yet potential injury to such interest was  
2 found to be enough to support standing.

3 The Supreme Court affirmed that  
4 understanding in the case of Friends of the Earth, Inc.  
5 v. Laidlaw Environmental Services, that was 2000, which  
6 was strikingly similar in fact to the matter at hand.

7 DNREC simply cannot claim a lack of  
8 standing here unless they also believe the Supreme Court  
9 does not have authority over the State of Delaware or the  
10 Supreme Court of Delaware is not binding upon DNREC as an  
11 agency. And my reference here Food & Water Watch v.  
12 Delaware Department of Natural Resources and  
13 Environmental Control, 2018.

14 So finally, DNREC claims that because our  
15 community wasn't able to retain Delaware pro bono counsel  
16 then our community has no right to participate despite  
17 the myriad standings I have already described is a  
18 violation of the spirit and principles that the Delaware  
19 Lawyers Rules of Professional Conduct that outline the  
20 imperative for all lawyers to support the inclusion of  
21 disadvantaged communities in the legal process.

22 Everyone here knows that Delaware is a  
23 small state that has historically and continues to  
24 prioritize corporations and industry, which makes

1 Delaware-based lawyers reluctant or unwilling to take on  
2 our case so as not to offend those corporate or industry  
3 clients.

4 This fact should mean that public  
5 servants, agencies of the State, should do everything  
6 within their power to ensure that communities are part  
7 and parcel of the process at every step of the way.  
8 DNREC and EAB are failing in their oath to protect the  
9 public interest.

10 And I am going to speak to the issue of  
11 the particularized nature of our comments in the appeals.  
12 There are differences in those appeals. We decided as  
13 individuals to submit things that were similar but not  
14 necessarily totally the same. That is our right as  
15 individuals to do that.

16 So you cannot at one level say we have the  
17 support -- we can't submit something as a group and then  
18 when we submit something as individuals and do it the way  
19 we want to it do it as individuals say that we can't do  
20 that either. You are essentially saying we can't submit  
21 anything that is worthy of note.

22 I want to speak to the issue of the  
23 particularized harm. I have been to Fox Point. It's a  
24 tremendous resource. It's a resource that needs to be

1 broadened and preserved so that all people can  
2 participate and receive the water and the air and that  
3 land and just participate and be enriched by that. It is  
4 a particularized harm because I have been there directly.

5 And so I just want to state that in  
6 reference to Attorney Scott there that I was talking  
7 about things like fairness, which we should be talking  
8 about. In fact, it's kind of disturbing that the issue  
9 of fairness would be brought up as something to be  
10 denigrated. When you are talking about public  
11 participation in the process, yes, fairness should be a  
12 part of the law and should be a part of the process where  
13 citizens interact with the State.

14 And I do have particularized harm because  
15 of my experience at Fox Point, seeing that beauty -- and  
16 that is something that all people need to participate in,  
17 and it would be a loss for this community as a whole.  
18 And it has significant impact both to the natural  
19 environment and probably to the economy because it's a  
20 place that could be developed in a way that benefits the  
21 community and protects the natural environment as well.

22 Those two things can coexist. So I wanted  
23 to respond to that.

24 And the other thing, finally, is this

1 issue related to timeliness, we submitted our documents  
2 on time, which has been noted. But I do find it a little  
3 bit disturbing that we submitted our documents on time  
4 throughout this process, but the first response we got  
5 from DNREC, which was supposed to be, I think, 30 days,  
6 we didn't get a response for months from DNREC.

7 So it seems there's an arbitrary  
8 application of guidelines for timeliness. When it suits  
9 DNREC, everything has to be on time. When it does not  
10 suit DNREC, then things do not have to be on time. But  
11 we from the community have to have everything on time.  
12 If we are late, we are out.

13 There's something that is absolutely  
14 unfair about this process. And it seems to be more  
15 organized just to get us out of here than actually to  
16 have us participate in the process.

17 So that's my statement about  
18 particularized harm, my experience at Fox Point. And  
19 then I wanted to reinforce again these codes and laws  
20 that are absolutely clear and go directly to the matter  
21 at hand.

22 Thank you.

23 CHAIRPERSON HOLDEN: Thank you,  
24 Mr. Richardson. I appreciate your time.

1 From the Board, any remaining questions?

2 (No response.)

3 Is there interest from the Board to go to  
4 Executive Session to address the matter of DNREC's motion  
5 to dismiss?

6 BOARD MEMBER MULROONEY: I move we go to  
7 Executive Session.

8 CHAIRPERSON HOLDEN: Is there a second?

9 BOARD MEMBER HORSEY: Second.

10 CHAIRPERSON HOLDEN: All in favor say aye.

11 ALL MEMBERS: Aye.

12 CHAIRPERSON HOLDEN: So, for all the  
13 parties present, we will move into Executive Session. If  
14 you can, you can either stay right here or you can  
15 communicate to Ms. Sapp a number to reach you at so that  
16 we can text you back or email you back that we are going  
17 to be coming back into public session. Either path  
18 works.

19 For the Board, we will transition over to  
20 our Executive Session meeting room. We will take five  
21 minutes to get settled. We will take a quick break.

22 Mr. Richardson, did you have a question  
23 there?

24 MR. RICHARDSON: The timing. I didn't

1 quite hear the timing. You said you are taking a break  
2 and you are going to then come back at?

3 CHAIRPERSON HOLDEN: I did not say what  
4 time we are going to come back. We are going to move  
5 into Executive Session. Ms. Sapp can email the parties  
6 at their addresses or you can keep this link active or  
7 you can email to Ms. Sapp a cell phone number that she  
8 could text you at. We will try to give you notification  
9 about five minutes before we are going to come back to  
10 public session.

11 MR. RICHARDSON: But before 4 o'clock?  
12 Sometime between now and 4 o'clock? You are saying you  
13 don't know when?

14 CHAIRPERSON HOLDEN: Look, I would be  
15 guessing. And so it's going to be for the Board, and the  
16 legal direction that we need to seek here that guides  
17 that. I don't think that it's going to be anywhere near  
18 4 o'clock. I would expect it could be an hour, but,  
19 again, sir, I am guessing at that. I don't have a firm  
20 time to tell you.

21 MR. RICHARDSON: Certainly.

22 MR. HAHN: I have a question.

23 CHAIRPERSON HOLDEN: Mr. Hahn?

24 MR. HAHN: In this Executive Session will

1 the Board be making its ruling or will the individuals  
2 have an opportunity to provide a statement?

3 CHAIRPERSON HOLDEN: That's not a point  
4 I'm going to address here at this time.

5 MR. HAHN: So should we give our closing  
6 statement now or not?

7 CHAIRPERSON HOLDEN: Sir, we have heard  
8 your arguments against it. We have outlined the process  
9 here. The Board is going to go to Executive Session to  
10 seek some legal counsel on what we have before us.

11 MR. HAHN: I don't know that I was ever  
12 given 15 minutes because I have some other information to  
13 present on individual standing. I know Ms. Scott from  
14 DNREC probably had much more than 15 minutes.

15 CHAIRPERSON HOLDEN: Mr. Hahn, we have  
16 followed the process that we outlined that we were going  
17 to follow here.

18 The Board is going to head to Executive  
19 Session. We will notify you when we come back.

20 MS. REED: You are cutting us off, just  
21 like you did the last time.

22 MR. MALONEY: Can I ask Ms. Sapp to please  
23 resend the link to the Executive Session.

24 MS. SAPP: Yes, give me one second.



1 MR. MALONEY: Thank you.

2 (The Board went into Executive Session at  
3 11:26 a.m. and the hearing resumed at 12:44 p.m.)

4 CHAIRPERSON HOLDEN: From the Board, any  
5 Board members have a motion?

6 BOARD MEMBER MULROONEY: Yes, I have a  
7 motion. I move to grant DNREC's motion to dismiss  
8 Curran's amended statement of appeals.

9 CHAIRPERSON HOLDEN: Is there a second?

10 BOARD MEMBER HORSEY: I second.

11 CHAIRPERSON HOLDEN: Any discussion by the  
12 Board?

13 (No response.)

14 CHAIRPERSON HOLDEN: I will take a roll  
15 call vote. Mr. Horsey?

16 BOARD MEMBER HORSEY: I approve.

17 CHAIRPERSON HOLDEN: Ms. Riddle?

18 BOARD MEMBER RIDDLE: I approve.

19 CHAIRPERSON HOLDEN: Mr. Mulrooney?

20 BOARD MEMBER MULROONEY: I approve.

21 CHAIRPERSON HOLDEN: And I vote in favor  
22 of the motion. The motion is granted and unanimously  
23 passed.

24 Any other motions from the Board?

1                   BOARD MEMBER MULROONEY: Yes. I move to  
2 grant DNREC's motion to dismiss the appellants for 2107  
3 due to lack of standing.

4                   CHAIRPERSON HOLDEN: Is there a second?

5                   BOARD MEMBER HORSEY: I second.

6                   CHAIRPERSON HOLDEN: Any discussion from  
7 the Board?

8                   (No response.)

9                   I will take a roll call vote. Ms. Riddle?

10                  BOARD MEMBER RIDDLE: I agree.

11                  CHAIRPERSON HOLDEN: Mr. Horsey?

12                  BOARD MEMBER HORSEY: I agree.

13                  CHAIRPERSON HOLDEN: Mr. Mulrooney?

14                  BOARD MEMBER MULROONEY: In favor.

15                  CHAIRPERSON HOLDEN: I vote in favor of  
16 the motion. The motion passes.

17                  So to the appellants of 2021-07, this will  
18 be the end of your participation in the hearing today.  
19 The Board is mandated to get our order out for your  
20 review and consideration within 90 days. I appreciate  
21 your participation today.

22                  Ms. Sapp will move you all to attendees if  
23 you choose to remain to view the rest of the hearing  
24 today.

1 MR. RICHARDSON: I have a critical  
2 question. Is this going to be put in writing as  
3 effective this date? Can you give us a sense of when we  
4 will receive the official notification on that? That  
5 needs to be part of the record. We need to hear that.

6 CHAIRPERSON HOLDEN: Mr. Richardson, so  
7 the minutes of the hearing will be made available. The  
8 breakdown of the order that the Board will expand upon  
9 the motions that have just been made will be made  
10 available. They will be required to be released within  
11 90 days of the hearing today.

12 MR. RICHARDSON: Is there a period? When  
13 we get this, is this going to be in writing? Is that  
14 effective today or is that effective when we receive  
15 something in writing from you? How does that work?

16 CHAIRPERSON HOLDEN: The documents aren't  
17 effective until you receive them in writing. Any other  
18 questions that are legal, I can't really answer. I  
19 appreciate your participation today.

20 MR. RICHARDSON: I am sure you do.

21 CHAIRPERSON HOLDEN: I will have to remove  
22 you guys now.

23 MR. RICHARDSON: It is not effective until  
24 we receive it in writing, correct?

1 MR. MALONEY: I believe the Board's  
2 ruling, having deliberated and voted, their order is  
3 effective immediately, but the written order will be  
4 forwarded within 90 days of today's date.

5 CHAIRPERSON HOLDEN: Thank you,  
6 Mr. Maloney.

7 With that, we are going to move on to the  
8 Port Operators and Walter Curran's joint motion for  
9 summary judgment.

10 Are the Port Operators -- or who is going  
11 to start with that motion?

12 MS. SCHILLER: I am, Chairman.

13 Is there a ruling on the motion to dismiss  
14 with regard to the consistency certification?

15 CHAIRPERSON HOLDEN: Kevin?

16 MR. MALONEY: No. Basically, what the  
17 Board decided to do is make the motions in the  
18 affirmative. So if it wasn't covered by one of those  
19 motions, it's still a live document.

20 MS. SCHILLER: Okay.

21 MR. MALONEY: I know that wasn't very  
22 articulate, but do you understand what I mean?

23 MS. SCHILLER: I do.

24 MR. MALONEY: Thank you. I didn't want to

1 get into granted in part and denied in part, which I  
2 think is even more confusing for the folks that aren't  
3 lawyers, so we decided to just do it affirmatively.

4 MS. SCHILLER: Okay. And we will  
5 eventually get a ruling or an order on that one? On the  
6 motion to dismiss the Port Operators' claim under appeal  
7 of the federal consistency certification?

8 MR. MALONEY: That will be addressed in  
9 the order, yes.

10 MS. SCHILLER: Okay. Thank you.

11 MR. MALONEY: You are welcome.

12 MS. SCHILLER: So, Ron, do you have  
13 control of the screen? Great.

14 So the joint motion for summary judgment  
15 is actually very straightforward. Despite the  
16 characterizations and the complications inserted into it  
17 by the opposition papers failed by DNREC and by the  
18 Applicant Diamond State Port Corporation.

19 The motion comes down to this: Is an  
20 applicant for a subaqueous land permit required to comply  
21 with the regulation under which the permit is evaluated?  
22 And if the answer to that question is yes, then this  
23 motion must be granted because Diamond State did not do  
24 so.

1           So, first, just to set the stage, and I am  
2           sure we are all familiar with the project, but a brief  
3           summary as it is relevant to the motion here. Because  
4           this is the largest project ever reviewed by DNREC, or at  
5           least everybody seems to think that it is, with regard to  
6           impacts to subaqueous lands, Diamond State intends to  
7           build a new container port at Edgemoor. This will  
8           involve building a 2600 foot long wharf structure,  
9           installing a bulkhead along 3200 feet of shoreline, and  
10          dredging the berth and access channel to a depth of 45  
11          feet.

12                 Initial construction will require dredging  
13          of over 80 acres of riverbed and approximately 3.3  
14          million cubic yards of river sediments and underlying  
15          soil. As a point of comparison, this is the same size of  
16          soils that would be needed to fill the Houston Astrodome  
17          twice. And every year to keep the river, the access  
18          channel, and the berth accessible to the ships that will  
19          use it, an additional 500,000 cubic yards of sediment  
20          will have to be dredged every year.

21                 So the impact of this project on the river  
22          and the riverbed is huge. And we need to make sure that  
23          the approval of the project is done right.

24                 The facts on which the Port Operators'

1 motion is based are really undisputed. Section -- Ron,  
2 if we can bring it up -- Section 7504-3.1.1.2 of the  
3 regulations governing the use of subaqueous lands  
4 provides that the application for every type of activity  
5 shall provide the information requested in the  
6 appropriate application form. That's the language of the  
7 regulation.

8 And then, Ron, if we could bring up the  
9 next one. 7504-3.1.3 regards keeping the application  
10 current, and says, "The applicant shall maintain the  
11 application in a current state and notify the Department  
12 immediately of any changes in the information provided."  
13 So it's undisputed that this is what the governing  
14 regulations provide.

15 And, in fact, Diamond State did initially  
16 comply with the regulations, and they submitted a  
17 complete application. And if we look at page 2 of  
18 Appendix S, Question 5, the question itself is: How  
19 often will maintenance dredging be required, and what  
20 measures are being taken to reduce the frequency of  
21 dredging? Those are the questions.

22 And initially, right here, we have a  
23 complete answer. Shoaling fans are being pursued as a  
24 means of reducing the frequency of dredging. Maintenance

1 dredging is expected to be performed on a yearly basis.

2 But unbeknownst to everyone except  
3 evidently DNREC and Diamond State, the answer to that  
4 question changed on March 25th, 2021. On that day,  
5 Diamond State wrote to the Secretary and said that it was  
6 asking DNREC to suspend its consideration of the  
7 anti-sedimentation devices, the shoaling fans, as part of  
8 the Delaware subaqueous permit application and the  
9 Coastal Zone Management Consistency request.

10 So they acknowledge that it was part of  
11 the application that they were withdrawing. In other  
12 words, Diamond State was changing its application such  
13 that there was no longer any answer to the question:  
14 What measures are being taken to reduce the frequency of  
15 dredging? No answer at all.

16 And here is the thing really: Diamond  
17 State knew, they knew that they needed to update the  
18 application because the letter itself goes on to say,  
19 "Given the importance of moving this project forward, we  
20 make this request, and we trust this action will not  
21 prompt a resubmittal requirement of any information  
22 previously provided." So they knew what they were up  
23 against.

24 DNREC and Diamond State argued that this



1 change only lessened the environmental impact of the  
2 project and so no harm, no foul. But, in fact, there's  
3 no evidence of that in the record. The Secretary has to  
4 make a decision based upon the record before it. And  
5 there is no evidence in the record whatsoever as to  
6 whether removal of the shoaling fans and the increased  
7 amount of dredging improves the environmental impacts,  
8 reduces it, exceeds it. There is nothing in the record  
9 at all on that.

10 And, in fact, even the letter -- the very  
11 fact of the removal of the shoaling fans -- was not a  
12 part of what DNREC considered part of the record. It was  
13 kept hidden from the public. It was a secret. And,  
14 really, if it's such great news, if it's such an  
15 improvement to the environment, then why not amend your  
16 application? Why not let the public know that you have  
17 made this great improvement to the project, addressing  
18 the concerns raised by several commentators, including my  
19 clients. And the only reason, really, is because then a  
20 revised application would have to have been submitted as  
21 required by the regulations.

22 So how has DNREC and Diamond State  
23 responded? DNREC builds up a few straw men, reframing  
24 the motion into one that wasn't really made just so it

1 can knock the straw men down. DNREC suggests that the  
2 motion seeks to invalidate the approval because the  
3 shoaling fans were removed. That's not what we are  
4 seeking.

5 The motion proposes only to have the order  
6 rescinded, require Diamond State to resubmit a complete  
7 application, and then have the Secretary make a  
8 determination. We are not suggesting that the  
9 application be denied out of hand, only that it be  
10 resubmitted in a complete form as required by the  
11 regulations.

12 DNREC also suggests that the Port  
13 Operators are seeking an order requiring another comment  
14 period. And admittedly, that is what our motion seeks,  
15 but that is really not within the purview of, I will  
16 admit, the Board or us. If the application is  
17 resubmitted, and it is resubmitted as complete, we leave  
18 it up to DNREC to decide whether or not it thinks another  
19 public comment period is required.

20 We think it is, but if DNREC decides it's  
21 not, decides that the application is complete, it can go  
22 forward and issue the order. Let it do so, and we will  
23 deal with it at that time.

24 DNREC also suggests that the motion

1 interferes with its ability to interpret its own  
2 regulations, but this is not a matter of interpretation.  
3 Complete is complete. And there's no answer to one of  
4 the questions at this point. The motion seeks to have  
5 DNREC comply with the very clear and expressed language  
6 of the regulations.

7 And regulations exist for a reason, so  
8 that there's a level playing field, and so that one  
9 applicant isn't treat differently from another applicant  
10 based on things like simply a desire to move the project  
11 forward, which apparently is what the basis was here.  
12 And that's not an appropriate reason to not comply with  
13 regulations.

14 And, in fact, this isn't just kind of made  
15 up out of thin air. DNREC cites in its brief, twice,  
16 twice in its brief it cites the Burns decision. And in  
17 that case, the Delaware Supreme Court rejected an  
18 agency's attempt to -- and I am quoting here: "Impliedly  
19 rewrite its rules in the guise of exercising its  
20 interpretative power over the rules."

21 That decision, in fact, was very clear,  
22 that if a rule is clear, it has to be followed and it's  
23 not a matter of interpretation.

24 Finally, DNREC argues -- it was very

1 surprising to us to see it, but it argues that  
2 maintenance dredging isn't even a consideration at this  
3 stage of the approval process. That's not true. It  
4 can't be true. First of all, it's on the application.  
5 Why is it on the application if it's not an issue? And  
6 it makes no sense that it wouldn't be part of the  
7 analysis.

8 The regulations require that the Secretary  
9 consider the cumulative and secondary environmental  
10 impacts of a project. And, certainly, the maintenance  
11 dredging is exactly that. And it just defies logic that  
12 DNREC would say it's okay if you dredge once, but we are  
13 going to go every year and decide whether or not you can  
14 dredge.

15 Indeed, the Hearing Officer's report and  
16 the federal consistency certification talks specifically  
17 about maintenance dredging. In several places it talks  
18 about, for example, restricting all dredging, including  
19 maintenance dredging. And here it has to do with the  
20 spawning period. So, clearly, maintenance dredging was  
21 an issue, it was considered, it was part of the  
22 application, and it's part of the order and the Hearing  
23 Officer's report that led to the issuance of the  
24 approvals.

1                   And really, when you think about it,  
2                   right, this is almost a billion dollar project. Is DNREC  
3                   really arguing that they are going to approve a billion  
4                   dollar project, and then the next year, hmm, just another  
5                   application permit, we may deny it. And so what would  
6                   happen, the Port would close down. A billion dollar  
7                   project would be closed down after one year of operation.  
8                   It doesn't make sense.

9                   And, in fact, Diamond State agrees with  
10                  that. Diamond State recognized in its argument that that  
11                  was nonsensical. And in its opposition it acknowledged  
12                  the maintenance dredging is important. And so in its  
13                  brief, page 14, Diamond State says, "In reviewing the  
14                  construction permit applications, DNREC considers whether  
15                  future maintenance dredging could be optimized or  
16                  reduced." So it is an issue. It's not an issue that's  
17                  ignored.

18                  Diamond State instead argues that because  
19                  removing the shoaling fans reduces the environmental  
20                  impact, the application did not need to be revised. But  
21                  as I noted initially, that's an assumption that Diamond  
22                  State is making that the environmental impacts are  
23                  reduced. We don't know that. We don't know that until a  
24                  complete application is submitted, DNREC analyzes it, and

1 it's determined.

2           There is a lot of dredging going on. And  
3 you can't just say by simply removing the shoaling fans  
4 that there is a net reduction in environmental impact or  
5 that a net reduction in environmental impact necessarily  
6 warrants a granting of the application.

7           The application was not complete. It was  
8 not kept up to date. And that's what the regulations  
9 require.

10           Finally, Diamond State makes another  
11 argument, which I have to say is a little bit deceitful,  
12 and it argues that there were alternatives already in the  
13 record in something called the McDonald Assessment. They  
14 don't point out, however, where in the McDonald  
15 Assessment that is. And I have to tell you, I have  
16 looked at that document many times. I have had an  
17 associate look at that document many times. And it's not  
18 there.

19           That document, the McDonald Assessment,  
20 all it does is evaluate the sedimentation rate, assuming  
21 two different possible depths of dredging. And that's  
22 all it does and nothing more. So the description of it  
23 is very misleading in the brief.

24           I'm not doubting that maybe Diamond State

1 made changes to its design because of something in that  
2 report, but there's nothing in that report, nothing that  
3 answers the question about what options are being  
4 considered to reduce maintenance dredging.

5 So we come back to what is the undisputed  
6 facts. This is a motion for summary judgment, it's made  
7 on the undisputed facts. The undisputed facts are that  
8 the regulations require an applicant to maintain an  
9 up-to-date application. Diamond State changed the  
10 project. It did it by a letter to the Secretary that was  
11 never made part of the record, that was not made part of  
12 the application, that did not result in a change of  
13 maintenance of an up-to-date application.

14 It's as simple as that. The order has to  
15 be rescinded, and an updated application has to be  
16 submitted. And then the Secretary can act on that  
17 updated, complete application.

18 And that's the basis for our motion.  
19 Thank you.

20 CHAIRPERSON HOLDEN: Thank you,  
21 Ms. Schiller.

22 Are we also hearing from Ms. Skjoldal or  
23 Mr. Rockman?

24 MS. SKJOLDAL: Yes, thank you,

1 Mr. Chairman.

2 I really don't have too much to add on to  
3 Ms. Schiller's argument. We agree with all of her  
4 points. Mr. Curran agrees with all of the points made as  
5 outlined in the filing and then also as highlighted by  
6 Ms. Schiller right now.

7 I think the key thing to remember here is  
8 the regulations say that an applicant shall provide the  
9 information requested in the appropriate application  
10 form. Not should, but shall. The shall standard simply  
11 was not met here. And I think that in the responses that  
12 we received to our motions, there was kind of some  
13 confusion of the issues and some argument raised that  
14 really tries to gloss over just the very simple fact that  
15 DNREC did not follow the plain language of its own  
16 regulations.

17 And it's not simply the question of the  
18 amount of maintenance dredging, it's the issue of the  
19 application not being properly updated. Again, shall is  
20 the mandate, and that requirement just simply was not  
21 met. And there were some changes made. The question in  
22 Appendix S specifically asks what is being done. There  
23 was some kind of behind-the-scenes interaction between  
24 the agency and the applicant, but the public was not



1 aware of that.

2 So we fully support all of the other  
3 points that Ms. Schiller just made in her argument, and  
4 we have nothing more to add. Thank you.

5 CHAIRPERSON HOLDEN: Thank you.

6 Ms. Scott, are you replying?

7 MS. SCOTT: Mr. Tweedie is going to be  
8 replying for DNREC on this issue.

9 MR. TWEEDIE: Thank you, Chair Holden and  
10 the Board.

11 I am Jameson Tweedie, Deputy Attorney  
12 General representing DNREC. So as detailed by  
13 Ms. Schiller, the motion for summary judgment deals with  
14 one very discrete issue, which is the shoaling fans. And  
15 the specific question posed by the motion is whether the  
16 removal of the shoaling fans from the project invalidates  
17 the order.

18 And contrary to what Ms. Schiller  
19 asserted, our description and argument related to the  
20 standard of review that the Board needs to consider in  
21 resolving this motion is not a straw man. The standard  
22 of review is absolutely critical to the evaluation of  
23 this decision. And it's different than what it would be  
24 in court. The standard of review here is governed by 7

1 Delaware Code 6008. And the burden is upon the  
2 appellants, here the movants, to show that the  
3 Secretary's decision is not supported by the evidence on  
4 the record before the Board. And to succeed in an  
5 appeal, an appellant must prove to the Board that the  
6 Secretary lacked evidence to support its decision.

7 And they cannot succeed merely by showing  
8 the various technical evidence which the Secretary  
9 rejected. Thus, the question is whether or not the  
10 record contains sufficient evidence to support the  
11 Secretary's decision. And that is the relevant inquiry,  
12 not other aspects of the application or other facts  
13 asserted by movants.

14 So summary judgment, in turn, requires the  
15 moving party to demonstrate two things. That there is no  
16 genuine issue as to any material fact, and, critically,  
17 that the appellants are entitled to judgment as a matter  
18 of law. So summary judgment can only be granted if both  
19 parts are met. And in light of the burden of proof under  
20 6008, appellants on this motion must show that no matter  
21 the record presented to the Board at the hearing, the  
22 appellants would meet their burden by showing the  
23 Secretary's decision was not supported by the evidence.

24 The appellants have not done so, and their

1 motion should be denied.

2 I want to just quickly touch on a couple  
3 of the items raised by Ms. Schiller before I get into the  
4 bulk of my argument.

5 So she said at one point complete means  
6 complete and that there was no answer on maintenance  
7 dredging. So as we present in our brief and as I will go  
8 through in a little more detail, Diamond State Port  
9 Corporation provided the two pieces of information that  
10 they are asserting are the problem. They alerted DNREC,  
11 alerted the Department when shoaling fans were removed,  
12 and they provided the amount of maintenance dredging that  
13 would be needed in the absence of mitigation measures  
14 like shoaling fans.

15 So the information that they are asserting  
16 should justify overturning the Secretary's order is, in  
17 fact, information that was there. So turning to the sort  
18 of substance of our argument, first -- and one other  
19 clarification, I guess, of what was presented a moment  
20 ago. DNREC did not make a ruling on maintenance  
21 dredging, neither the permit nor the Secretary's order  
22 makes a decision about maintenance dredging. That was  
23 not a germane part of what is actually included in the  
24 decision of the Secretary. So the crux of movants'

1 position is summed up by their concern that, "Neither the  
2 Secretary's order nor the Hearing Officer's report  
3 discusses or mentions how, if at all, Diamond State Port  
4 Corporation proposes to reduce frequency of anticipated  
5 maintenance dredging now that the shoaling fans are not  
6 part of the project design."

7 But that gets to the heart of the very  
8 issue: The Secretary was not addressing an application  
9 for maintenance dredging, and thus did not make a  
10 decision about maintenance dredging. The subaqueous land  
11 permit at issue here authorizes only construction  
12 dredging, not maintenance dredging. And as a result, the  
13 order similarly did not need to address maintenance  
14 dredging.

15 So, as I said, and I am going to repeat,  
16 the question for the Board is whether the appellants  
17 prove that the Secretary's decision was not supported by  
18 the evidence on the record before the Board. And as  
19 maintenance dredging was not decided by the Secretary's  
20 order or approved by the subaqueous lands permit, it  
21 cannot be the basis for finding that the Secretary's  
22 decision was not supported by the record.

23 Second, disputes about maintenance  
24 dredging are not ripe. That is part of a separate

1 process that is being undertaken before the U.S. Army  
2 Corps of Engineers over whether the Army Corps of  
3 Engineers will take responsibility for maintenance  
4 dredging. That's called the Section 204(f) process. And  
5 I know very little about it other than it is occurring in  
6 parallel.

7 Unless and until the U.S. Army Corps of  
8 Engineers makes its decision on maintenance dredging, it  
9 will not be known what party is responsible for  
10 maintenance dredging, let alone the frequency or duration  
11 of maintenance dredging that Diamond State Port  
12 Corporation might theoretically need a permit for. And  
13 as the motion is limited to the issue of the inclusion or  
14 exclusion of shoaling fans, it's only purpose is for  
15 maintenance dredging. And the determination of  
16 maintenance dredging issues is not ripe at this time.

17 Third, as I said before, I will say  
18 quickly again, those aspects of what is argued was  
19 incomplete were in fact presented to DNREC. First, the  
20 motion argues that Regulation 3.1.3 was violated because  
21 it requires the applicant to notify the Department  
22 immediately of any changes in the information provided in  
23 an application. However, as I think everyone has  
24 conceded here, Diamond State Port Corporation did alert

1 DNREC to the fact that shoaling fans were being removed  
2 from the application.

3 Second is regarding the volume of  
4 maintenance dredging. And here, again, the amount of  
5 maintenance dredging that was included in the  
6 application, 500,000 cubic yards, was the total need for  
7 maintenance dredging. Diamond State Port Corporation  
8 evidently hoped that shoaling fans could reduce that, but  
9 that was the amount of maintenance dredging that could be  
10 required. And, as a result, that amount is true and  
11 accurate as far as we understand it, regardless of  
12 whether or not the shoaling fans are included or excluded  
13 from the project.

14 Here both of those pieces of information  
15 were either included in the application or disclosed  
16 promptly to DNREC. And as a result, the regulations were  
17 not violated and movants have not met their burden.

18 And the fourth part of our argument is  
19 that if adopted, the movants' position for requiring an  
20 amended application and additional rounds of public  
21 comments would turn the permitting process potentially  
22 into a circular process. That's not consistent with past  
23 practice and it's not required by the regulations.

24 To be clear, DNREC supports robust public

1 engagement. Indeed, the Department pursued an extensive  
2 process for this permit, including public comment and a  
3 virtual hearing that was attended by more than 50 members  
4 of the public. The Department consciously chose to  
5 process these two applications together.

6 As was stated in the Secretary's order,  
7 "To make sure the public was afforded the ability to  
8 provide meaningful comment on a proposed project in its  
9 entirety." The Department, in fact, extended the public  
10 comment period in response to public interest resulting  
11 in a public comment period that was far longer than is  
12 required in the statute. As a result, DNREC received  
13 comments both before and after the hearing in written  
14 comments, at hearing, and in total approximately 200  
15 public comments, evidence of just how robust the process  
16 was.

17 So if movants' proposed interpretation of  
18 requiring a renoticing and a new public comments -- or an  
19 amended application and a new public comment period were  
20 required, it would risk turning the regulatory process  
21 into -- the permitting process into a potential circle.  
22 All the parties benefit from a clear timeline and a  
23 process that has finality. Requiring an additional round  
24 of public comment for every change to a project that

1 results from public comment or from concerns raised  
2 during the public -- during the permitting process,  
3 creates the risk, not only risks delaying the process,  
4 but it also could result in manipulation by project  
5 opponents who raise a concern. And when that concern is  
6 addressed, and a new round of amended application and  
7 public comment occurs, they have a new opportunity to  
8 delay and extend the project further.

9 It seems that what movants are asking for  
10 would do exactly that. They want the Board to remand the  
11 Secretary's order for another round of public comment,  
12 including, as they specifically say, for their own  
13 opportunity for public comment.

14 Second, it could have the perverse  
15 incentive of causing project applicants to not want to  
16 incorporate valuable proposals obtained during the public  
17 comment process, because doing so could risk having to  
18 amend their application, go through another round of  
19 public comment, and thus delay and extend their  
20 permitting process. And that risk is apparent here.

21 Diamond State Port Corporation initially  
22 proposed the shoaling fans, but the various parties,  
23 including consulting divisions of DNREC, as well as  
24 movants had concerns about the shoaling fans. Diamond



1 State Port Corporation then removed the shoaling fans to  
2 address those concerns, as movants acknowledge in their  
3 brief, in their motion.

4 But if movants' approach is adopted, then  
5 there would have been a strong disincentive for Diamond  
6 State Port Corporation to adopt these seemingly  
7 universally agreed-upon causative change, because it  
8 would have delayed the application, required an amended  
9 application, and a new round of public comment. And I  
10 suspect that many project applicants would not be  
11 inclined to delay their projects just to incorporate  
12 valuable public comment.

13 And as is in our brief and Ms. Schiller  
14 noted, an agency in Delaware is entitled to deference in  
15 its rules and regulations.

16 I just wanted to refer to one other point,  
17 which is in movants' motion, they cite to various federal  
18 court precedents. Here Delaware law, Delaware precedent  
19 controls the standards applicable to the Department and  
20 the Board. That is Section 6008, the Board regulations,  
21 et cetera.

22 So respectfully, DNREC requests that the  
23 Board deny the motion for summary judgment. Thank you.

24 CHAIRPERSON HOLDEN: Thank you,

1 Mr. Tweedie.

2 Ms. Schiller, any rebuttal there?

3 MS. SCHILLER: Yes.

4 MR. BURTON: Chairman Holden, William  
5 Burton from Diamond State Port Corporation. Can I get a  
6 chance to make argument as well before rebuttal?

7 CHAIRPERSON HOLDEN: Mr. Burton, please go  
8 ahead.

9 MR. BURTON: Thank you. Mr. Chairman and  
10 Members of the Board, I believe our response did a good  
11 job of showing why the Port Operators and Mr. Curran's  
12 arguments and the single case they rely on are not  
13 grounds for granting the motion. The motion implies that  
14 the process used to grant Diamond State Port  
15 Corporation's permit was somehow flawed. That is not  
16 consistent with the record.

17 The expansion of the Port of Wilmington  
18 was in fact thoroughly planned and publicly vetted.  
19 Before the application was submitted, Diamond State Port  
20 Corporation engaged with stakeholders and members of the  
21 public, hosted various public forums, attended committee  
22 meetings of the Delaware General Assembly, and met with  
23 DNREC's joint permit processing committee. After the  
24 application was submitted, it was evaluated during a

1 public hearing, which was attended by more than 50  
2 members of the public, and was subjected to a 101-day  
3 public comment period.

4 As a result of this robust process, DNREC  
5 received approximately 200 comments on the pending  
6 application. During the notice and comment period,  
7 several of the appellants in these consolidated appeals,  
8 including the Port Operators and Mr. Curran, raised issue  
9 with Diamond State Port Corporation's proposed view to  
10 shoaling fans. These concerns included arguments that  
11 there was not enough adequate testing to determine the  
12 environmental impact of the fans.

13 Based on their concerns and in order to  
14 make the proposed project more environmental friendly,  
15 Diamond State Port Corporation removed the fans from its  
16 application and notified DNREC immediately. After the  
17 issue was addressed, the Port Operators and Mr. Curran  
18 now seek to remand the Secretary's order in order to have  
19 another public hearing on the proposed project. The  
20 entire reason they argue to reverse the Secretary's  
21 decision is because the removal of the use of shoaling  
22 fans, which they advocated for, supposedly render the  
23 current application out of date and incomplete. As a  
24 result, they contend DNREC did not adhere to its own

1 regulations.

2 As we outlined in our papers, there are  
3 both factual and legal issues with the Port Operators and  
4 Mr. Curran's joint motion for summary judgment. First,  
5 the issue concerning maintenance dredging is not ripe for  
6 adjudication. The permit that was granted was a  
7 construction permit, not a maintenance dredging permit.

8 The distinction between these two permits  
9 is very important. The removal of these shoaling fans  
10 only potentially impacted the need for future maintenance  
11 dredging. That is the subject of a maintenance dredging  
12 permit, not a construction permit.

13 Diamond State Port Corporation will submit  
14 a maintenance dredging permit which will be subject to  
15 its own regulatory process. The issue of maintenance  
16 dredging is simply not an issue in this appeal.  
17 Importantly, the issue of maintenance dredging can't  
18 actually be at issue, because it's currently unknown how  
19 much maintenance dredging will be needed.

20 Diamond State Port Corporation will submit  
21 an application to the United States Army Corps of  
22 Engineers seeking them to assume maintenance dredging for  
23 the access channel to the proposed project. Based on how  
24 that application goes, Diamond State Port Corporation may

1 only need to submit a maintenance dredging permit  
2 application for areas outside the access channel. On the  
3 other hand, it may have to submit a maintenance dredging  
4 permit for the entire project.

5 The scope of any forthcoming maintenance  
6 permit application is unknown, making appellants'  
7 arguments not ripe to determine at this time.

8 The motion for summary judgment also  
9 failed because DNREC did adhere, through its own  
10 procedures and regulations, in issuing the permit. The  
11 Environment Appeals Board acknowledged in McFall v. The  
12 Secretary of DNREC, that the application and permitting  
13 process is fluid in nature. In that case, the Board  
14 stated: "Not every permit application received by DNREC  
15 is going to be approved in precisely the terms set forth  
16 in that application. The permit process is often fluid,  
17 with modifications being made as the agency and the  
18 public provide input into the process."

19 That fluid nature of the permitting  
20 process makes sense. Permit applicants should be  
21 incentivized, and not penalized, to make changes to their  
22 application in order to reduce the potential  
23 environmental impacts of their projects. The system is  
24 set up to allow for modifications, and encourages them.

1 Those modifications do not create an endless circular  
2 process that prevents projects from going forward.

3 The same argument before the Board today  
4 was before the Board a couple of years ago in Lampner v.  
5 DNREC. In that case the challenge was whether the  
6 Secretary's decision should be remanded because there was  
7 not a re-notice and a re-comment on the revised  
8 application.

9 The Board ultimately concluded that  
10 DNREC's decision not to re-notice and solicit new  
11 comments on the project was supported by the facts and  
12 the law. In rendering that decision, the Board noted  
13 there was no applicable rule or procedure that governed  
14 whether re-notice and rehearing was required, but  
15 encouraged DNREC to address this issue through the rule-  
16 making process.

17 These two decisions are important. First,  
18 McFall teaches that the process is designed to be fluid,  
19 and the permit that is ultimately granted may not be the  
20 one requested in the application.

21 Second, Lampner is important because it  
22 demonstrates there is no strict rule or procedure that  
23 requires a re-notice and rehearing.

24 Both these decisions are contrary to the

1 rigid process that the Port Operators and Mr. Curran are  
2 demanding. Importantly, the single decision that they  
3 rely on to support such a rigid process is Hegman v.  
4 DNREC. As noted in our papers, procedurally that case  
5 does not support granting the instant motion. In that  
6 case, the Board actually heard testimony about the  
7 process that was used to evaluate the permit, and the  
8 Board rendered its opinion only after conducting a  
9 hearing.

10 Thus, it does not support the argument  
11 that the Board should make its decision on a motion for  
12 summary judgment before having the benefit of a hearing.  
13 More importantly, however, the process in Hegman was a  
14 far cry from the process that was used in this case. In  
15 that case, the Board noted supervisors did not read the  
16 application. No one considered the potential  
17 applicability or relevance of certain provisions for  
18 regulation, and instead the application was merely rubber  
19 stamped.

20 Here the application and planning process  
21 started long before Diamond State Port Corporation  
22 submitted its application. The application was subjected  
23 to an expended comment period, and the comments were  
24 taken seriously.

1           In fact, Port Operators and Mr. Curran got  
2 what they wanted below: the removal of the shoaling  
3 fans. Simply stated, the process in Hegman was not like  
4 the process that Diamond State Port Corporation's permit  
5 was subject to. That case does not support reversing the  
6 Secretary's order.

7           Lastly, there are material factual  
8 disputes that preclude summary judgment. In their motion  
9 the Port Operators and Mr. Curran questioned whether the  
10 amount of dredging Diamond State Port Corporation's  
11 application was up to date or accurate when the  
12 application was granted. The estimation, however, was  
13 correct and up to date because it was based on an  
14 assessment that modeled the annual sedimentation without  
15 the use of shoaling fans.

16           To the extent the motion disputes the  
17 amount of maintenance dredging that will be needed, that  
18 is a factual dispute. The motion also argues that there  
19 are no other measures identified in the application for  
20 reducing the need for maintenance dredging. Although  
21 that issue is not before DNREC because this was a  
22 construction application, the assessment submitted with  
23 the application and incorporates into it, does identify  
24 additional mitigation for maintenance dredging.



1           The presence of these material factual  
2           disputes alone warrants denying the pending motion.

3           So to summarize, the permit application  
4           was thoroughly planned and publicly vetted, and the  
5           process resulted in a reduction of the potential  
6           environmental impact of the project. The Secretary's  
7           decision is supported by the facts and the law. The  
8           instant motion should be denied because the issues it  
9           raises are not ripe for a decision, that they relate to a  
10          maintenance dredging permit application that is yet to be  
11          filed. The single case relied on in their motion is not  
12          remotely on point, and actually supports having a  
13          hearing.

14          Other decisions by this Board acknowledge  
15          the process that was used in this case is normal,  
16          standard operating procedure, and there are no rules that  
17          require a different process.

18          Lastly, there are issues of material fact  
19          which necessarily preclude summary judgment.

20          And I just want to directly reply to one  
21          argument the Port Operators just made. They stated that  
22          nothing in the record regards the environmental impact of  
23          the shoaling fans in terms of indicating them being  
24          removed reduces the environmental impact. I submit that

1 numerous comments that were submitted by the public  
2 outlined the environmental impact of the shoaling fans  
3 and their reduction would further make the project more  
4 environmentally friendly.

5 And to the extent that the Port Operators  
6 disagree as to what is in the record, I think that's a  
7 materially factual dispute which we could all benefit  
8 from hearing.

9 Thank you for your time.

10 CHAIRPERSON HOLDEN: Thank you,  
11 Mr. Burton.

12 Ms. Schiller.

13 MS. SCHILLER: First, I would like to ask  
14 Mr. Burton, where is it in the record that he contends  
15 that there is an identification of alternative reduction  
16 methods to the shoaling fans? The only mention made is  
17 the assessment. It's not in the assessment.

18 So if Mr. Burton can point to that, I  
19 would appreciate it because I would respond to that.

20 MR. BURTON: So, if I may, in Footnote 9,  
21 on page 22 of our response, we say, for example, "Based  
22 on the modeling, the geometry in the channel was changed  
23 and the grade of the side slopes was reduced in order to  
24 increase the water velocity through the project to reduce

1 sedimentation."

2 If the Board wants further clarification  
3 on this issue, I am more than happy to submit a  
4 supplemental submission, and provide that information to  
5 the Port Operators' counsel and the Board.

6 MS. SCHILLER: So what Mr. Burton has just  
7 read is not an alternative to maintenance dredging. It  
8 talks about how they designed the project. That's not an  
9 answer to the question.

10 So I just wanted to make that clear, get  
11 that out of the way, because there is nothing in the  
12 application that talks about alternatives or in any of  
13 the submittals. And, in fact, that's where the  
14 distinction comes with, for example, the Lampner case.  
15 Because what happened in Lampner is that there was an  
16 up-to-date or revised application submitted. And that's  
17 what generated all of the assessment on whether or not  
18 there needed to be a public comment. There was a revised  
19 application submitted.

20 That didn't happen here. All of the  
21 arguments that have just been made is that we would --  
22 that our proposal of compliance with the regulations  
23 would dissuade applicants from revising their  
24 application. It's the exact opposite. We want

1 applicants to revise their applications and keep it up to  
2 date. That is exactly what we are asking for.

3 And I acknowledge that we had asked for  
4 new public comment. I am here to say that's up to DNREC.  
5 That doesn't need to be decided on this motion. The  
6 question is: Is this change significant enough to  
7 warrant additional public comment? We won't know that  
8 until an up-to-date application is submitted, and it  
9 hasn't been.

10 Mr. Burton did, however, just actually  
11 correct something from the record that I was going to  
12 correct with regard to the position taken by DNREC, and,  
13 that is, the Army Corps, who is going to do this  
14 dredging, the Army Corps dredging, the issue of whether  
15 the Army Corps is going to take it over, that's solely  
16 the channel's. And it is not the actual berthing area.  
17 No matter what happens here, Diamond State is going to be  
18 responsible for dredging that berthing.

19 Again, there will be an application for  
20 maintenance dredging, and it will be approved or  
21 disapproved, but the fact is this application needs to be  
22 reviewed with the understanding that there will be  
23 maintenance dredging and that it should be reduced in  
24 some manner. It should be mitigated to the extent it

1 can. And that's why the application calls for it.  
2 Neither DNREC nor Diamond State have given the Board any  
3 indication of what the standard is for when an  
4 application has to be kept up to date, because the  
5 standard is what the statute says. The statute said this  
6 is the standard, you need to keep your application up to  
7 date.

8 So without any standards, what are we  
9 talking about? What if five questions were not answered?  
10 What if ten questions were not answered? What if an  
11 application or an attachment wasn't included? Where is  
12 the standard of what needs to be included in order for  
13 the Secretary to fully consider the application as it  
14 exists, as it is going to be granted? And that wasn't  
15 done.

16 DNREC and Diamond State are asking the  
17 Board to just allow them to pick and choose what  
18 regulations to follow.

19 Ron, if you could bring up 3.1.3, I would  
20 like to also respond to a statement that was made.

21 A statement was made that all that needed  
22 to happen was for Diamond State to notify DNREC of the  
23 change. That's not what 3.1.3 says. It says that it  
24 needs to maintain the application current. That's what

1 we are here for. Yes, it's an and. They shall maintain  
2 the application in the current state and notify the  
3 Department immediately. We are not arguing that they  
4 didn't notify the Department immediately. What they  
5 didn't do was maintain the application in a current  
6 state. And that application is what the public is able  
7 to see.

8 And, in fact, so the issue in Hegman,  
9 which is right on point here, what happened in Hegman was  
10 that DNREC made a decision without any public -- I'm  
11 sorry -- without any notice to the public. And it was  
12 all about phone calls and things happening in a non-  
13 transparent way. That's exactly what happened here.  
14 Things happening in a non-transparent way. It needs to  
15 be transparent. And that's what 3.1.3 requires, that it  
16 be transparent.

17 The McFall case, also not applicable here.  
18 In McFall, the application as a whole did, in fact,  
19 disclose what was seemingly not on the face of the  
20 application, and that was some low-level lighting that  
21 was going on at a pier. First of all, we are talking  
22 about a pier, a small pier. Here we are talking about  
23 something the size of two Astrodomes. Big difference  
24 between a little pier and Astrodomes.

1           And the fact is there was, in the  
2 application, an acknowledgment of this lighting that was  
3 going to be on there. Here there's no indication  
4 anywhere as to what steps were going to be taken, if any,  
5 and if it's none, it's none, to reduce the maintenance  
6 dredging.

7           To talk about this as though we don't --  
8 there's no consideration of maintenance dredging at the  
9 initial permit stage is just nonsensical. Are you going  
10 to build a billion dollar project and then not in any  
11 way, shape, or form consider whether or not that building  
12 project -- whether that project is going to be viable the  
13 next year or two years down the road or three years down  
14 the road? The issue in Hegman was about prior practice.  
15 And they needed a hearing, because there wasn't -- they  
16 weren't dealing with a written statute such as --  
17 sorry -- Regulation 3.1.3.

18           So all of that being said, all that we are  
19 asking here is that the application be updated, and that  
20 the Secretary issue an order based on an updated  
21 application, that the regulation is complied with, the  
22 application is updated. And, again, it's up to DNREC.  
23 If DNREC thinks that this is such a minor change that it  
24 doesn't require another public hearing, then that will be

1 the decision of DNREC. But it shouldn't be the decision  
2 of DNREC as to whether or not Diamond State had to comply  
3 with the regulation. The regulation says what it says,  
4 and compliance is required.

5 CHAIRPERSON HOLDEN: Thank you,  
6 Ms. Schiller.

7 Questions from the Board?

8 (No response.)

9 Ms. Schiller -- and I am curious about  
10 Mr. Tweedie's response too.

11 Ms. Schiller, are you contending that the  
12 application is the forms themselves and not inclusive of  
13 other information mandated to be submitted as part of the  
14 application process?

15 MS. SCHILLER: My position is that there's  
16 an application form, and the application form is required  
17 to be complete and maintained and up to date. The fact  
18 is the application form has a specific question: What  
19 efforts are going to be taken to reduce maintenance  
20 dredging? That is a question. The rules require that  
21 that question be answered.

22 And once the shoaling fans were removed  
23 from the project, that question was no longer answered.  
24 I would say that if, in fact, there was a document



1 attached that said: And if we remove shoaling fans,  
2 these are the three other things that we are going to do,  
3 that might be sufficient. It might have been sufficient  
4 depending on how it was stated. But that doesn't exist  
5 here. There is no up-to-date answer. There is no answer  
6 to the question: How are you going to reduce and  
7 mitigate maintenance dredging?

8 We are talking 500,000 cubic feet of  
9 maintenance dredging every year. That's a lot of  
10 dredging. That's more dredging than the majority of  
11 projects that come before the Secretary under the act --  
12 I'm sorry, cubic yards. I apologize, I misspoke.

13 To say that would not be considered and is  
14 not considered as part of this process is again -- it's  
15 nonsensical. Of course, maintenance dredging of a  
16 project this size has to be in the consideration. It has  
17 to be. It's a secondary impact, and it's required to be  
18 considered by the Secretary.

19 If the Secretary considered it, and is  
20 still going to issue the same order, fine. But it has to  
21 be in the application. The public needs to know what is  
22 being --

23 CHAIRPERSON HOLDEN: If I can kind of  
24 change the question and ask it a little different way,

1 too.

2 MS. SCHILLER: Okay.

3 CHAIRPERSON HOLDEN: I don't know if I got  
4 the cite issue right, but it was like 3.1.3 that we  
5 looked at it a minute ago. It spoke about the  
6 application being complete.

7 Do you contend that that statement refers  
8 only to the forms?

9 MS. SCHILLER: No, I believe the entire  
10 application has to be complete. I mean, there has to be  
11 a complete application. And I would say that to the  
12 extent that a question is not answered, that application  
13 is not complete.

14 Again, I would say if there was an  
15 attachment, an appendix, if there was a reference to an  
16 appendix that said: And in the event we don't use  
17 shoaling fans, we may use the following three other  
18 options to reduce maintenance dredging, then that would  
19 be an answer to that question. But, in fact, there is no  
20 answer to that question, so the application is not  
21 complete.

22 CHAIRPERSON HOLDEN: Mr. Tweedie or  
23 Ms. Scott, two points. One is kind of your view on the  
24 application and what contains the application. And

1 secondly, a little more discussion around how some  
2 permitting submissions -- and I would refer to the  
3 permitting application submission to be inclusive of all  
4 that goes along with it. Right? Sometimes you have  
5 hydrologic reports, sometimes you have geotechnical  
6 reports, you have different pieces that come with  
7 different permit applications.

8 How often do those projects change from  
9 what comes in in the initial submission and what is the  
10 final permitted project?

11 MR. TWEEDIE: So let me start with this.  
12 Ms. Schiller has pointed you to two provisions of the  
13 regulation, but I want to make sure that the Board has  
14 sort of read them in full. One of them that is cited in  
15 their brief and that they are relying on is 3.1.1.2, and  
16 I don't have the ability to quickly put that in front  
17 of you, maybe someone else does, but I can read it to  
18 you. And it says: "The application for every type of  
19 activity shall provide the information requested in the  
20 appropriate application form. No application shall be  
21 considered complete or acted upon" -- and this is the key  
22 part -- "until the application is deemed complete by the  
23 Department."

24 So contrary to what Ms. Schiller says,

1 complete does actually mean what the Department says it  
2 means. It is right there in the regulation that the  
3 Department gets to determine whether or not an  
4 application is complete.

5 And so this is all sort of spinning in a  
6 circle, because DNREC gets to decide when the application  
7 is complete. It's right there in the regs. It's clear  
8 in the regs. And the question before the Board is  
9 whether or not the movants' motion would entitle them to  
10 summary judgment, which means that the movants' motion  
11 would entitle them to prevail on this appeal.

12 So it has to show to the Board that the  
13 Department cannot prevail under any record presented to  
14 the Board at the hearing. And the movants have not  
15 remotely shown that.

16 To your specific question of how often  
17 projects change from an initial application to the  
18 permitted one, that question would undoubtedly better be  
19 directed to someone in DNREC's staff who deals with these  
20 regularly. We, as the lawyers, are brought in when  
21 there's an appeal. So I do not have a sense of the full  
22 scope of applications and how they are permitted. As  
23 undoubtedly you know, many, many of them are not ever  
24 subject to appeal, so we don't have that before us.

1                   But my expectation is that they change  
2 regularly from the exact parameters of what is in the  
3 application to what is granted in the Secretary's order  
4 and the relevant permit.

5                   CHAIRPERSON HOLDEN: Thank you,  
6 Mr. Tweedie.

7                   Other questions from the Board?

8                   BOARD MEMBER MULROONEY: I guess my  
9 question is, Mr. Tweedie, what would the process be to  
10 make a change to an application? So if this particular  
11 issue, if there were to be a change to the initial  
12 application, how would that be done? What would the  
13 process be to file for that?

14                   MR. TWEEDIE: Again, probably I'm not in  
15 the best position to answer that because I deal with  
16 issues that turn into disputes.

17                   I think what is germane is what the  
18 movants have asked for, which is that the application be  
19 amended, and -- although they have changed their mind  
20 here today, what they explicitly put in their motion was  
21 that the new application be put back out for public  
22 comment. So if we follow down that path maybe then we  
23 are sort of restarting the process and delaying it quite  
24 significantly, very significantly given that we are

1 already well into the appeal process.

2 BOARD MEMBER MULROONEY: But can an  
3 application be changed or updated without resubmitting  
4 the application?

5 MR. TWEEDIE: That is DNREC's position.  
6 That is exactly what we think happened here, that Diamond  
7 State Port Corporation alerted us to this one change to  
8 an appendix. As we put in our brief, the actual -- the  
9 regulations require that the -- for example, the cubic  
10 yards of dredging be included. That was included. There  
11 doesn't seem to be a dispute about the fact that that was  
12 included. And the one change was the removal of shoaling  
13 fans, which was communicated to the Department.

14 MS. SCHILLER: Can I respond very briefly  
15 to just those two points?

16 CHAIRPERSON HOLDEN: Ms. Schiller.

17 MS. SCHILLER: So the application is a  
18 public document. And so updating the application,  
19 whether it's the document itself or a letter, for  
20 example, a letter written by Diamond State Corp to the  
21 Secretary, if that's an updating, it needs to be made  
22 public in the same manner that the application is made  
23 public.

24 Here that letter from Diamond State to

1 DNREC, completely a mystery, hidden from the public, not  
2 transparent at all. In fact, it wasn't provided until  
3 these motions were submitted.

4 So that's the difference between updating  
5 an application, which is a public document, and merely  
6 just notifying the Department. And that's why there is  
7 an and in 3.1.3. That's the and. You have to update the  
8 application, let the public know, and notify the  
9 Department.

10 The other point that I would just simply  
11 make is to the extent that the Department argues that it  
12 can all on its own, without any standards, determine when  
13 an application is complete. Certainly what that refers  
14 to is DNREC asking for more information, more information  
15 being provided, that happens all the time in the  
16 permitting process. An application is received, the  
17 agency in charge of it looks at it and says, wait, I need  
18 another study, I need more information. This is an  
19 answer to, for example: How many cubic yards are going  
20 to be dredged every year?

21 That's the process that goes on, but there  
22 has to be some standards. Because if you take DNREC's  
23 argument to its logical conclusion, what DNREC is saying  
24 is that it can decide if no questions are answered, the

1 application is complete. It can decide that if no plans  
2 are submitted, the application is complete.

3 Certainly, that's not what DNREC is  
4 saying. DNREC is saying that it can ask for more  
5 information and determine that it is complete. But the  
6 statute itself -- I mean, the regulation itself requires  
7 that the application form be completed. And that didn't  
8 happen here.

9 MR. TWEEDIE: Can I respond very briefly?

10 CHAIRPERSON HOLDEN: Yes.

11 MR. TWEEDIE: We, obviously, disagree with  
12 that, but I don't think the Board will be benefited by me  
13 pushing forward on that.

14 The one thing I do just want to reiterate  
15 again, and apologies if this is repetitive, but Ms.  
16 Schiller is trying to pull us down a rabbit hole that is  
17 very far afield from the germane question for the Board,  
18 which is, would this motion, which is a motion for  
19 summary judgment, actually resolve the appeal? Because a  
20 motion for summary judgment is dispositive. So to be  
21 dispositive, it needs to mean that the movants have  
22 prevailed on the burden of proof.

23 And here that burden of proof is tied to  
24 the burden of proof that is applicable to this appeal,



1 which is that the movants have shown that the Secretary's  
2 decision was not supported by the record. This issue is  
3 not going to change whether or not the Secretary's  
4 decision is supported by the record.

5 Maintenance dredging was not part of the  
6 decision. Maintenance dredging was not a decision made  
7 by the Secretary. So going down this rabbit hole of  
8 whether or not Diamond State Port Corporation had to  
9 click -- had to remove the shoaling fans from its  
10 application versus just inform the Department, as  
11 Ms. Schiller has conceded the Diamond State Port  
12 Corporation did, is not germane to the actual decision  
13 that's before the Board, which is whether or not the  
14 movants have met their burden of proof.

15 Thanks.

16 MR. BURTON: Mr. Chairman, if I could have  
17 a quick response.

18 CHAIRPERSON HOLDEN: Yes.

19 MR. BURTON: I think directly to the  
20 question of whether or not if an application is changed  
21 it has to be re-noticed and re-commented, I think that's  
22 exactly what the Lampner decision is saying that that  
23 does not have to happen, just to directly address the  
24 question that was asked by the Board member.

1           And I think the arguments here are that we  
2           are trying to put a very rigid process in place here, and  
3           I think that's not what the prior EAB appeal board  
4           decisions have said. It's a fluid process. The  
5           applications change based on public comments. They  
6           change based on additional submissions. It's not the  
7           application form, it's the entire universe. It's  
8           everything that's incorporated in the application through  
9           the submissions.

10           And I would submit that what Diamond State  
11           Port Corporation submitted and continued to submit  
12           throughout the process is the application, and that  
13           application was kept up to date. So I think the motion  
14           should be denied.

15           CHAIRPERSON HOLDEN: Thank you,  
16           Mr. Burton.

17           I would like to ask if any other board  
18           members have questions?

19           BOARD MEMBER RIDDLE: If I might make a  
20           quick question. I think I might have fallen down another  
21           rabbit hole in the legal arguments here, but I think this  
22           would be to Ms. Schiller.

23           If you could just help me understand a  
24           little bit why you have taken this route rather than

1 proceeding to a hearing on the merits and make these  
2 arguments at that time rather than in this forum?

3 MS. SCHILLER: Well, because we have the  
4 right to move for summary judgment, and we do believe  
5 this would be dispositive of that. In fact, even the  
6 cases that DNREC relies on to show that an updated  
7 application has to be submitted, the Lampner case, which  
8 they rely on, that was a hearing that was held after a  
9 revised application was submitted.

10 So it really goes to whether or not the  
11 process was done appropriately. And where there are no  
12 disputed material facts, then judgment should be entered  
13 and avoid the expense and the time of a hearing. And  
14 that's what we are saying here. There are no disputed  
15 facts with regard to this issue. Was there an up-to-date  
16 application? There was not an up-to-date application.  
17 Do the rules require an up-to-date application? The  
18 rules require an up-to-date application.

19 And so that's why we have made this  
20 motion. There are no disputed facts. And thus, we avoid  
21 the hearing by making our motion for summary judgment.  
22 And if we need to go on and make it at hearing, we will  
23 make this argument at the hearing as well, but the fact  
24 is there's no disputed facts on this matter, so there's

1 no reason to go to a hearing to determine whether or not  
2 the regulations were complied with. They were not  
3 complied with.

4 CHAIRPERSON HOLDEN: Ms. Schiller, if the  
5 term application is a term broader than the forms, and  
6 the applicant had informed DNREC of a change in  
7 previously submitted information, if DNREC intended for  
8 any change to the application form require resubmission  
9 of the form, wouldn't it say that explicitly? Whereas,  
10 application covers project information, right? And I'm  
11 not sure that I am capturing the right definition, but do  
12 you capture what I am saying?

13 MS. SCHILLER: I do. And, in fact, I  
14 would also almost concede -- in fact, I would concede  
15 that if that letter was made part of the application, was  
16 made part of the public record at the time, then the  
17 application would have been updated, because the  
18 application is the public document, the document that the  
19 public sees, the document that the public responds to.  
20 So it wasn't sufficient for them to simply notify the  
21 Department.

22 There is still a question to be answered.  
23 And, in fact, to be honest, that document doesn't really  
24 answer the question. Actually, I am going to take a step

1 back, because when I think about the document, the  
2 letter, the letter simply says we are removing the  
3 shoaling fans from the project. It doesn't actually  
4 answer the question, which is: What are you going to do  
5 to reduce maintenance dredging? And, again, to say  
6 maintenance dredging is not an issue here, again, it's  
7 part of the application process. It's something that is  
8 considered by the Secretary. It's something that the  
9 Hearing Officer wrote about. It's something that the  
10 order contains. All of this discusses maintenance  
11 dredging, so it's all part of it.

12 And so to say that it's not part of the  
13 consideration of the Secretary, I think is really  
14 nonsensical. But, again, that question needed to be  
15 answered because maintenance dredging is important. This  
16 is all about navigation, it's all about the environmental  
17 effects. And that much dredging is substantial and could  
18 affect and will affect, there is no question, will affect  
19 both navigation in the river and will affect the  
20 environment.

21 So the fact is without an answer to that  
22 question: What are you going to do to reduce the  
23 maintenance dredging? the application is incomplete. If  
24 the letter submitted had said, We are removing the

1 shoaling fans, but we are going to do X, Y, and Z, and  
2 that letter was made public as part of an up-to-date  
3 application, then that regulation would have been  
4 complied with.

5 But the fact is that left the question  
6 unanswered, and it wasn't made public. So for those two  
7 reasons, I would argue that the application was not  
8 updated. It could have been updated by letter, but it  
9 wasn't.

10 CHAIRPERSON HOLDEN: Ms. Schiller, did  
11 your clients advocate or provide public comment in  
12 opposition to the shoaling fans?

13 MS. SCHILLER: We did. And I would say we  
14 had no objection to the shoaling fans being removed. It  
15 would appear that they were not environmentally friendly.  
16 But that doesn't answer the question, because then the  
17 next step is: Okay. You have removed the shoaling fans.  
18 The application says: What are you going to do to reduce  
19 maintenance dredging? It's right there in the  
20 application. It's right there in the form.

21 So the question then needs to be answered.  
22 Okay? You are removing the shoaling fans, what are you  
23 going to do now? Because the fact is what are you going  
24 to do now, that could be even worse. It could be better,

1 it could be worse. It could have very different effects.  
2 The issues of the shoaling fans was both environmental,  
3 and on navigation, the shoaling fans would have pushed  
4 sediments to the channel where they would have required  
5 dredging right in the middle of the channel. So that was  
6 not a good solution, and we agreed that was not a good  
7 solution.

8 So there needs to be another solution or  
9 the answer needs to be there's no solution. There is no  
10 way that we are going to be able to reduce this  
11 maintenance dredging. But the fact is that is a question  
12 that needs to be asked and needs to be answered.

13 CHAIRPERSON HOLDEN: I understand.

14 Any other questions from the Board?

15 BOARD MEMBER MULROONEY: It just seems  
16 this whole permitting and approval process, these things  
17 do come up routinely. Whenever there are public  
18 hearings, you get individuals who bring up issues, and I  
19 am sure there are changes made to projects as a result of  
20 the public hearings.

21 So I guess maybe I am just asking out  
22 loud: What is usually the process for this? In most  
23 cases does the applicant have to resubmit the project or  
24 do they just continue with the changes if there's

1 agreement to changes to the project? I'm not sure who  
2 can answer that, but it just seems like this is something  
3 that must come up routinely through this whole permitting  
4 process.

5 MS. SCHILLER: So my understanding -- and,  
6 in fact, if you look at the cases that we cite, yes,  
7 changes are made, changes are good. We are not trying to  
8 stop changes. But the changes that are made have to be  
9 made publicly. It has to be a transparent process where  
10 the public has an opportunity to review the actual  
11 project that is going to be approved. And that's really  
12 the issue here is that a change was made. It was not  
13 made transparent. It was not made public. And the  
14 question wasn't answered.

15 So, yes, changes do happen, but they  
16 happen by a process, by amending the application and  
17 making the public aware of what changes are going to  
18 happen.

19 Again, most projects I think, as has been  
20 stated several times, do not attract this kind of  
21 attention. Right? They are a dock. They are a much  
22 smaller project. This is such a huge project. And  
23 maintenance dredging and dredging is such a huge project,  
24 that this was a significant aspect of the application.



1 And again, that is why the regulations require an updated  
2 application.

3 BOARD MEMBER MULROONEY: Thank you.

4 MR. BURTON: If I might also add to that  
5 answer.

6 I think the McNulty quote that I read  
7 earlier is particularly on point to that question. In  
8 that opinion the Board said, "Not every permit  
9 application received by DNREC is going to be approved in  
10 precisely the terms set forth in that application."  
11 That's exactly what happened here.

12 But the Board went on to also say, "The  
13 permitting process is often fluid, with modifications  
14 being made as the agency and the public provide input  
15 into the process."

16 So is it the natural process to allow a  
17 project to develop through the comment process? I mean  
18 reducing the environmental impact is what this entire  
19 process is designed to create. And that is exactly what  
20 happened here. The process worked.

21 And so, I think this is really just a  
22 tactic to delay the project from moving forward by people  
23 who have a beneficial business relationship to see the  
24 project stopped.

1                   CHAIRPERSON HOLDEN: I am going to ask for  
2 last questions from the Board, right, and then I think we  
3 can move into a pretty quick close on this item.

4                   (No response.)

5                   Hearing no other questions, Ms. Schiller,  
6 I think we have heard a lot of the information you wanted  
7 to share. I think we can probably get through a quick  
8 close and move on to the next motion.

9                   MS. SCHILLER: Sure. Again, I think I  
10 have made the points that are salient here. The  
11 regulations require a complete and up-to-date  
12 application. They require them so that the Secretary  
13 makes his decision based upon a complete application, and  
14 so that the public can see the application in the  
15 project.

16                   We are not denying that projects change  
17 along the way. In fact, that's why 3.1.1.3 exists. It  
18 says projects may change along the way, but the  
19 application has to be complete and updated. And that did  
20 not occur here.

21                   I would also argue that we do not know if  
22 the environmental impact is better or worse because all  
23 we know is that shoaling fans won't be used. There's  
24 been no assessment of any alternative for reduction of

1 maintenance dredging. That alternative may be better, it  
2 may be worse. We don't even know what it is because the  
3 application is incomplete, and that's why the regulations  
4 require a complete application. You can't pick and  
5 choose. DNREC can't pick and choose which regulations  
6 it's going to enforce and which regulations it's not.  
7 This is a regulation that's very clear on its faces. It  
8 requires an updated application. That was not done here.

9 CHAIRPERSON HOLDEN: Thank you.

10 Ms. Schiller.

11 With that I think we are going to move  
12 direct to Walter Curran's motion for an issuance of a  
13 subpoena for documents to DNREC. Will that be Ms.  
14 Skjoldal or Mr. Rockman?

15 MR. ROCKMAN: Actually not, Mr. Chairman.  
16 There are two pending motions for discovery subpoenas.  
17 The first one was actually filed by the Port Operators, I  
18 think it raises essentially identical issues with the  
19 motion filed on behalf of Mr. Curran. And in discussions  
20 prior to this hearing, again to streamline things, I  
21 think Ms. Schiller is going to take the lead on  
22 presenting the arguments for the discovery motion.

23 CHAIRPERSON HOLDEN: Thank you, sir.

24 Ms. Schiller.

1 MS. SCHILLER: Sure. So I want to  
2 preference by saying very late last night we received  
3 some documents from DNREC that were responsive to a  
4 number of the items on the subpoena.

5 And so as not to belabor any points or  
6 make any arguments that don't need to be made, the only  
7 aspects of the subpoena that are now, I think, at issue  
8 are Item 4 and 5 and Item 7.

9 So, Ron, if I could ask you to pull up  
10 first the form of subpoena. And if we could go to Item 4  
11 and 5.

12 So these two requests are related. And  
13 they are related to something that's in the Hearing  
14 Officer's report. The Hearing Officer's report  
15 references communications with the U.S. Coast Guard on  
16 September 17th, 2021 regarding navigation.

17 Ron, if you could pull up that section of  
18 the Hearing Officer's report.

19 So we talk about whether or not the  
20 Secretary's order is supported by the evidence. And in  
21 the Hearing Officer's report, there is a discussion here  
22 about a coordinated telephone call with an unnamed person  
23 at the U.S. Coast Guard saying that it does not see this  
24 project posing a risk to safe navigation.

1           That's part of the record. And all we are  
2 asking for is what that statement was based on. Now, if  
3 DNREC is going to say and Diamond State is going to say,  
4 that's it, that one sentence, that's all there is, and  
5 that's all the Secretary relied on. Nobody spoke to the  
6 Secretary, nobody provided any additional information.  
7 There's nothing in the file that was reviewed by the  
8 Secretary.

9           That one statement is all that there is.  
10 Then, they should say that on the record. And if there's  
11 no notes, nothing else that was relied on, then a simple  
12 response to the subpoena is there are no responsive  
13 documents, and we can move on.

14           But if, in fact, there is something that  
15 supports that, then we are entitled to it because it's  
16 part of what the Secretary relied on. That's all we are  
17 asking for.

18           Again, the argument was made in response  
19 to the subpoena that the Board will have to decide on the  
20 record. We are not disputing that. The Board will have  
21 to decide based on the record that was before the  
22 Secretary. We just want to make sure that the record, in  
23 fact, includes everything that was before the Secretary.  
24 And apparently there was a phone call that had conveyed

1 some information, and that's all we are seeking there  
2 with respect to Item 4 and 5.

3 Item 7, again, I admit it's not a request  
4 for a document, it's a request for names. And the  
5 enabling legislation, 3.6, allows the Board to issue  
6 subpoenas. And, in fact, 60063 says that the Court can  
7 administer oaths, examine witnesses, and issue subpoenas  
8 requiring the testimony of witnesses.

9 So these are witnesses that we would like  
10 to call -- or at least one witness -- again dealing with  
11 navigation, just as the U.S. Coast Guard statement deals  
12 with navigation. And we simply want to be able to call  
13 the right witness, to be honest. We can ask the Board to  
14 issue a subpoena to every single DNREC employee who may  
15 have discussed navigation, but that is not what we are  
16 asking for.

17 We want to be able to have the testimony  
18 of the person who had this call with the Coast Guard or  
19 however the information was received. I guess we don't  
20 even know if it's a phone call. However this information  
21 was received, we are entitled to call that person as a  
22 witness, call the person who is addressing navigation as  
23 a witness, and to know the documents that were relied  
24 upon to make that statement in the Hearing Officer's

1 report. And so that's the only thing that's at issue  
2 right now, and that's what we are looking for.

3 CHAIRPERSON HOLDEN: Thank you,  
4 Ms. Schiller.

5 Mr. Rockman, anything further?

6 MR. ROCKMAN: Very little, Mr. Chairman.  
7 The arguments that were just presented I think match what  
8 Mr. Curran is currently seeking. We are willing to step  
9 back from the other items in our subpoena, and we  
10 appreciate getting the documents that were provided late  
11 last night. That was very helpful and resolved, I think,  
12 some of the core concerns because we were looking for  
13 documents that were specifically referenced in the  
14 Hearing Officer's report, so that was provided.

15 We shared the same concern about that one  
16 U.S. Coast Guard contact that was pulled up on screen and  
17 was discussed, and sort of have similar interests in  
18 trying to narrow the scope of who from DNREC might be  
19 subpoenaed to appear at the hearings here. The ability  
20 to narrow down that list will probably save lots of  
21 headaches and time all around for everybody on this call.  
22 We had raised some of these issues by email with DNREC's  
23 counsel prior to filing the motion, didn't get a  
24 response, and so ended up filing the motion.

1                   But with some progress forward, we're  
2 happy to step away from the bulk of it except for the  
3 issues that Ms. Schiller discussed.

4                   I will point out, though, sort of by way  
5 of additional comment, the motivation here is making sure  
6 that we have a clear understanding of the record, and  
7 have that in front of us.

8                   As DNREC points out in its response  
9 papers, the record before the Board is the record before  
10 the Secretary. Therefore, there ought to just be clarity  
11 and availability of that record so that we can all make  
12 our arguments and allow the Board to make its best  
13 decision as we have seen has happened today in the  
14 context of the earlier motion.

15                   There's the letter that was viewed from  
16 Diamond State removing the shoaling fans, that's clearly  
17 something that ought to have been part of the record. It  
18 was never made public. And we do not want to get to a  
19 hearing where in response to points that are made  
20 contesting the permit that DNREC or Diamond State pulls  
21 out documents that are suddenly claimed to be part of the  
22 record that no one had ever seen before. That will at  
23 best make everything a colossal waste of time for  
24 everybody here.



1                   We need clarity on the record now, and  
2                   that was the motivation for the motion.

3                   CHAIRPERSON HOLDEN: Thank you,  
4                   Mr. Rockman.

5                   Ms. Scott, Mr. Tweedie, who is going to  
6                   respond for DNREC?

7                   MS. SCOTT: Chairman, this is Devera  
8                   Scott. I will respond on behalf of DNREC.

9                   And in our papers we do make the point  
10                  that the record before the Secretary is the appropriate  
11                  information that should be presented at the hearing. But  
12                  to the extent that the issues have been narrowed today, I  
13                  will say that navigation is not relevant to the issues  
14                  here. DNREC did not make a decision about navigation.  
15                  That is not within its purview. So it's not relevant.

16                  However, to the extent that that document,  
17                  the navigation, the September 17th, 2021 correspondence  
18                  or discussion was in the Hearing Officer's report, I will  
19                  say that Laura Mensch, who was identified as a witness in  
20                  DNREC's list of witnesses that we provided some time ago  
21                  and before the consolidation, she made that inquiry. And  
22                  she had those conversations with the Army Corps of  
23                  Engineers.

24                  And it was Lieutenant Commander Cooke that

1 made the blanket statement that he did not believe that  
2 the project posed a risk to safety navigation. I am  
3 attempting to find that email, the September 17th email.  
4 Ms. Mensch is no longer -- she took a new job in  
5 Pennsylvania, but is available, has said that she will  
6 make herself available as a witness for the hearing in  
7 this matter.

8 So I am happy to go into my arguments  
9 about why discovery isn't appropriate, but if those are  
10 the two issues that the Board -- that have been narrowed  
11 for the Board today, I can make those statements. I will  
12 use my best efforts to find that email, because it was  
13 referenced in the Hearing Officer's report, even though  
14 DNREC maintains that navigation is not a relevant issue  
15 in this appeal, and that Ms. Mensch was the person who  
16 made that inquiry to the U.S. -- to the Coast Guard,  
17 Lieutenant Commander Cooke of the Coast Guard.

18 CHAIRPERSON HOLDEN: Ms. Schiller.

19 MS. SCHILLER: Okay. And we appreciate  
20 that. We look forward to receiving that information. I  
21 guess I just want to make sure that I understand what  
22 Ms. Scott has said, and, that is, that DNREC made no  
23 decision about whether or not this project would have an  
24 impact on navigation. Is that the position of DNREC?

1 MS. SCOTT: I am saying that navigation  
2 isn't a requirement -- that navigation is not part of --  
3 is not DNREC's -- in its purview to make a decision about  
4 the safety of navigation. That's a Coast Guard issue or  
5 an Army Corps issue, it is not a DNREC issue. If this  
6 issue was -- if an inquiry was made by DNREC to the U.S.  
7 Coast Guard, it does not mean that we are accepting or  
8 conceding that navigation was an important decision at  
9 DNREC when they went into this permitting process,  
10 because of the vastness of it, was trying to do -- make  
11 as complete of an inquiry as possible.

12 So to the extent that they made some  
13 inquiries that weren't necessarily required by the  
14 regulations, that they were overly inclusive, shouldn't  
15 be something that they should be punished for.

16 Navigation wasn't a decision by the  
17 Secretary and wasn't in the Secretary's order, and  
18 therefore should not be a subject to this appeal.

19 Again, because it was referenced in the  
20 Hearing Officer's report, out of an abundance of  
21 fairness, I provided the information last evening; but we  
22 are not waiving any arguments about whether discovery  
23 should be allowed or whether navigation is relevant here.

24 MS. SCHILLER: Again, I apologize, because

1 I have to ask for clarity whether or not DNREC believes  
2 it is relevant -- I am trying to understand whether or  
3 not DNREC believes that it made a decision as to whether  
4 or not this project would have an impact on navigation?

5 MS. SCOTT: And I would say that  
6 navigation was not a decision that the Secretary made.  
7 And I'm not a witness, so these issues would be more  
8 appropriate at the hearing on the merits, I believe.

9 MS. SCHILLER: Right. And I understand  
10 that. And I certainly wouldn't want to put Attorney  
11 Scott in a position that she is not able to answer, but,  
12 again, we are asking for the person and any documents  
13 that the Secretary relied on in determining the effect  
14 the project would have on navigation. And so, again, I  
15 don't want to put Attorney Scott on the hot seat, but if  
16 there's no -- if no determination was made by the  
17 Secretary of the effect of the project on navigation,  
18 that's one thing.

19 If there was a determination made and the  
20 Secretary relied on that determination in issuing the  
21 order, again, I believe we are entitled to the name of  
22 the witness, of a person at DNREC who will testify as to  
23 how that decision was made and what was taken into  
24 consideration in order to determine whether the Secretary

1 -- to determine the scope of the Secretary's reliance on  
2 it.

3 And if that person is Laura Mensch, who  
4 made that determination as a result of the interaction  
5 with the Coast Guard, if that's the position of DNREC,  
6 then that's the position, and we will accept that.

7 CHAIRPERSON HOLDEN: Ms. Scott, a couple  
8 of questions. Are you saying DNREC is going to provide  
9 the contacts and the information requested, right?  
10 That's question No. 1.

11 Question No. 2, the difference I think I  
12 hear is that that information and those individuals will  
13 be available at a hearing on the merits, but you are not  
14 taking a stance on how the information was used relevant  
15 to a determination on navigation?

16 MS. SCOTT: I am saying that Laura Mensch  
17 was the person that made the inquiries to the Coast Guard  
18 about navigation. I have agreed to produce the September  
19 17th, 2021 communication from the Coast Guard to  
20 Ms. Mensch stating that navigation was not an issue.

21 I'm not going to produce any other  
22 information because, as we have argued, discovery here is  
23 -- there is no discovery at the Board, but more  
24 importantly, that the navigation wasn't a decision that

1 the Secretary made. It's not in the Secretary's order.  
2 And it's not the subject of this appeal. So that answers  
3 the question.

4 Was it in the record before the Secretary?  
5 It's not something that the Secretary needed to decide  
6 and did not do so. I hopefully have answered all the  
7 questions.

8 MS. SCHILLER: That's fine. I don't want  
9 to leave it that it's not part of the appeal because it  
10 is certainly part of our appeal.

11 MS. SCOTT: And in terms of relevance and  
12 in limine motions, to address that as this proceeding  
13 goes on, but for today, I don't know what else I can add  
14 to the statements I have already made. I feel like I am  
15 just repeating myself.

16 CHAIRPERSON HOLDEN: I would like to take  
17 a break here and ask if anybody from the Board has any  
18 questions?

19 (No response.)

20 And are we expecting any other input from  
21 other parties present?

22 (No response.)

23 Okay. I think with that, and let me know  
24 if you feel differently, I think we are ready for

1 Ms. Schiller's closing argument on this issue.

2 MS. SCHILLER: Thank you. I mean, at this  
3 point I don't have any closing argument. Ms. Scott has  
4 given us the name of the person, Laura Mensch, and has  
5 promised to produce the underlying document that the  
6 Hearing Officer report was based upon. She said that  
7 there's no person who made a decision on navigation that  
8 the Secretary relied upon.

9 So with her assurances, I think we are  
10 good. As long as the record is clear, and I understand  
11 that the Department may make a motion in limine to say  
12 that navigation is not at issue, but we are not  
13 withdrawing that part of our appeal. As long as that is  
14 clear.

15 But I think with Ms. Scott's assurances on  
16 the record today, we are fine with that.

17 MR. ROCKMAN: And I would echo that as  
18 well on behalf of Mr. Curran. I believe, based on the  
19 discussion today, I think we have identified some  
20 interesting issues that maybe we revisit at the  
21 prehearing conference, motions in limine, or at the  
22 hearing itself, but better discussed in those forums than  
23 as part of a discovery motion.

24 CHAIRPERSON HOLDEN: Very good. So I

1 would ask the Board, is there a motion to go to Executive  
2 Session?

3 BOARD MEMBER MULROONEY: I move we go to  
4 Executive Session.

5 CHAIRPERSON HOLDEN: Is there a second?

6 BOARD MEMBER HORSEY: Second.

7 CHAIRPERSON HOLDEN: In favor?

8 BOARD MEMBER RIDDLE: Aye.

9 CHAIRPERSON HOLDEN: Opposed?

10 (No response.)

11 Very good. We will enter Executive  
12 Session.

13 Ms. Sapp will reach out and give you a  
14 heads up when we expect to be coming back, and we will be  
15 talking again shortly. Thank you.

16 (The Board went into Executive Session at  
17 2:18 and resumed the hearing at 2:45 p.m.)

18 CHAIRPERSON HOLDEN: It looks like we have  
19 got everybody back together again.

20 On the joint motion for summary judgment,  
21 does the Board have a motion?

22 BOARD MEMBER HORSEY: Chairman, I would  
23 like to make a motion to deny the joint motion for  
24 summary judgment.



1 CHAIRPERSON HOLDEN: Is there a second?

2 BOARD MEMBER MULROONEY: Second.

3 CHAIRPERSON HOLDEN: I will do a roll call  
4 vote. Ms. Riddle?

5 BOARD MEMBER RIDDLE: Aye.

6 CHAIRPERSON HOLDEN: Mr. Mulrooney?

7 BOARD MEMBER MULROONEY: In favor.

8 CHAIRPERSON HOLDEN: Mr. Horsey?

9 BOARD MEMBER HORSEY: In favor.

10 CHAIRPERSON HOLDEN: I vote in favor of  
11 the motion. It passes unanimously.

12 On the issue of the motion for subpoena,  
13 is there a motion?

14 BOARD MEMBER RIDDLE: Yes. I move to  
15 dismiss the request for issuance of a subpoena as moot.

16 CHAIRPERSON HOLDEN: Is there a second?

17 BOARD MEMBER HORSEY: Second.

18 CHAIRPERSON HOLDEN: Any discussion there?

19 (No response.)

20 CHAIRPERSON HOLDEN: All right, Board  
21 Member Riddle, do you vote in favor of the motion?

22 BOARD MEMBER RIDDLE: In favor.

23 CHAIRPERSON HOLDEN: Mr. Mulrooney?

24 BOARD MEMBER MULROONEY: In favor.

1 CHAIRPERSON HOLDEN: Mr. Horsey?

2 BOARD MEMBER HORSEY: In favor.

3 CHAIRPERSON HOLDEN: I vote in favor.

4 That motion passes unanimously.

5 MS. SCHILLER: I just want to confirm that  
6 it is moot because DNREC has agreed to provide the email;  
7 is that correct?

8 CHAIRPERSON HOLDEN: That is correct, yes.

9 MS. SCHILLER: Okay.

10 CHAIRPERSON HOLDEN: So that concludes the  
11 hearing today. I appreciate everybody's participation.  
12 The order will be out within 90 days. We'll have some  
13 further communication through Ms. Sapp to schedule the  
14 upcoming get-togethers and hearings.

15 Thank you all. Have a good afternoon.

16 ALL PARTICIPANTS: Thank you.

17 (The hearing concluded at 2:46 p.m.)

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C E R T I F I C A T E

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

WITNESS my hand and official seal this 2nd day of August A.D. 2022.



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Notary Public

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